



**RESERVE
BANK**

O F N E W Z E A L A N D
T E P Ū T E A M A T U A

Summary of submissions and final policy decisions on the consultation paper: Review of the Default Option for the Publication of Submissions

September 2016

PART ONE: INTRODUCTION AND BACKGROUND

1. This paper discusses the Reserve Bank's recent consultation¹ on its default option for the publication of submissions.
2. Some of the feedback received in the Regulatory Stocktake that was carried out in 2014 and 2015 suggested that the Reserve Bank change its current policy of not publishing the individual submissions it receives from public consultations. This feedback suggested that instead submissions should be published by default. It was noted that this is the practice adopted by many other government departments and agencies. For example, the Ministry of Business, Innovation and Employment publishes all submissions in full unless submitters explicitly request information be withheld and relevant grounds under the Official Information Act 1982 (OIA) apply. The Financial Markets Authority (FMA) also publishes all submissions received in full unless they, or parts of them, contain commercially sensitive or proprietary information. As of 2012, the Australian Prudential Regulatory Authority (APRA) has adopted a similar policy. Recognition by the Reserve Bank that it is good practice to regularly review how policy is made was another reason for considering this issue.
3. The Reserve Bank recognises the value of transparency as part of best regulatory practice. We believe that our current practice of publishing summaries of submissions is useful in explaining the thinking behind our policy decisions and helps make the consultation process more transparent, but we also recognise there could be room for further enhancements to the process. Publishing submissions could provide more public scrutiny and help show that the Reserve Bank considers all the viewpoints it receives from submitters. Publishing submissions may also be in the public interest by reducing any perceived ability for special interests to privately lobby the Reserve Bank.
4. A difference to other regulators, however; is that the Reserve Bank is constrained in terms of its ability to unilaterally publish individual submissions under the following legislation (collectively referred to as the protective provisions):
 - Section 105 of the Reserve Bank of New Zealand Act 1989 (RBNZ Act); relevant to registered banks;
 - Sections 135 of the Insurance (Prudential Supervision) Act 2010 (IPSA); relevant to insurers; and
 - Section 54 of the Non-bank Deposit Takers Act 2013 (NBDT Act); relevant to licensed non-bank deposit takers.
5. Section 105(8) of the RBNZ Act and section 55 of the NBDT Act also make it clear that any information, data or forecasts the Reserve Bank receives does not fall within the scope of the OIA. There are technical differences between the three Acts in regard to the OIA. However, the substantive effect is the same. In general terms these sections apply to:
 - a. Information, data and forecasts supplied to or obtained by the Reserve Bank under, or for the purposes of, or in connection with the exercise of powers conferred by the relevant statute;

¹ <http://www.rbnz.govt.nz/-/media/ReserveBank/Files/regulation-and-supervision/stocktake/Consultation%20paper-Review%20of%20the%20Default%20Option%20for%20the%20Publication%20of%20Submissions.pdf?la=en>

- b. Information and data derived, from or based upon, information, data and forecasts referred to in a. above and;
 - c. Information relating to the exercise, or possible exercise, of the powers conferred by the relevant statute.
6. The protective provisions prohibit the Reserve Bank from disclosing such information unless one of the exceptions laid out in the relevant statute applies. It is an offense for a person to disclose the information where no exception applies. There are five pertinent exceptions:
- a. Disclosure with the consent of the person to whom the information relates (e.g. the person who supplied it);
 - b. The information is in statistical or summary form and is effectively non-attributable;
 - c. Disclosure is for the purposes of the functions and powers of the Reserve Bank under the relevant legislation;
 - d. Disclosure is to overseas authorities with similar functions to that of the Reserve Bank under the relevant legislation; and
 - e. Disclosure is to a person with a “proper interest”.
7. The protective provisions reflect the fact that as a prudential regulator, the Reserve Bank receives commercially confidential or sensitive information about the financial position and governance of regulated entities. Inappropriate release of this information could prejudice the financial position of these entities, and in the most serious cases could impact on the soundness and efficiency of the financial system.
8. Our current practice of only publishing summaries of submissions makes use of the second pertinent exception noted above. That is, the Reserve Bank publishes anonymised and non-attributable summaries of submissions alongside its final policy decisions.
9. More recently, the Reserve Bank has also begun publishing lists of all the names of submitters in summary of submissions documents.
10. Apart from the legal constraints, there is also an issue about what the effect on submissions quality might be if we began publishing individual submissions (although feedback from APRA indicated that they had not observed any change upon adopting their new policy). We identified a range of both potential costs and benefits to submission quality and quantity, and transparency. At the time, the Reserve Bank considered it best to consult industry and other stakeholders before making a decision.
11. In the consultation paper we set out two options for submitters to consider:
- 1. The status quo: to continue with the current practice but improve how it is communicated; and
 - 2. Publication of submissions: to publish all or part of the individual submissions we receive when submitters explicitly consent to us doing so.

