The indifference of the powerful: an insider's perspective on events around the Reserve Bank superannuation scheme, 2014-2024

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I've been a trustee of the Reserve Bank of New Zealand Staff Superannuation and Provident Fund since 2008. Since 2014, trustees have been dealing with a series of issues, initially raised by members, about the validity or otherwise of a series of historical rule amendments. There had been earlier disputes between some members and the Bank about the application of some of the rules, culminating in (unsuccessful) action in the courts against the Bank as employer. Some issues around interpretation/application had been raised with trustees in 2007/08, but it is since 2014[1] that trustees as a group have been faced by arguments and evidence around potential (and actual) invalidity.

This document is my own take on the handling of those particular issues, as someone who has participated in every trustee meeting over this period. This is the story of how things seems to me today looking back.

Background and context

Who are the trustees?

At present, and since 2016, there are six of us. Two are elected from among the members, one is a member (typically a current employee) appointed by the Reserve Bank Board, and two are staff or Board members appointed by the Board. In addition, the Financial Markets Conduct Act mandates a licensed (so-called) independent trustee (LIT). Trustees elected by members serve for fixed terms, while those appointed by the Board serve at the pleasure of the Board (and thus are removeable at will and without notice). The LIT has, on paper, but cannot leave office unless the other trustees first appoint a replacement. All are required by law and by deed to conduct themselves as trustees in the best interests of members.

Until 2016, the Governor of the Reserve Bank was a trustee although it had latterly become customary (if dubiously legal) for the Governor to absent himself in favour of a permanent alternate (usually his direct report responsible for HR and finance matters).

The rules of the scheme can be amended by the trustees with the consent of the Bank's Board, through a deed amendment executed by both the trustees and the Bank. Provisions in the rules and in legislation limit what rule changes can be made, have often required Government Actuary (or more latterly FMA) consent for rule changes, and specify the circumstances in which member consent is required before rule changes are made.

The focus of trustees' discussions and investigations in the last 10 years have been on rule changes made in 1988, 1991, and 1995. In 1988, rule changes required the consent of any member whose interest in the scheme at the time of the rule change **could** be adversely affected. In 1991 and 1995 (and now) there is a weaker test; consent is required from any member whose interest **would** be adversely affected. I suspect it would now be common ground among any of those involved over the last decade that past trustees during that reform period had not exactly covered themselves in glory

[1] One might reasonably wonder why it took 20-25 years. Particularly in respect of the 1988 changes there is simple no good explanation or one that reflects well on anyone (Board, management, trustees – or members).

in the way they had gone about thing (those trustees included two successive Reserve Bank Governors).

What were the amendments?

- In 1988 they included
    - the introduction of vesting provisions, enabling staff who left before retirement to access some of the employer contributions,
    - changes to the wind-up provisions such that
        - rather than simply distributing net assets pro rata, annuities would have to be purchased
        - the Bank would be required to underwrite the purchase of annuities but, with the consent of the Government Actuary, would be able to receive any surplus left in the scheme after annuities had been purchased.
    - a change to the definition of salary for superannuation purposes. "Salary" had simply been a member's ordinary (cash) salary. In future, for those put onto total remuneration packages, the Bank could specify "salary" as a proportion of total remuneration, able to be varied by the Bank to any extent and at any time.
- In 1991 amendments
    - made membership of the superannuation scheme no longer compulsory and closed off entry to the Defined Benefit (DB) part of the scheme,
    - established a Defined Contribution (DC) division,
    - amended the definition of salary for the DB division, such that the percentage of total remuneration that would be used for superannuation purposes could in future be varied only by mutual agreement between the Bank and the member,
- In 1995 amendments were made in context of a large actuarial surplus
    - to enable the Bank to cease making fixed contributions to the DB division, instead requiring it to contribute only to extent the actuary determined necessary.
    - pension rates were permanently increased for DB members and
    - funds from the DB scheme were allocated, in a one-off transfer, to DC division members.

