



THE TREASURY
Kaitohutohu Kaupapa Rawa

Reference: 20170031

8 September 2017

Michael Reddell
mhreddell@gmail.com

Dear Michael Reddell

OFFICIAL INFORMATION ACT COMPLAINT – Crown Law advice relating to the appointment of Grant Spencer as Acting Governor of the Reserve Bank

I refer to your request made under the Official Information Act and received on 8 February 2017. Your request was for:

“I am writing to request copies of all papers, whether internal or provided to the Minister or his office, or to the Reserve Bank or its Board, relating to the end of Graeme Wheeler’s term as Governor, the approach to filling the forthcoming vacancy, and the appointment of Grant Spencer as acting Governor.”

As you are aware I wrote to you on 4 April 2017 declining parts of this request under section 9(2)(h) of the Official Information Act, to maintain legal professional privilege.

Subsequent to my response, you requested that the Office of the Ombudsman investigate my decision to withhold information covered by your request.

I have decided to revise my original decision, and am providing you with a summary, prepared by Crown Law, of the information requested, consistent with section 16(1)(e) of the Official Information Act. This summary is enclosed.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

Yours sincerely

Renee Philip
Manager, Macroeconomic and Fiscal Policy
cc: Heather Murdoch-Trollope, Office of the Ombudsman

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Appointment of Grant Spencer to act as Governor of the Reserve Bank of New Zealand Summary of legal advice

Introduction

1. This is a summary of legal advice provided to The Treasury and the Reserve Bank of New Zealand.
2. It is made available pursuant to s 16(e) of the Official Information Act 1982 (OIA). It does not, however, constitute a waiver (implied or otherwise) of the legal professional privilege in the advice provided, which is maintained pursuant to s 9(2)(h) of the OIA.

Background

3. The term of the current Governor of the Reserve Bank (Bank) expires on 26 September 2017.
4. The appointment of a successor as Governor for the full 5 year term would offend against the convention that significant appointments be deferred during the pre-election period.¹
5. As a result, on 7 February 2017 the Minister of Finance announced the intention to appoint Grant Spencer to act as Governor for 6 months (from 27 September 2017 to 26 March 2018) to cover the post-election caretaker period.

The proposed appointment of Mr Spencer is valid and lawful

6. In the normal course, a Governor would be appointed by the Minister on the recommendation of the Board of the Bank for a period of 5 years, pursuant to ss 40 (1) and 42(1) of the Reserve Bank of New Zealand Act 1989 (RBNZ Act).
7. Mr Spencer will, however, be appointed to act as Governor pursuant to 48 of the RBNZ Act, with effect immediately after the vacancy occurs.
8. Section 48(1) provides:

If the office of Governor becomes vacant, the Minister shall, on the recommendation of the Board, appoint—

 - (a) a director of the Bank; or
 - (b) an officer of the Bank; or
 - (c) any other person—

to act as Governor for a period not exceeding 6 months or for the remainder of the Governor's term, whichever is less.
9. On 27 September 2017 when Mr Spencer will be appointed:
 - 9.1 The office of Governor will have become vacant;
 - 9.2 Mr Spencer will be an officer of the Bank;² and

¹ Cabinet Office circular CO (14) 2: Government Decisions and Actions in the Pre-election Period.

9.3 The previous Governor's term will have expired.

10. The fact a previous Governor's term has ended does not exclude the ability of the Minister to appoint someone else to act as Governor under s 48(1). Applying the necessary purposive approach³ it is clear the qualifying words in s 48(1) limit any appointment to 6 months, and where the outgoing Governor's term is shorter, to the remainder of that term. Where, however, there is no remaining term for the previous Governor that restriction is not engaged because there is no remaining term, and the sole restriction is 6 months.⁴
11. The scheme of Part 3 of the RBNZ Act indicates there is to be a Governor of the Bank at all times. Sections 40 and 42 relate to the normal situation where there is a full term Governor. Sections 46 and 49 provide for the disqualification or removal of the Governor. Where a Governor is absent or incapacitated (which indicates a short term situation) s 47 provides for the Deputy Chief Executive to act as Governor. Where the office of Governor is vacant s 48(1) provides the authority to fill that vacancy, and to cover the time it might take to make a s 48 appointment, e.g. where the vacancy was unexpected, s 48(2) deems the Deputy Chief Executive to be Governor for a short period.
12. Applying an approach that interprets s 48 as it stands, indicates that the broad words chosen for s 48 - "If the office of Governor becomes vacant" encapsulates flexibility, and captures all situations where a vacancy arises for any reason, including unforeseen circumstances.
13. When the scheme is understood it is evident s 48(1) is intended to enable a vacancy, as opposed to a temporary absence or incapacity, to be filled. To interpret the provision to not apply after the end of a Governor's term would rob it of one of the purposes Parliament intended it to fulfil.
14. A person appointed under s 48(1) is the Governor. Were there to be a distinction between a full term Governor and a Deputy Governor appointed to act as Governor under s 48 difficulties arise in interpreting the provisions relating to removal.⁵
15. The appointment of Mr Spencer under s 48(1) will be lawful.⁶

The purpose of the Act promotes operational independence

16. The purpose of the RBNZ Act is expressed in s 1A, which amongst other things provides that "the Reserve Bank of New Zealand, as the central bank, is to be responsible for: formulating and implementing monetary policy designed to promote stability in the general level of prices, while recognising the Crown's right to determine economic policy."

