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By email simon.greenwood@rbnz.govt.nz

Dear Simon,

Consultation on publication of submissions

This letter is my submission on the Reserve Bank's consultative document on the publication of submissions.

General Approach

Lawmaking should be done openly. Under the Reserve Bank Act - and other legislation which the Reserve Bank operates under - the Governor of the Reserve Bank, a single unelected official, has very extensive law-making powers. Those powers directly affect regulated institutions, but indirectly affect a very much wider section of the population.

The nature of those powers is such that, in an open and democratic society governed by laws rather than men, there should be a strong presumption that material provided to the law-making (regulatory) agency, designed to influence the decisions of that lawmaker, should be disclosed openly as a matter of course. When our elected Parliament makes laws, the parliamentary debate occurs openly and the records of that debate are readily available. Submissions to parliamentary select committees on bills that have yet to be enacted are routinely disclosed on a timely basis by Parliament itself. Attempts to lobby government departments or ministers directly are subject to the disclosure provisions of the Official Information Act.

Such openness helps to provide greater confidence to the public about the integrity of our law-making processes, with a particular emphasis on reducing the risk of vested interests being able to make secret submissions.. No system is foolproof, but the inability of human beings to design perfect systems is not a good reason for avoiding being as open as possible, erring wherever possible on the side of transparency. As your consultative document notes, there has been a trend towards more agencies, here and abroad, making more submission material pro-actively and routinely available. The Reserve Bank remains, for the most part, an important exception to that trend, and your consultative document reflects a clear desire on the part of the Bank to remain much more secretive

than most agencies, even though there is (a) much more concentrated power under the relevant legislation (the Governor personally, rather than Parliament, Cabinet, a select committee, a local council), and (b) much more limited effective public accountability for the Bank (the Governor can't cannot be tossed out by voters). In addition, in the international literature there is a widely recognised recognised problem of regulatory capture, and some reason to think this is a particular problem in respect of the regulation of the financial sector. Lobbying by regulated entities on the rules under which they will have to operate is an area where it should be particularly important for the sunshine to be let in. Doing so protects citizens, enhances public confidence in the lawmaking processes, and should help protect the Reserve Bank too - by enabling the public to see what material from regulated entities is influencing the Bank when it sets the rules.

There is an important distinction, which seems to be barely recognised in your consultative document, between information supplied to the Bank by regulated entities as part of ongoing supervision and crisis management (ie once the rules themselves are set) and information and views provided to the Bank to influence the design of the rules in the first place.

On the former, there is of course an established disclosure regime. Unfortunately, the Reserve Bank has pulled back on even this disclosure over the last few years, but there is nonetheless recognition that having information about the health of institutions in the public domain helps depositors and other creditors monitor their exposures and manage their risks. Reasonable people can debate where that disclosure line should be drawn. Probably few would argue that every material development should be openly disclosed in real time, and I am comfortable that there should be protections for the ability of a regulated institution that finds itself in difficulty to alert the Reserve Bank to that matter, and be able to engage in confidential discussions on the matter, without having to worry about that information being publicly disclosed at the time (there may be a case for full disclosure well after the event, but that is a different issue). But the Official Information Act provides ample protection for that sort of information anyway.

Possible protections for sensitive material provided to supervisors in the course of the application of the rules - or even, say, in requests for specific Lender of Last Resort assistance - are a quite different matter than submissions as part of public consultations by the Reserve Bank on the design of the rules in the first place. In those consultations, banks should (and do) have no greater or lesser rights than other citizens. In making legislation (eg conditions of registration for banks), the arguments and evidence that people advance to try to influence the Bank should be disclosed as a matter of routine. Disclosure should not require the consent of the submitter: in fact, it is probably those submitters who would be reluctant to have their submissions disclosed whom the public should have most reason to worry about. They wish to influence our nation's laws, but are not willing to openly reveal their arguments. If such submitters were regulated entities, we would have particular reason for concern - after all, in this area as in so many others, regulation supposedly exists to protect us (citizens) from the unfettered activities of regulated institutions.

