



## **Consultation paper: Review of the Default Option for Publication of Submissions**

The Reserve Bank invites submissions on this consultation paper by 5pm on 4 August 2016

Submissions and enquiries about the consultation should be addressed to:

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Please note that a summary of submissions may be published. If you think any part of your submission should properly be withheld on the grounds of commercial sensitivity, or for any other reason, you should indicate this clearly.

**May 2016**

## 1. Introduction/Background

1. This paper discusses the Reserve Bank of New Zealand's (Reserve Bank) review of the default option for the publication of submissions. The review follows feedback from a submission on the Reserve Bank's recently completed "Regulatory Stocktake" of the prudential requirements for registered banks and licensed non-bank deposit takers (NBDTs) (the Stocktake)<sup>1</sup>.
2. Some of the feedback the Reserve Bank received on its regulatory stocktake proposed that the Reserve Bank fundamentally change its current policy of not publishing individual submissions it receives from regulated entities to publishing all submissions by default. The Reserve Bank notes that publishing submissions is also the practice that has been adopted by many other government departments and agencies in New Zealand. For example, the Ministry of Business, Innovation, and Employment (MBIE) publishes all submissions received in consultation processes unless submitters explicitly request information be withheld from the public and relevant grounds under the Official Information Act 1982 (OIA) apply. The Financial Markets Authority (FMA) also publishes all submissions unless they, or parts of them, are subject to confidentiality. As of November 2011, the Australian Prudential Regulatory Authority (APRA) adopted a similar policy.
3. A difference to other regulators; however, is that the Reserve Bank is currently 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.<sup>2</sup>
  - Sections 136-137 of the Insurance (Prudential Supervision) Act 2010 (IPSA); relevant to licensed insurers.
  - Section 54 of the Non-bank Deposit Takers Act 2013 (NBDT Act); relevant to licensed non-bank deposit takers
4. 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 from regulated entities does not fall within the scope of the OIA. There are technical differences between these sections and section 137 of IPSA, particularly with regard to the application of the OIA. However, the substantive effect is the same. In general terms, these sections apply to:

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<sup>1</sup> The consultation document for the stocktake, the full initial Terms of Reference, and the Summary of submissions and policy decisions are available on our website at:

<http://www.rbnz.govt.nz/regulation-and-supervision/regulatory-stocktake>

<sup>2</sup> Sections 156G and 156ZN of the RBNZ Act restrain the Reserve Bank's ability to publish information provided by payment and particular settlement systems. However, sections 156G and 156ZN only apply to information the Reserve Bank requires from such systems to perform oversight or to exercise other specific powers within the RBNZ Act. The sections offer no protections against the release of information in submissions to consultations. The OIA applies to information in submissions concerning payment and settlement systems. However, the OIA provides some protections for information, including truly commercially sensitive information.

- 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;
  - 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.
5. 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 regulated entity who supplied it).
  - b. The information is in statistical or summary form and 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.
  - e. Disclosure is to a person with a “proper interest”.
6. These protective provisions generally relate to use of the Reserve Bank’s powers and information about a particular regulated entity. The purpose of the provisions is to encourage a candid and open relationship between regulated entities and their supervisor, the Reserve Bank. This is necessary to enable the Reserve Bank to perform its function of supervision. It is also necessary for financial stability purposes, particularly regarding banks. Commercially sensitive information about a registered bank, if released publicly, could trigger avoidable market overreaction and system contagion, as such information is often misunderstood. Where a registered bank is being candid with its supervisor about its problems it is important they can work out appropriate responses away from public scrutiny while solutions are formulated that protect the financial system.
7. Information from submitters on broader policy topics, such as the shape of legislative frameworks, does not come under the protective provisions. The focus is on prudential information and the Reserve Bank’s use of its supervisory powers.
8. Apart from the legal constraints, the Reserve Bank has also been concerned that publication of submission feedback by default could adversely affect the content of some respondents’ submissions. The Reserve Bank places great value on the quality of the submissions it currently receives. However, in some circumstances, the Reserve Bank can also see the possibility of submission quality rising when submissions are to be by default published online.
9. At the same time, the Reserve Bank recognises the value of transparency as part of best regulatory practice. There is a strong public interest in the Reserve Bank being accountable for its policy decisions and actions wherever possible. The Reserve

Bank believes it has met the requirement to be transparent by publishing detailed, but anonymised and non-attributable, summaries of the submission feedback it receives.