² If not, certainly "any other person".

³ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Fonterra Co-operative Group Ltd v The Grate Kivi Cheese Company Ltd* [2012] NZSC 15, [2012] 2 NZLR 184; and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 201.

⁴ Support for this approach is also to be found in s 12 of the Interpretation Act 1999.

⁵ For example, is this power vested in the Board under s 45 or the Minister under s 50.

⁶ The conditions of employment for the interim Governor are governed by s 42 of the RBNZ Act, which aligns with the powers of appointment and removal, as well as the overall purpose and general legislative context of the RBNZ Act.

17. Section 8 sets out the primary function of the Bank:

The primary function of the Bank is to formulate and implement monetary policy directed to the economic objective of achieving and maintaining stability in the general level of prices.⁷

18. Section 9(1) of the RBNZ Act provides:

The Minister shall, before appointing, or reappointing, any person as Governor, fix, in agreement with that person, policy targets for the carrying out by the Bank of its primary function during that person's term of office, or next term of office, as Governor.

19. The purpose of s 8, combined with s 9, includes defining the relationship between the government of the day and the Reserve Bank at an operational level. To that end, it has been noted that although the policy targets are to be established by the Minister, in agreement with the Governor, the Bank has operational independence in the sense of operating monetary policy to pursue this objective. This independence is said to enhance the credibility of New Zealand's monetary policy.⁸

A person appointed under s 48(1) is the Governor

20. Section 48(1) authorises the appointment of a person "to act as Governor." The fact the appointment may be an interim one does not detract from the fact the person appointed is the Governor for the purposes of the RBNZ Act.
21. As a result an interim Governor is from an operational standpoint, "Governor" for the purposes of s 9. An interim Governor will be bound to the duties set out in s 11 of the RBNZ Act.
22. Section 48(3) clarifies that the interim Governor would have "*all the duties, responsibilities and functions of the Governor under the Act*", in addition to being able to exercise the powers of the Governor.

The Act provides for Policy Target Agreements to be agreed with interim Governor

23. One of the key duties of the Governor is found in s 11:⁹

It is the duty of the Governor to ensure that the actions of the Bank in implementing monetary policy are consistent with the policy targets fixed under section 9.

24. The combined effect of ss 8, 9 and 11 can be seen as providing an important guiding force to the operation of the Bank throughout the term of the presiding Governor (however short or long). The Governor must ensure that the actions of the Bank are consistent with the policy targets that are subject to a written agreement, as agreed to

⁷ While the "formulation" aspect does not itself necessarily infer formulation of specific policy targets, it nevertheless appears to reinforce the importance of the Bank's operational independence, and the importance of the input of its Chief Executive into the policy targets that will, from that point forward, govern the operations of the Bank.

⁸ See e.g. *The Right Honorable Ivor Richardson -- What Can Commercial Lawyers Expect of a Legal System?* (1998) 4 NZBLQ 128 at 130-131. Examples of this independence include ss 20, 33(2) & 42(3) of the Act.

⁹ It is of some significance that this particular duty is placed prominently within the Act, in Part 2, "Functions and Powers of Reserve Bank". Other duties are set out in Part 3 addressing the management of the Reserve Bank.

in advance of the formal appointment of that Governor, ultimately submitted to the House of Representatives.¹⁰

25. This context informs the interpretation of s 9, which contemplates policy targets would be the subject of an agreement between the Minister and the incoming person to act as Governor *before* the “appointment or reappointment” of the Governor.
26. An agreement on policy targets in advance of an appointment is mandatory (“shall” connotes a statutory duty) and the exceptions are very limited. The scheme of s 9 therefore indicates the intent of Parliament is that there will always be a policy targets agreement in place.
27. There is no indication in the Act that an incoming interim Governor would lack the capacity to enter into an agreement for policy targets in advance of appointment.
28. Excluding an appointment of an interim Governor from s 9 would be a departure from the mandatory requirement for a policy targets agreement before an appointment. Such a departure is not supported by the provision or the Act.

21 July 2017

RELEASED UNDER THE OFFICIAL INFORMATION ACT

¹⁰ Section 9(5)(a)-(c).