12. It is important to note that proactive publishing of submissions is related to, but distinct from, releasing them in response to an OIA request. Aside from ensuring information covered by the protective provisions is not released (unless in summary form or with a submitter's consent), what the Reserve Bank proactively publishes is purely a policy decision. However, if an OIA request for unpublished submissions is made and the protective provisions do not apply the only grounds for withholding information are within the OIA itself.
13. Eleven submissions on our consultation were received in total, including submissions from six banks, an insurer, a payments system operator, an industry body and two individuals.² The Reserve Bank would like to thank all submitters for their feedback to this consultation.

PART TWO: HIGH LEVEL SUMMARY OF SUBMISSIONS AND RESERVE BANK RESPONSES

14. Seven of the submitters supported the Reserve Bank adopting a policy of publishing individual submissions by default. Three submitters supported the continuation of the status quo. One submitter, the New Zealand Bankers Association, did not state a preference for the status quo or publishing by default.
15. Those submitters who supported a more proactive approach to releasing submissions all noted that doing so would likely increase transparency, and either have a negligible or positive effect on submission quality. Some of these submitters noted the usefulness of the summaries of submissions that are published under current practice or offered ways to improve them. However, there was a consistent view that such summaries do not (and could not) serve as a substitute for the publication of individual submissions in terms of providing transparency and demonstrating that the Reserve Bank had considered all viewpoints appropriately.
16. Four of the seven submitters in favour of publishing submissions supported option two. It was felt that this option would improve transparency while preserving an organisation's or person's right to redact commercially sensitive or private information that if made public would prejudice future free and frank information. Two submitters suggested alternative options discussed below.
17. On the other hand, the three submitters who supported the continuation of the status quo suggested any move towards publishing individual submissions would impact the quality and quantity of their submissions. Two of the three dissenting submitters thought it is evident from the current summaries of submissions documents that submissions are being properly considered by the Reserve Bank. The third dissenting submitter said they were not in a position to comment on whether they felt the summaries of submissions are sufficiently detailed, but if they suspected a summary did not accurately represent their views they would raise the issue with the Reserve Bank directly.
18. It was emphasised by those not wanting submissions to be published that the Reserve Bank has a fundamentally different relationship with regulated entities than other regulators and that it is crucial that they are able to submit fully and frankly.

² They were: ANZ Bank New Zealand Limited, ASB Bank Limited, Bank of New Zealand Limited, The Co-operative Bank, IAG New Zealand Group, Martien Lubberink, Michael Reddell, The New Zealand Bankers Association, Payments NZ, SBS Bank and Westpac New Zealand Limited.

This includes supporting submissions with actual data and examples where appropriate, without fear of confidences being disclosed.

19. One of the submitters opposed to publication of individual submissions noted that preparing submissions that would be published would be more time consuming and costly, particularly for smaller banks who do not have access to internal legal counsel, and that this would likely lead to a reduction in individual submissions. Another dissenting submitter suggested that they would begin writing more generic submissions.
20. We believe we have a responsibility to make it as easy as possible for all stakeholders to communicate their views candidly to the Reserve Bank, but this needs to be balanced against public transparency. However, irrespective of what option is chosen, the Reserve Bank will continue to ensure that information that is legitimately prudential or commercially sensitive in nature remains protected. Also, arguably our position as the prudential regulator alone may not justify a different approach to say the FMA, the financial conduct regulator for New Zealand. Another counterargument is that if submitters choose to no longer submit to our consultations their views will be less likely to be heard, casting doubt on whether they would no longer choose to respond to consultations.
21. Submitters were asked whether they believed there was a risk of stakeholders relying less on written submissions if these were to be published and instead rely more on bilateral meetings with the Reserve Bank. Submitters who supported publishing submissions suggested they would not change their behaviour. Although one of these submitters qualified their answer by stating that if the only grounds for withholding information were the protective provisions or provisions in the OIA they would indeed rely less on written submissions.
22. Submitters were asked if they thought there would be an increase in information being indirectly attributed to a submitter who wished to keep it confidential if other submissions were published. Answers to this question again were divided along the lines of those who supported submissions being published versus those who did not.
23. Some submitters also suggested that the Reserve Bank would have to provide more guidance on what type of information would be covered by the protective provisions. We accept this point and will look to provide clear guidance about what information may be proactively published and what information would be protected either by the protective provisions or by provisions in the OIA. Some submitters also had different interpretations of what information section 105 and the other protective provisions covered.
24. Some of the submitters in favour of publishing submissions suggested that the grounds in the OIA and the exceptions in the protective provisions not be the only criteria for determining when submissions are published. Instead exemptions in the OIA should be simply guidelines as to what could be withheld. One submitter in particular suggested that there is information about bank practices and processes that would not be covered by the protective provisions or considered a trade secret for the purposes of the OIA, but that they would still consider commercially sensitive and not want released. We have been unable to think of any examples of this type of information and why it could not be withheld. However, we agree with the point on the OIA and protective provisions serving as a guideline and this was our intention in designing option two of the consultation. Our intention was not to release any information submitters do not want published whether or not it is legitimately covered by the protective provisions or would be under exemptions to the OIA (if a