The Bank's consultative document puts considerable weight on the provisions of section 105 of the Reserve Bank Act. But they simply take those provisions for granted. A first-best solution, in my view, would be for section 105 to be amended. It would be a quite simple amendment, involving a simple new subsection making it explicitly clear that nothing in section 105, and the resulting

exemptions from the provisions of the Official Information Act, applies to any submissions sought or received by the Reserve Bank, from any party, on proposals to amend the rules governing all, or a significant subset of, any class of regulated entity. The Reserve Bank cannot, of course, change the Reserve Bank Act itself, but it is difficult to imagine who would seek to resist such a change - except perhaps some regulated entities, which would itself be telling - if the Reserve Bank were to champion such a simple reform. Under such legislation, the Reserve Bank could move to pro-actively releasing all submissions from any parties, placing them on the website on the day submissions closed. Individual submitters could still request that some parts of their submissions be withheld, but only in terms of the provisions of the Official Information Act (eg the protection of commercially sensitive information). Under those provisions, there is scope to withhold information that would "disclose a trade secret" or be likely unreasonably to prejudice the commercial position of the person who supplied" the information, always subject to an overriding test of whether the release of such information would nonetheless be in the public interest.

The Bank's consultative document seems not to recognise the way in which the applicability of the section 105 provisions have evolved. The provisions were put in the Act at a time - the 1987 amendment Act - when the Bank had very few powers to discretionarily vary prudential supervision rules. In practice, it mainly protected the ability of banks to communicate sensitive data to the Reserve Bank, particularly in crisis situations. There were no consultative processes on change to conditions of registration, as a means of varying the policy regime, because the Reserve Bank did not have powers in that area. The ability to use conditions of registration to set system-wide policy has grown progressively, and some of the most controversial areas in which the Reserve Bank has exercised discretionary law-making power in recent years were introduced to the Act in 2003. Prior to that set of amendments, LVR restrictions (for example) could not have been imposed by the Bank.

The point I'm making is that the disclosure provisions of section 105 were simply never designed for a policy regime such as we now have, where the Governor is himself making subsidiary legislation on major issues of economic policy. The Reserve Bank should be championing reform in this area, to distinguish clearly between advocacy regarding how the rules should be designed (which should be fully open for public scrutiny), and information provided to the Bank by regulated entities in the application of the rules once they are set where a different set of rules is probably required.

Turning back, however, to the existing statutory provisions, the Reserve Bank's consultative document asserts that section 105 treats differently submissions on proposed rule changes from regulated entities and submissions from other parties. In your view, that enables you to release submissions from other submitters - even though you refuse to do so routinely - and not to release submissions from regulated entities. Perhaps you have legal advice to that effect, but if so it would be helpful to publish any such advice. On a plain reading of section 105, there appears to be no distinction drawn between submissions from regulated entities and other submissions. The law as it stands at present prohibits you from publishing any material obtained relating to "the exercise, or possible exercise, of powers conferred by this Part". Since all submitters' views on a proposed regulatory change affect the possible exercise of powers under the Act - since you are required to have regard to all submissions - it would seem plain that if you want to withhold any submissions under this section, you must withhold them all. The Act appears to provide no discretion.

Of course, that makes it an absurd, and dangerous, law. A reasonable reader might interpret the Act as not applying to lobbying or advocacy material favouring or opposing some regulatory measure the Bank is proposing, or suggesting refinements in how those proposed rules should be applied. That would be a sensible outcome - although it might require a Court to determine if it was permissible one - but there is simply no scope apparent in the Act to distinguish between a submission on a proposed change to conditions of registration from someone like me (an interested expert commentator and concerned citizen) and one from a regulated entity. And, if anything, because of risks around capture, there is a stronger public interest in having submissions from regulated entities published than for those of other submitters.

Specific Proposal

In your consultative document you list only two options, with the argumentation strongly skewed towards a maintenance of the status quo. A far better option would have been to sought submissions of the option of proposing an amendment to the Reserve Bank Act (and other similar legislation the Bank is responsible for) to make publication of submissions, when received, a matter of course.

I am reluctant to comment on Option 2, lest my doubts about it - it is a very slight step forward, at best - be construed as support for the status quo, Option One. To be explicitly clear, I do not support the status quo: an arrangement which allows the Governor to exercise extensive discretionary law-making power and conduct lawmaking processes with little or no transparency (beyond what suits him) and little effective accountability either.. Option 2 would be a slight step forward if the submissions of those who consented to release were made available at the time submissions closed, rather than weeks afterwards when the Governor has made his final decision.