10. The feedback received as part of the Regulatory Stocktake and an increase in OIA requests for individual submissions to be made public has prompted the Reserve Bank to review its current stance on whether it should seek consent from regulated entities to publish individual submissions. It is also good practice to test one's thinking and assumptions from time to time.
11. This consultation document seeks feedback on whether the Reserve Bank should change its current default position of only publishing consultation feedback from regulated entities in summary form. Two options are considered in this document.
  - I. Status quo: to continue with the current practice but improve how it is communicated.
  - II. Publication of submissions: to publish parts or all of the individual submissions we receive when the submitter explicitly consents to us doing so.
12. The Reserve Bank requests that all submissions be filled in using the template in the appendix and sent in electronic form. [A word version of the appendix is available](#). The consultation closes on 4 August at 5pm.

## **2. Current Reserve Bank Practice**

13. Recent Reserve Bank practice is that the contents of individual submissions are not published in full. However, a summary of submissions (within a document that also contains the final policy decisions) is generally published on our website. Summaries are published in such a way as to prevent any information contained within being identified as relating to any particular submitter (i.e. they are anonymised). This is signalled to respondents by the following disclaimer:

*"Please note that a summary may be published. If you think any part of your submission should be withheld on the grounds of commercial sensitivity, or for any other reason, you should indicate this clearly"*
14. Recently, the Reserve Bank has begun to publish a list of all the submitters to public consultations. This list appears as an appendix to the summary of submissions documents.
15. Not all information received in submissions is protected by the protective provisions. One notable exception is submissions to consultations on changes to Reserve Bank legislation rather than policy. A second exception is any submission from a non-regulated entity as these submissions are not covered by the protective provisions.
16. However, the Reserve Bank has had a blanket approach to publishing submissions. This is for three reasons.
  - a. Submissions will often contain information covered by the protective provisions.

- b. The Reserve Bank thinks a blanket approach to all submissions is appropriate because it is clearer and provides more certainty for submitters.
- c. There is nothing preventing a submitter making their own submissions public.

17. This practice is generally well understood by the entities regulated by the Reserve Bank. It is less clear whether other stakeholders are aware of the interaction between Reserve Bank legislation and the OIA.

*Question 1: Are you familiar with the Reserve Bank's current practices of publishing summaries of submission feedback and the relationship between Reserve Bank legislation and the OIA?*

*Question 2: Do you think the Reserve Bank's summaries of submissions are sufficiently detailed? Do you have any suggestions for improvement?*

### **3. Polices of other government departments and agencies**

- 18. The Reserve Bank is aware that other government departments and agencies often publish all submissions as a matter of course unless the submitter explicitly requests that all or part of the submission be withheld.
- 19. MBIE's policy is communicated by a disclaimer appearing within their consultation documents. The disclaimer also takes account of the potential for submissions to MBIE being released under the OIA. A recent example of such a disclaimer follows:

*"Except for material that may be defamatory, the Ministry of Business, Innovation and Employment (the Ministry) will post all written submissions at [www.mbie.govt.nz/telcoreview](http://www.mbie.govt.nz/telcoreview). The Ministry will consider you to have consented to publication by making a submission, unless you clearly specify otherwise in your submission. If sensitive material in your submission cannot be published, please provide two versions of your submission – a full version (with that material clearly identified) and a publishable version with redactions."*

*"Submissions are also subject to the Official Information Act 1982 (the OIA). If you have any objection to the release of any information in your submission, please set this out clearly with your submission. In particular, identify which part(s) you consider should be withheld, and explain the reason(s) why you consider we should withhold the information by reference to section 9 of the OIA. The Ministry will take such reasons into account when responding to requests under the OIA. The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure by various agencies, including the Ministry, of information relating to individuals and access by individuals to information relating to them, held by such agencies. Any personal information you supply to the Ministry in the course of making a submission will be used by the Ministry only in conjunction with consideration of matters covered by this document. Please clearly indicate in your submission if you do not wish your name to be included in any summary the Ministry may prepare for public release on submissions received."<sup>3</sup>*

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<sup>3</sup> Source: MBIE. (2015, September). Regulating Communications for the future: Review of the Telecommunications Act 2011. Retrieved February 25, 2016, from <http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/regulating-the->

20. The Financial Markets Authority (FMA) also has a similar policy to MBIE's, although their disclaimer indicates that the FMA does not treat its publication policy and its OIA obligations as distinct.