hypothetical request was made). Instead we wanted to make it clear to submitters that anything we receive regardless of whether it is proactively published by the Reserve Bank could be subject to an OIA request which would be dealt with under the OIA.

25. Finally on a point unrelated to the consultation itself, several submitters took the opportunity to request that in the future the Reserve Bank provide exposure drafts of all proposed requirements as part of its consultation process.

Policy suggestions

26. The consultation paper asked submitters to suggest any alternative options the Reserve Bank could consider in publishing submissions. Several were put forward. One submitter opposed to releasing submissions suggested that instead we could have our current summaries of submissions externally reviewed. We consider this option below.
27. A second submitter suggested that if we do not move towards publishing submissions we could improve our summaries by using a table to demonstrate how many submitters were in favour, opposed or neutral to each of our proposals. We note that many of our summaries of submissions already discuss the amount of support from submitters to each of our proposals, albeit often not so explicitly.
28. A third submitter put forward that the Reserve Bank ought to be redacting submissions in line with submitters' requests rather than asking the submitters to provide both full and redacted versions of the same submission. We considered this option (see below). However, we think submitters would have more assurance that information they do not want proactively released would be withheld when they themselves make redactions.
29. A fourth submitter suggested if section 105 is as restrictive as suggested by the consultation document that we propose an amendment to section 105 (and the corresponding provisions in the other Acts) that makes it clear that section 105 does not apply to submissions on a public consultation. This submitter additionally suggested that the Reserve Bank could publish submissions on the day a consultation closes and this could be mandated by the proposed amendment to section 105. Or, if the Reserve Bank chooses to not publish submissions, that we should at least publish the names of all submitters on the day a consultation closes. On the first point, the Reserve Bank may in the future consider whether the proposed legislative amendment has merit.

PART THREE: POLICY OPTIONS CONSIDERED

30. With the feedback in mind the Reserve Bank considered several options including the following:
- The status quo;
 - The status quo with a periodic external review;
 - Publish submissions when consent is granted and request submitters make redactions; and

- Publish submissions where consent is granted and the Reserve Bank makes redactions.

Option 1: Status quo

31. The option of no change in Reserve Bank practice would mean no change in the quality and quantity of submissions received or the level of transparency in our policy development process. In particular, we would not have to be concerned about those submitters (and anyone of a similar mind) who were opposed to submissions being published changing the content of their submissions or not submitting at all. One other likely implication of this option would be for continued pressure for the Reserve Bank to publish individual submissions in the future. The Reserve Bank also believes there is a risk that its summaries of submissions could be perceived as not fully reflecting submitters' views, even though we aim to make them as representative of responses as possible.
32. One consequence of persevering with the status quo is that, having raised the alternative of publishing individual submissions and heightened awareness of the issues, more OIA requests for individual submissions may result. The status quo may not operate in the same way going forward.

Option 2: Status quo with external review

33. The option of having an external party review a random sample of our summaries of submissions periodically may increase transparency over the status quo without the risks to submission quality. We have not considered this option in great detail but can envisage a third party reviewing a random sample of our summaries of submissions periodically (e.g. biannually). While this option would satisfy those who do not want to see submissions published and some of those in favour of publishing submissions, others will reasonably see it as not equivalent to publishing submissions. One could make the argument that review by a single external person or firm (and even an expert) is never a substitute for information being public. We are also unaware of any other government bodies using this approach and, indeed, cannot be sure how well it would work in practice.