Each of the sets of amendments involved extensive discussion, negotiation, and consultation on aspects of the various plans. But the focus here is on the legal requirements.

Even on a superficial reading, it was fairly obvious that at least some members (notably those not already retired) **could** have been adversely affected by the 1988 changes. DB schemes operate over decades and benefits are generally determined by salary (for the purposes of the scheme) in the last few years before retirement. Without changing the employee's actual remuneration (set in employment agreement contexts), the proportion of remuneration on which pension contributions or entitlements were calculated could be altered by the Bank at any time and to any extent, with no notice. If some members' interests could have been adversely affected, consent had been required for the changes.

The 1991 changes might have seemed innocuous, but there were indications that the change to the definition of salary, unquestionably done at the last moment, may not actually have had the approval of the Bank's Board.

The 1995 changes were not initially in focus. Member consent was sought and obtained. However, issues arose as trustees looked into the 1988 and 1991 changes as to whether those consents had been fully informed.

Trustees' involvement: 2014 to 2018

Concerns around validity were first raised with trustees in a letter (and lengthy attached document) received from a member in July 2014. Within days, the chair - a busy senior executive, who gave no indication he had either absorbed all the material or taken advice personally - had written a memo to trustees proposing that trustees do nothing, suggesting we simply write back to the member and indicate that we considered the issue closed. It was breathtaking. Bascand sought to "sweeten the pill" by suggesting that even if legal action were ever taken against trustees, it didn't matter that much as we were indemnified by the Bank. Bascand was then the senior Bank executive responsible for HR and finance functions. His dismissive approach showed repeated signs of being shaped primarily by his perspective as a Bank senior manager on the employment case unsuccessfully taken against the Bank (which trustees as a group have never had particular reason to pay much attention to).

Bascand's attempt to close the issue down was rejected by trustees. Instead a very slow process got underway in which a group of (mostly) fundamentally decent people squirmed uncomfortably about what had happened, and what came to light. Trustees consistently rejected suggestions that past trustees should be approached for their perspectives and that some independent (non-conflicted) party's input should be sought (eg arbitrator or court)

The process was not helped by the seriously inadequate record-keeping (a Bank responsibility under the deed) that came to light. Confidence in the earlier processes was also not helped by realising that the same law firm had acted for the Bank (seeking the changes) and for the trustees (supposed to have been acting in the best interests of members). Over the entire 10 years, trustees have refused even to explicitly note and/or express regret about these lapses.

Two law firms, one after another – the first, the one that had previously acted for both trustees and Bank - both observed that on a plain reading it appeared that consent should have been sought for the 1988 changes. No evidence was found of consent ever having been sought, and trustees themselves - two years on – agreed (without dissent)[2] that "members could potentially have been adversely affected...and that consent should probably have been obtained". That in itself should have been enough to conclude that the rule change had been invalidly made.

But instead "creative" lawyers - operating with the same mindset as economic consulting firms eager to deliver helpful assessments for their client of the moment - devised fairy tale stories for why it didn't matter and nothing needed to be done. The Bank-appointed majority of trustees lapped this up. On one particular telling, we could assume that the Bank would never have used the powers inappropriately, and so no one could actually have been adversely affected. On another, either the 1991 change had "fixed" things, or the signing of individual employment contracts several years later had done so, or a non-binding statement of Bank policy issued months after the rule change allayed concern. In that vein, majority trustees did agree to check that no one who had retired in the first few years had been harmed (grandfathering provisions had been put in place by the Bank for such a

[2] Minutes of the meeting of 23 June 2016

group), but refused adamantly - then and later - to look at the impact on those retiring later (often decades later).

Despite their earlier conclusion (members could have been adversely affected and consent should probably been sought), a majority of trustees finally formally resolved that while proceeding without consent was a "questionable judgement", it didn't matter and nothing needed to be done. About this time the so-called independent trustee was being added to the mix: he showed his hand by first suggesting he never wanted to come between member and employer-chosen trustees, and then suggesting that trustees had a responsibility not just to members but to be fair to the Bank. Quite which section of the deed or the Act this alleged responsibility stemmed from was never clear.