*“Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.”*<sup>4</sup>

#### 4. **High level problem**

##### ***Reserve Bank legislation***

21. In reviewing the Reserve Bank's policy on the publication of submissions, it is not enough to solely consider the possible trade-off between transparency and quality feedback. Legislation unique to the Reserve Bank constrains when and to whom we may publish or disclose information provided by external parties.
22. The protective provisions do not allow such information to be disclosed unless a stated exception applies.
23. To release submissions relating to information from regulated entities the Reserve Bank would look to utilise two of the stated exceptions found across the protective provisions. They are:
- a) with the consent of the person to whom the information applies; or
  - b) in statistical or summary form arranged in such a manner as to prevent any information being published or disclosed from being identified by any person as relating to any particular person.
24. Current Reserve Bank practice makes use of the second exception. We note there are further exceptions in the protective provisions, but they are not relevant for disclosing consultation submissions to the general public.

##### ***Quality of feedback and transparency***

25. The Reserve Bank believes that transparency is an important part of any policy making process. Transparency is one of the seven guiding principles of the “Best Practice” regulation model, provided by the Treasury that the Reserve Bank seeks to follow.<sup>5</sup> The framework suggests that a transparent regulator is one that is able to

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[telecommunications-sector/review-of-the-telecommunications-act-2001/consultation-8-sept-2015/telecommunications-review-2015](https://www.fma.govt.nz/assets/Consultations/151217-Consultation-paper-proposed-exemptions-for-existing-property-schemes.pdf)

<sup>4</sup> FMA. (2015, December 17). Consultation paper: Proposed exemptions for existing property schemes. Retrieved February 25, 2016, from <https://fma.govt.nz/assets/Consultations/151217-Consultation-paper-proposed-exemptions-for-existing-property-schemes.pdf>

<sup>5</sup> Source: <http://www.treasury.govt.nz/regulation/bpr>

justify decisions and be subject to public scrutiny. Consultation processes, and in particular the publication of the summaries of submissions and final policy decisions, provide existing means for the Reserve Bank to show publicly that it has considered the views of stakeholders and can justify its decisions.

26. It is possible that the Reserve Bank's regulatory decision process would be more transparent if individual submissions received to the Reserve Bank's consultations were made publicly available. Their publication would provide an additional means, beyond the publication of a summary of submissions, for the public to check whether or not the Reserve Bank is considering the feedback it receives in submissions appropriately.
27. The Reserve Bank is concerned that the publication of individual submissions would impact the quality and quantity of some submissions. This is especially a concern because the Reserve Bank receives submissions from a relatively small group of submitters whom are often the institutions the Reserve Bank regulates and supervises. The Reserve Bank's policies often require expert comment and to support their arguments submitters often must provide commercially sensitive and prudential information. Furthermore, prior feedback from some submitters has indicated that they would be reticent to share their cost information publically.
28. However, the Reserve Bank does not only foresee a risk of the quality of some submissions falling under a revised policy. The Reserve Bank can envisage the possibility of the quality of other submissions rising. One reason why this may happen is the potential for increased public scrutiny of submissions under a policy change.
29. Therefore, the Reserve Bank is uncertain whether or not increased transparency would come at the cost of lower quality submissions. If there is a trade-off, the public interest in a transparent regulatory process needs to be weighed appropriately against the benefit that the Reserve Bank receives from candid information, when forming policy. One objective of this consultation is to gauge whether or not transparency and submission quality are trade-offs. If they are trade-offs, the Reserve Bank would also like to know to what extent.
30. We note that it is not expected that truly commercially sensitive information should be disclosed in the interests of transparency. Therefore, one could argue that the Reserve Bank should separate information truly protected information (either by the protective provisions or an exemption within the OIA), and publish the remainder of all submissions regardless of whether permission to do so is given. However, we still believe that that submission quality could fall under this scenario. Submitters may be unsure whether information is protected and choose to withhold rather than seek guidance. Submitters could also have unprotected information that they are willing to risk being disclosed by an OIA request but are not willing for it to be published proactively. The Reserve Bank may find some of this type of information useful for informing policy.

*Question 3: Do you think the Reserve Bank publishing submissions by default would have effects on overall submission quality and quantity, if so why?*

#### **5. Policy options**

31. There are two options for reviewing the Reserve Bank's current practice and formalising its policy on the publication of submissions.

- **Option one (the status quo):** The Reserve Bank continues to only publish anonymised summaries of submissions, along with a list of submitters.
- **Option two (a revised policy):** The Reserve Bank would begin to publish all or parts of the submissions we receive on future consultations when submitters give us their consent explicitly. A document containing an anonymised summary of all submissions received and our final policy decisions would continue to be published along side this release, along with the list of submitters.