Option 3: Publish submissions when consent is granted and request submitter makes redactions

34. This is the second option that was put forward by the Reserve Bank in the consultation paper. Under this option all or part of a submission would be published when the submitter consents. We would also ask consenting submitters to provide us two versions of their submissions. One version would be for internal use by the Reserve Bank and another version for public release. We would ask that the two versions be identical except for any redactions made (and we would request text be blacked over rather than simply deleted). In the consultation paper, we suggested that we would ask submitters to provide use reasons under the OIA or the protective provisions why information should not be published when they do not grant consent. However, this would be voluntary guidance.
35. In terms of submission quality, under this option, a submitter could choose to not consent to proactive publication of any part of their submission. On the face of it, this appears to deal with risks to quality and quantity of information the Reserve Bank receives. However, it is possible that pressure (e.g. from the media) may be applied to submitters who choose not to have their submissions released when their peers

have done so. We therefore see a risk of submissions becoming more generic and written more towards a public audience.

36. However, we also think that it could lead to further improvements in the quality of some submissions. Rather than public pressure leading to submissions becoming more generic it could lead to some submitters taking more care in their arguments due to higher potential for public scrutiny. Feedback from some submitters to different consultations may also become more consistent.
37. Given that a majority of submitters (including four regulated entities) thought the effects of publishing submissions would likely have a negligible or positive effect on quality, and APRA's experience with this, we think it is likely that publishing submissions would likely have only a minor effect on quality, but we still acknowledge the downside risks.
38. In the consultation paper, we suggested that consent from a submitter to their submissions being published would need to be explicit. That is, the submitter would need to state their consent in the submission and of course the act of providing two versions of a submission would also make this clear. On reflection, it is possible that a disclaimer for option 3 could state that the Reserve Bank will publish submissions where there is no objection to do so as long as the disclaimer was clear in the consultation paper.

Option 4: Publish submissions where consent is granted and the Reserve Bank makes redactions

39. This option was a modification of option 3 suggested to us by a submitter to the consultation. They argued that the Reserve Bank should be responsible for redacting information as per the requests of submitters and that this is the approach of other government bodies. Broadly the costs and benefits of this policy are similar to option 3. However, we believe it would provide less assurance (that information will indeed be withheld in proactive releases) for submitters than option 3.

PART FOUR: POLICY DECISION AND IMPLEMENTATION

40. Having considered the feedback to the consultation, the Reserve Bank has decided to implement option 3, that is, to begin publishing individual submissions when consent to do is granted with submitters making redactions themselves. This option will continue to allow genuinely commercially sensitive and prudential information to be withheld from proactively released submissions. This option will also treat all submitters to a consultation equally in terms of what is proactively published. The feedback from APRA, and the greater transparency provided when compared with the status quo are the other reasons the Reserve Bank choose option 3. The policy will apply to all public consultations where the consultation paper is released on or after 22 September 2016 (the day this document is published).

“Important disclosure statement: *All information in submissions will be made public unless you indicate you would like all or part of your submission to remain confidential. Submitters who would like part of their submission to remain confidential should provide both a confidential and public version of their submission. Apart from redactions of the information to be withheld (i.e. blacking out of text) the two versions should be identical.*

Submitters who request that all or part of their submission be treated as confidential should provide reasons why this information should be withheld if a

request is made for it under the Official Information Act 1982 (OIA). These reasons should refer to section 105 of the Reserve Bank of New Zealand Act 1989, section 54 of the Non-Bank Deposit Takers Act, section 135 of the Insurance (Prudential) Supervision Act 2010 (as applicable); or the grounds for withholding information under the OIA. If an OIA request for redacted information is made the Reserve Bank will make its own assessment of what must be released taking into account the submitter's views.

The Reserve Bank may also publish an anonymised summary of the submissions received on this consultation.”

41. Please note the above disclaimer differs from the example in the May consultation paper. This is due to feedback suggesting the disclaimer in the consultation paper could be clearer.
42. The Reserve Bank acknowledges that this option imposes a small additional cost on submitters, but we believe the benefits of this approach outweigh this cost.
43. Decisions on precisely when the submissions on a consultation are published will be made on a case by case basis, but in no instance will submissions be published any later than the announcement of final policy decisions.
44. We wish to reiterate that submitters can continue to have confidence that legitimately commercially-sensitive or prudential information will continue to be protected by the Reserve Bank. We would also like to reiterate that under the new policy the Reserve Bank will continue to make its own assessment of what should be released when an OIA request is received. The Reserve Bank would again like to thank all submitters for their feedback to this consultation.