A majority of trustees also accepted advice from lawyers that the 1991 change had most likely been made with the (required) consent of directors, notwithstanding important gaps in the documentary record, and a not-very-detailed engagement with the documents that were available. In many respects, the 1991 rule change might have seemed not to matter (to have harmed anyone), but to those majority trustees who claimed any potential harms that 1988 changes might have done were sorted out (in some way or another) by the 1991 change it did matter. For them it seemed to function as some sort of defensive barrier - knock it away and the potential invalidity of 1988 would stand exposed.

Trustees could not, however, avoid the finding that failing to advise members of the 1991 rule change (affecting "salary" for DB members), as required in the scheme's Annual Report, had been a breach of the Superannuation Schemes Act, and while trustees were no longer liable for prosecution there was a possible risk of civil action should any members seek to demonstrate damages. Trustees made an apology to members for this past failure.

Nor could trustees avoid the implications of the discovery that the 1988 rule change providing for a surplus at wind-up to revert to the Bank was (a) simply unlawful (ultra vires, even if member consent had been sought), and (b) that this had been advised to trustees as early as 1991, and that nothing had been done about it since. 2014 trustees were mostly taken by surprise by this discovery[3], and steps were finally taken over the next few years to remove the illegal provision from the rules (by this point significant scheme surpluses were a thing of the past, and the formal relevance was limited - ie little/no expected cost to the Bank). Trustees also accepted (and disclosed this to members in the 2018 Annual Report) that the change to the windup provisions in 1988 (from lump sum distribution to annuities) should also have been subject to member consent[4].

By this point it was clear that (a) the salary definition from 1988 should have had member consent, (b) the change to the wind-up rules should also have, (c) the reversion of any surplus to the Bank had been illegal all along. I further argued that the vesting provisions should also have required member consent, as they transferred money from the Fund (in which continuing members had the economic interest) to early leavers[5]. It was a mess - and not likely to be an easily resolved one unless (as the

[3] Although years later documents emerged showing that one Bank-appointed trustee in 2014, who had been chair a decade earlier had then overseen publication of a description of the scheme for staff which had noted this invalidity.

[4] For any member with reason to think s/he had a shorter than average life expectancy at wind-up a full lump sum would potentially be more valuable than an annuity,

[5] This is no theoretical point. I am trustee of another scheme where the FMA has recently insisted that we obtain full member consent for a change in the vesting arrangements even though (a) any theoretical cost to individual members was tiny, and (b) for years trustees had been exercising their discretionary powers to provide, in effect, full vesting, so that the actual cost was essentially zero.

majority insisted, never evidently engaging with their legal obligations to members) we just did nothing, and relied on time and costs to see off any aggrieved members.

The discovery of the illegal and invalid surplus-reversion provision, together with the realisation that trustees had known about it in 1991, also raised serious question for trustees about the validity of the consents obtained in 1994 for the 1995 rule change. That package had been about the large actuarial surplus then in the scheme. But if the Bank no right to the surplus (even in wind-up) why - some members might have asked - should any relief be provided to the Bank? Younger members in particular - for whom the package offered nothing - might have been content to wait a few decades, (including rather than see what was legally "their" money transferred in part to DC members who had, in a fully informed way, chosen to leave the DB scheme).

Trustees took this issue seriously. The Reserve Bank stood to lose millions of dollars if the rule change had simply been invalid (in addition, if the whole package was invalid money would have been paid to DC members to which they were never entitled). Trustees were considering advice on remediation and rectification options, including seeking the intervention of the courts, including paying for representation for members, when - another illustration of the shocking recordkeeping - I happened to stumble on a 1991 memo to members from the chair of trustees (my copy of the document was buried in a box of old personal files in my garage that I was going through with my young daughter). The memo to members was about the establishment of the new Defined Contribution division, and was written mainly for the benefit of people who were serious considering changing to it. The 1995 changes had never been our (trustees') focus (that was on the 1988 and 1991 changes, the issues first raised with us), and no attempt had been made to look carefully at the files around that change. Instead, all trustees (I now regret that that included me) jumped at this discovery and closed down the issue.