32. Due to the protective provisions, we believe we are unable to consider a policy such as MBIE's. When the protective provisions apply, absence of objection from publishing all or part of a submission on the behalf on the submitter would not be sufficient to satisfy the Reserve Bank's legal obligations.

### **Option one**

33. The status quo option would be communicated by the following disclaimer to appear within our future consultation documents:

*"Please note that the Reserve Bank may publish a summary of the submissions it receives on its website. This summary will not attribute any information provided to any particular submission.*

*In all cases, unless section 105 of the Reserve Bank of New Zealand 1989, sections 135-137 of the Insurance (Prudential Supervision) Act 2010, or sections 54 and 55 of the Non-Bank Deposit Takers Act 2013 apply, the only grounds for the Reserve Bank to withhold information are those provided under the Official Information Act 1982."*

34. The above disclaimer already reflects recently adopted practice. Furthermore, if we continue with option one there is no restriction on our submitters choosing to release their submissions, if they were minded to do so.

*Question 4: If the Reserve Bank were to retain the current policy, can you think of other ways we might be able to reassure stakeholders that submissions are being properly considered?*

*Question 5: If you had made submissions to the Reserve Bank in the past have you ever made, all or part of, the submission publically available yourself? Please explain why. Would you consider making all or part of any future submissions you make publicly available yourself?*

### **Option two**

35. If the Reserve Bank were to implement option two, we propose that it would be communicated by an expanded version of the above disclaimer to appear within our future consultation documents:

*“Please note that the Reserve Bank may publish a summary of the submissions it receives on its website. This summary will be anonymised so that the responses of specific submitters cannot be identified. In addition, the Reserve Bank may publish individual submissions where submitters have consented to this. When you provide your submission, please:*

- *clearly indicate whether you consent to your submission being made available on the Reserve Bank website in whole or in part, and any information you wish to remain confidential;*
- *where you only consent to part of your submission being published on our website, provide both a confidential version and a redacted public version of your submission (except for the parts of your submission you wish to be withheld, these two versions should be otherwise identical); and*
- *state on the public version of the submission that you consent to this entire document being made public.*

*To the parts of your submission you do not consent to being made publically available we request that if applicable you provide us justification under either:*

- *section 105 of the Reserve Bank of New Zealand 1989, sections 135-137 of the Insurance (Prudential Supervision) Act 2010, or sections 54 and 55 of the Non-Bank Deposit Takers Act 2013 (collectively referred to as the protective provisions); or*
- *the Official Information Act 1982 (OIA).*

*In all cases, unless the protective provisions apply, the only grounds for the Reserve Bank to withhold information from OIA requests are exemptions stated within the OIA itself.”*

36. The Reserve Bank believes that option two would impose a minor voluntary cost on submitters. We would be requesting submitters to write their submissions in such a way that confidential information is separable from the remainder of the submission. This might mean some submissions are longer than previously.

37. We are satisfied that both options one and two are allowable under the protective provisions, and that they communicate the distinction between the policy of online publishing, whatever it may be, and our OIA obligations. In deciding between the options we will be considering the effect each would have on transparency, the quality of feedback we receive, and the extent to which these two considerations are trade-offs.

*Question 6: Do you agree that the disclaimers for each of the two policy options correctly and fully explain each policy option to a potential submitter?*

## **6. Implications to be considered**

38. In this section, we discuss the potential implications and our concerns about option two relative to option one. Overall, there are four main implications of choosing option two over option one.

- **Positive**
  - a. The potential for enhanced transparency within the policy making process.
  - b. The Reserve Bank would be more in line with other government entities.
- **Negative**
  - c. The potential for a fall in the quality and quantity of submission feedback.
  - d. The potential for increased costs to the Reserve Bank.

These points are discussed below.

### ***Quality of submissions***

39. Compared to a policy such as MBIE's there may be less risk that option two would adversely affect the quality of some submissions. This is because of the explicit consent feature of option two. No effort on the behalf of submitters is required to prevent the Reserve Bank from publishing their submissions online. The costs of complying with option two, which are relatively minor, eventuate only when a submitter is consenting to part or all of their submission to be made publically available.
40. However, we can still foresee a risk that some submitters may withhold some information completely or send submissions which do not properly represent their views, because they are concerned about the public release of their submissions. However, this should not be the case in respect of information to which the protective provisions apply. Unless submitters consent to publishing such information, the protective provisions will prevent publication of that information.
41. Additionally, under policy two submitters may feel obliged to make their submissions publically available and therefore choose to withhold particular information.