In your defence of the current arrangements, the Bank argues that the publication of a summary of submissions accomplishes much or most of what is necessary and desirable. That simply isn't so. The summary of submissions is prepared by the Bank, as part of its own announcements of the results of consultations. With the best will in the world, it is hard to prevent such a summary - and even the representation of dissenting arguments - being skewed by the Bank in its own favour (either omitting dissenting points, or characterising them in ways to given them less apparent force). In my own experience, the best will in the world is not always exercised, and important dissenting points have at times been omitted from summaries of submissions. Since the public has not been allowed to see submissions from regulated entities we cannot know how widespread that problem is. At very least, it might help if the summary of submissions was prepared, or critically reviewed, by external parties.

The summary of submissions is also not a substitute for disclosing submissions themselves precisely because it is not published until after the Governor has made his final decision on the matter under consultation. That is a hugely different situation from, say, a parliamentary select committee, where submissions are typically and routinely published well before final decisions are made. Even if the Reserve Bank is not willing to publish submissions themselves at present (or believes on good advice it is legally unable to do so) one small step forward might be to at least publish the names of all submitters on the day submissions close. That, at least, might enable journalists to approach submitters from their submissions – and highlight those, especially regulated entities, which refused to let us see how they are lobbying their regulator.

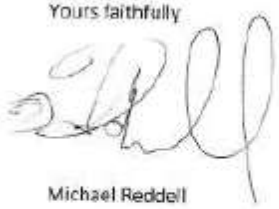
In your consultative document you also worry that publication of submissions could lower the quality of submissions. As you recognise, the effect could work the other way - publication might prompt some submitters to put more effort it. I'm not in a position to know - since I routinely publish my own submissions to the Bank - but I would highlight that the trend across other government agencies is clearly towards greater openness, and the principles of the Official Information Act support that direction of movement. It is quite unlikely that there is anything that means that submissions on Reserve Bank policy proposals will be affected differently than those in other areas of government.

The Reserve Bank also worries that publication of formal submissions would lead to some submitters eschewing the path of formal submissions and relying instead of behind the scenes lobbying of the Governor, and perhaps key advisers. The most important protection against that sort of thing, from public agency officials committed to open and robust processes, would be simply not to allow it. The Governor could simply say to regulated entities that he would engage only through the formal submissions process. Or, he could indicate that the filenotes of any conversations with regulated entities on proposed law changes would be published together with formal written submissions. After all, under the Official Information Act there is no difference in principle between oral and written records/advice. But there is no perfect system, and our system remains more vulnerable to this risk than most because of the extensive power vested in a single person. But a commitment to good process, and open and transparent government, can minimise such risks.

The final question in your consultative document invites submitters to propose any third option. Mine has already been outlined above. It would involve simple amendments to section 105 of the Reserve Bank Act, and the parallel provisions in the other two acts, to make it clear that submissions from anyone on proposed changes in the prudential rules affecting all or any significant subset of regulated entities are, in fact, subject to the Official Information Act, with no special exclusions or protections. Such an amendment might go a little further and require the publication of all such submissions on the day submissions close, subject to the ability of the submitter to seek to have the commercial confidentiality provisions of the Official Information Act applied to specific identified sections of any submissions. Reform along these lines would represent a significant step forward, in bringing transparency around Reserve Bank policy proposals more closely into line with those prevailing in the rest of government. And it is worth recalling that any citizen's submissions on what the Governor should do with the OCR (sought by the Bank or not) would automatically be dealt with solely under the provisions of the Official Information Act. There is no reason why, say, submissions on LVR restrictions should be treated differently.

Finally, I would note that since this particular consultation does not specifically relate to the exercise of the Reserve Bank's regulatory powers - it is at one remove from that - there is no reason why all submissions on this consultation should not be routinely released. Consistent with that proposition, I request copies of all submissions received by the Reserve Bank on this consultation up to and including the close of the consultation period on 5 August 2016.

Yours faithfully



Michael Reddell