And so by 2018, from a trustee perspective, the historical issues appeared to be over, unless someone was to seek to take us to court. Trustees were, perhaps understandably, quite concerned about their insurance position[6] (the FMCA had limited the extent of the Bank indemnity for decisions made after 2016), and majority trustees were disapproving and uncomfortable when at times I highlighted serious concerns on my blog, or talked of raising matters with the FMA (at one point the LIT memorably complained that if I went to the FMA they might expect him to do something). But beyond what was (a) simply inescapable and b) easy and cheap, there was little evident sign of operating in the best interests of members if there was any tension with the interests of the Bank (or a quieter life).

Trustees would go as far as to say that some things had not been done, or communicated, as well as they should have been in years past but, content with the implausible just-so stories their lawyers spun from thin air,……well, that was it. Not one former trustee had been spoken to officially, ever. As for the FMA itself, it evinced little real interest, even as (under the FMCA) it became the primary regulator/supervisor for restricted schemes. It was hard not to notice that (a) one of the FMA's forerunners, the Government Actuary, had actually signed off on the whole suite of questionable 1988 changes (so opening anything up might look awkward for that institution too) and (b) that the FMA worked very closely with the Reserve Bank in financial regulatory matters (by the end of this

[6] Personally I was very concerned because despite having recorded dissents on almost all the major issues I was nonetheless party to and bound by those decisions (a point our lawyers helpfully, if uncomfortably clarified). One reason why I have been willing to speak out is to attempt to distance myself from the majority.

particular wave of trustee engagement Mr Bascand had become the deputy governor directly responsible for financial regulation and engagement with the FMA).

Further review: 2020 to 2022

In the next wave of engagement - running from 2020 to 2022 - things deteriorated further. The chair had changed again, to the external Reserve Bank Board member Jonathan Ross, and the member (Bruce White) who had first raised the concerns had been elected as a trustee.

What was to prove an incredibly expensive and acrimonious review of some of the issues was probably triggered mainly by a letter written by Don Brash to Bruce White. Don Brash had been Governor, chair of directors, and chair of trustees at the time of the 1991 rule change. In that letter Brash asserted that to his knowledge - being in a good position to know - it had never been the intention of either trustees or directors to have changed the definition of "salary" in the DB scheme. That such a change was in fact executed, unquestionably having been done at the very last minute, suggested a mistake had been made. Dr Brash noted, among many other points, that the scheme's Annual Report in 1991 had not made any mention of such a rule change, as it was required to by law. Dr Brash being a person of stature, known both for integrity and attention to detail, it was not really something that could be simply ignored.

Even now, and right through the post-2020 review, trustees as a group (and the chair in particular) still consistently refused to meet with Dr Brash or with any other past trustees or directors (three trustees had been at the relevant Board meeting in 1991) but did finally agree that they should be interviewed by a law firm. But the mark of the unseriousness of the entire exercise was that, at Mr Ross's insistence, DLA Piper was chosen to review its own previous advice and to undertake the interviews with past trustees. Since trustees themselves refused to engage seriously with the factual evidence base, DLA Piper – a law firm with no institutional context, and no evident interest in gaining it - was also invited to assess what had (or had not) actually happened. They chose as the lead lawyer a litigation partner who, while offering some useful advice on some narrow legal points, consistently acted in ways that resembled the way counsel acting in court for a party might pursue that party's case and its view of its own interests. While the interviews themselves probably were always going to offer less than some of us might have hoped - happening 6-7 years after they'd first been suggested – not one of them suggested any awareness of an intent to have made such a change, and one former trustee had already provided sworn testimony some years earlier that he had not been aware of a change to the DB salary definition at the time it was made.