### ***Transparency***

42. While there may be a lower risk of a change in submissions under option two, the explicit consent characteristic of this option may mean it would operationally be no different to the status quo. Therefore, we are further requesting that when submitters do not consent to information being published on the Reserve Bank website they give us justification why the information should not be made public (if applicable). We hope that this incentivises submitters to not automatically refuse to consent to the publication of any part of their submission.
43. Submitters may try to use other avenues to voice their opinions on our future policy proposals. Some submitters may not want to have particular views attributed, whether directly or not, to them and so may seek other avenues such as bilateral meetings to voice their opinions. This may reduce the transparency of the policy making process, although it is likely that in our summary of submissions the Reserve Bank would acknowledge when information was received via other avenues.
44. Besides a direct effect on transparency, a divergence between what is contained in the formal submissions the Reserve Bank receives and the overall information

provided to the Reserve Bank creates a risk that we cannot properly communicate our justification of policy decisions to the public.

*Question 7: In general, would you expect to consent to at least part of your future submissions being published on the Reserve Bank website?*

### **Additional Costs**

45. We are also concerned that a reduction in the information we gather from submissions will impose significant efficiency costs on the Reserve Bank. An increase in the number of industry workshops and bilateral meetings would be needed to make up for any reduction in submission quantity or quality. Furthermore, we are also concerned of the risk that if the Reserve Bank began publishing submissions online we would have to meet the costs of preventing confidential information being inadvertently published. Although, we have tried to minimise this second concern in our design of option two.

*Question 8: If option two were to be implemented, would you rely less on submissions and seek other avenues to voice an opinion on Reserve Bank consultations?*

### **Indirect attribution of information**

46. Another issue that the Reserve Bank must consider is the potential for information to be indirectly attributed to a submitter even when the submitter does not consent to their submission being released.
47. The Reserve Bank's consultations usually have a small number of submitters. Under option two, it would therefore be difficult to ensure that information in our anonymised summary could not be attributed to an individual who did not consent to the relevant part of their submission being made public. This may occur if a sufficient number of the other submitters consent to the relevant parts of their own submissions being made public. Such indirect attribution is not allowed for information falling under the protective provisions.
48. This raises two concerns for the Reserve Bank. The first is that submitters withhold particular information from their submissions altogether due to the risk that it is indirectly attributed to them. This may be irrespective of whether the information falls under the protective provisions. Second, if the Reserve Bank has to remove information from our summaries of submissions this may have the effect of reducing the transparency of the policy-making process.
49. We do note that it is possible that this could still occur under current practice. If some submitters chose to publish their submissions voluntarily, one might be able to attribute information in our summaries to the remaining submitters. However, this attribution would not be the result of the Reserve Bank's action.

*Question 9: Do you consider indirect attribution of information to a submitter to be a risk? If so, how could the Reserve Bank minimise this risk?*

### **Conclusion**

50. Overall, while option two, *prima facie*, seems to avoid the risk of information being withheld to the same extent as a policy where submitters were required to justify redactions, there may still be risks to the quantity and quality of information we receive relative to option one.

51. Partly because option two relies on submitters' direct consent and partly because of the existence of other avenues for stakeholders to make their views known it is not obvious to us how much, if at all, transparency would be enhanced by option two compared to option one.
52. We are seeking more information on the "size" of each potential implication of option two relative to option one. This should allow us to better weight up our concerns.

*Question 10: Relative to current Reserve Bank practice, do you think the quantity or detail of your submissions would change under option two?*

*Question 11: Do you agree that publication of individual submissions, whether in full or in part, would enhance the transparency of the consultation process, beyond what is already achieved through the publishing of submission summaries or any other part of our current consultation processes?*

*Question 12: Overall, do you prefer option one or option two? Please provide detailed reasons for your preference. If you can think of a third option you prefer over the first two please explain it in detail too.*

## **7. Timeline and next steps**

53. The consultation period for this review will run until 5pm on 4 August 2016. Following that, the Reserve Bank expects to release a summary of submissions along side a policy decision.
54. The Reserve Bank requests that all submissions be filled in using the template in the appendix and sent in electronic form. [A word version of the appendix is available.](#)

**Appendix- Submission table**

<b>Q1</b>	
<b>Q2</b>	
<b>Q3</b>	
<b>Q4</b>	
<b>Q5</b>	
<b>Q6</b>	
<b>Q7</b>	
<b>Q8</b>	
<b>Q9</b>	
<b>Q10</b>	
<b>Q11</b>	
<b>Q12</b>	