Concerningly, transcripts suggested that leading questions (in the interests of the status quo) were common, and there were efforts that amounted to, in effect, actively misrepresenting to trustees what Dr Brash in particular had or had not said. At one point our lawyer claimed Brash had recanted a particular view, which a checking with Dr Brash in writing – later circulated to trustees – proved clearly not to have been the case. Fanciful creative stories about what might have happened - eg typos were claimed with not a shred of evidence – were created, and when challenged, the defences of the status quo simply morphed into other specific forms. But - at vast expense to members – it was going in ways convenient for Mr Ross and the Bank cohort. Ross in particular seemed to be operating with a goal of having all the historic issues tidied away in the hope of handing over a clean slate when his term on the Board ended.

Looking back it is simply staggering how much money was spent on the 1991 issue (always in substance somewhat peripheral in my view). But not once could any of the majority trustees articulate a credible story, consistent with the evidence, as to how the 1991 change might have been

come to have been lawfully made. The last minute change was clearly a matter that altered the substance of the proposal (as it affected DB members) as it had gone to the Board in the set of Board papers we have, and the Board had agreed to minor last minute changes only if they didn't affect the substance. Majority trustees were simply determined to ignore the overwhelmingly most likely explanation, supported by what material record we have; that an unwitting mistake was made. On more than one occasion in the course of the meetings I was moved to openly describe what was going on as a "corrupt process". Majority trustees' view appeared to require a belief that either the 1991 trustees had been dishonest - deliberately lying - or had just paid no attention to their statutory duty in finalising their 1991 Annual Report (the one that didn't report the change).

Ross was still keen on having everything tidied away, even matters that had not been the subject of an in-depth review by this group of trustees or their advisers. Abusing fund resources (ie members' money) in the process to move his own agenda ahead, Ross secured a majority for his view that the 1991 amendment had been validly made (although other trustees could not be persuaded to endorse his bizarre claim – first championed by the lawyers - that the 1991 amendment rectified any possible defect in the 1988 amendment). He also got the majority to repeat (just) the formal 2016 resolution around the definition of "salary". No substantive investigation had been made of this issue at all by the 2022 trustees (only two of whom had been trustees in 2016), and none at all was made of the "lack of actual adverse effect" assertion that the majority now signed up to. The nature of what Ross was apparently seeking - just to end things - was perhaps best illustrated by the fact that he chose not to seek a new endorsement of the unanimous view of 2016 trustees that members could have been adversely affected by the 1988 changes and that consent should probably have been obtained.

The 1995 rule changes were also put back on the table briefly, primarily as a result of my review of a fairly large collection of documents relating to those changes that I had obtained some years earlier. Majority trustees displayed no interest in examining these documents. This review was among the factors that had led me to recant my 2018 stance, that discovery of the August 1991 document was, in itself, sufficient reason to conclude that consents by members had been properly informed.

On closer consideration it was clear that those with the strongest interest in the 1995 changes had had the least incentive or reason to read the 1991 document (if you had no interest in changing schemes, if you read it at all it might only have been out of interest). Moreover, the document had been provided to members three years earlier and although the point - the invalidity of the rules around disposition of surplus at wind-up – might reasonably be considered crucial in considering whether to agree to a package dealing with a large actuarial surplus – neither trustees nor the Bank had made any effort at all to ensure that members being asked for consent in 1994 had the full context. In fact, the documents make it clear that - among both (1994) Bank management and trustees - there was a really strong interest in getting the deal done, and unease that some younger members (those most likely to focus on windup scenarios) might be reluctant to consent. It wasn't that either trustees or the Bank had forgotten the legal situation (of which they'd been advised in 1991) but they had done nothing about it and chose not to alert members to it (and talked in terms of legal action if there was any resistance to the deal by any member). The courts, by contrast, had been clear that it was for each member to make his or her own assessment, including of his or her overall own interests, in deciding whether or not to consent.

Majority trustees in 2022 had little interest. The lack of seriousness of some majority trustees was illustrated when I asked one trustee - still today a senior Bank manager - why he was taking a particular view on this matter, and his response was that "although he had not looked into the issues deeply and he did not fully understand the counterarguments, he had read the legal advice and he

trusted the legal advice"[7]. In the Annual Report the following month all trustees signed up to the following

> "All today's Trustees agree that the invalidity in the Rules enabling the passing of surplus to the RBNZ on the Fund's winding-up should have been drawn more directly to the attention of members when Trustees sought members' consents in 1994/95 for the Rule 12 amendment."

It was rather on a par with the 2016 and 2018 situations. Majority trustees were happy to do a little criticism of their predecessors, just so long as there was no suggestion anything should actually be done now to address past failings, mistakes, and errors. The majority did not even attempt to reconcile this line with their view, reported a few paragraphs earlier, that members providing consents in 1994 had, in their view been "fully informed".

The focus of the 2020 to 2022 review process had been on the specific issue of the validity, or otherwise, of the 1991 amendment to the definition of "salary" as it affected the DB division of the scheme. Staggering amounts of money were to spent in an attempt to avoid what was increasingly obviously the simplest and most likely explanation, and to overwhelm by paper and lawfare. (Even having done all this, there was still no willingness by the majority to meet with Dr Brash or to provide a full explanation of majority trustees' view as to why they believed him to be wrong. It was discourteous to say the least, but it was a reflection of the Ross-led majority approach from the start.)

In the course of all this, the Licensed Independent Trustee decided that he should advise the Financial Markets Authority that I had been describing what had gone on as a "corrupt process". This prompted me to write a letter to the FMA explaining the basis for my description and expanding on my points. On reflection, it is staggering that when a LIT came to the regulatory agency and reported that a trustee was suggesting a "corrupt process" had been underway, there was no follow-up, no questions, no attempt to approach me to understand the issues and concerns. But it was to be much the same with my own letter: the FMA disclaimed any interest or responsibility at all, notwithstanding that in a restricted scheme (such as this) it was the only entity with any legal oversight responsibility of trustees (and it actively licensed the LIT). In the wake of the 2020-2022 process, the scheme administrators (MJW) tendered their resignation, and then the scheme auditor resigned without notice (both connected to these controversies/reviews). A subsequent Official Information Act request suggested no record of any interest or concern or even internal comment by the FMA, even though they had been kept updated of these developments.

The meeting of members: 2022 to 2024

The chair of trustees had left office - his term as a Reserve Bank Board member having expired - before members received the 2022 Annual Report. But fairly shortly after receipt of the Annual Report, a group of members lodged a request with trustees for a meeting of members (under provisions of the Financial Markets Conduct Act) to (in summary) discuss the Annual Report material on historical rule issues and hear explanations for the views taken by both majority and dissenting trustees.

That meeting is finally being held this week (31 January 2024). That in itself is a poor reflection on trustees. This is the first such meeting to be held by any scheme under this decade-old provisions and so it was reasonable for trustees to ensure they properly understood the legal requirements,

[7] Minutes of meeting of 10 June 2022

although since there was no power for any resolution from such a meeting to bind trustees, this was more in the nature of a formality. Moreover, trustees had first explored these issues some years earlier when the suggestion of a members' meeting request had first been mooted.

In September 2022, five of the six trustees responsible for the 2022 decisions were still in office, and memories (while perhaps raw) were fresh. A reasonable initial approach by trustees who were serious about acting in the best interests of members might have been to have invited the requesting members to a meeting and provided them exactly the sort of explanations and rationales they said they'd been seeking. Pro-active trustees might have sought to prevail on Mr Ross, clearly the driving force behind the resolutions, to have turned up to such a meeting (he had after all held the office as chair of trustees because he had been a government-appointed Board member, a public office older). Of course, nothing of the sort happened.

Perhaps most telling has been the stance of the new chair, Sarah Owen, one of Adrian Orr's numerous highly-paid direct reports. Her approach has been one that trustees really owe members nothing beyond what is already in the Annual Report - as if the limitations of the Annual Report had not been what prompted the request in the first place. She fairly notes that decisions are as they are (whether unanimous or by majority), and also that she was not party to those decisions. But much of the request from members seems to have been to understand the thinking that led individual trustees to reach particular views, reflected in their voting. Ms Owen has been consistently resistant to any such explanations. Fairly early in the piece a majority of trustees, over against Ms Owen, had favoured a model in which each of would write a short (perhaps 3 pages) piece on the thinking that led us to our particular views/votes. All of the remaining five trustees (from the 2022 decisions) prepared such statements. I personally - even having been in the room when decisions were made - found 2 of the 3 statements from majority trustees useful and enlightening (the 3rd was from the senior manager whose default appeared to be 'if the lawyers tell me it is ok I don't much need to think myself") in understanding the reasoning they had used.

As 2023 proceeded two more trustees left office (one dissenting, one majority), and the remaining two trustees – both about to end their terms - eventually decided not to provide their statements as part of the material that went out to the meeting (it isn't yet clear whether either will be willing to answer serious questions at the meeting).

Ms Owen, however, was particular vexed by my stance, apparently believing that I had some duty to support the majority positions (having once been made), or not to disclose any criticisms or concerns beyond what the majority agreed to. Since my primary responsibility was to members (as I believed it was for all trustees) I had no intention of having my views censored by Ms Owen. I had written a short statement earlier last year which might have been used for distribution to members. Ms Owen - or other trustees – never once suggested any drafting amendments or outlined the specific nature of any of their concerns about the contents of that statement (much of which is factual, most of the rest is simply a summary of views I'd expressed in the course of meetings in recent years) but appeared not to like the fact that I had been critical of lawyers, other trustees, and of the Financial Markets Authority[8]. I have published a version of this statement on my own website[9], as I have

[8] In a similar vein has been her attempt to cover up the uncomfortable in the minutes. To the credit of trustees, it was agreed to release to members those (lengthy) portions of the minutes from 2014 to 2022 dealing with these historical rule amendment issues. Ms Owen and her majority saw to it that what was released to members did not include (for example) my observations that the review had been a "corrupt process" or most of my criticisms of the performance of the DLA Piper lawyer's work.

[9] rb-super-scheme-2023-explanation-of-mhr-positions-on-historical-rule-change-issues -substance-and-process.pdf (wordpress.com)

published various critical posts on my blog over the years since 2015. This, Ms Owen, claims is some "breach of trust", citing neither scheme rules nor statutory provisions she believes I have breached, and she is now using members' money to attempt lawfare and intimidation against me.

Meanwhile, she has evinced no interest at all in getting to the bottom of member concerns or the substantive issues members are raising. Stonewalling appears to be the preferred strategy, a stance conveyed directly to representatives of the requesting members (in process-focused meetings that have been held).

None of this is directly relevant to the historical rule amendment invalidity issues, but together with two further straws in the wind it goes to the cast of mind of the majority trustees:

- the majority's refusal to make any serious attempt to get Jonathan Ross (the key majority mover in 2022) to attend (even virtually) the members' meeting. After some persuasion it was eventually agreed to ask if he wanted to attend. Unsurprisingly, he did not. But there was no attempt at persuasion or pressure.
- in working through the minutes to be released, the majority trustees decided to give former trustees the choice as to whether when comments/votes from them were reported their names would be withheld (current trustees all agreed to disclosure). All three past chairs – Bascand, Taylor, and Ross - exercised the option, preferring to keep their names off comments and votes they had made. It was their choice, of course, but it hardly spoke to any interest in either transparency or accountability to members.

Formal provision for a meeting of members is included in the Financial Markets Conduct Act, an act administered by the FMA. The law requires that the scheme supervisor be notified of any such meeting, in just the same way as scheme participants are. The meeting to be held this week, is we are told, the first under these provisions of the Act. The FMA has, however, advised trustees that it will not be represented at the meeting.

Summary reflections

Astonishingly expensive of time and (members') money as the years of trustees' focus on the historical rule amendments have been, it cannot be said to have been futile or to have involved matters of no merit:

- shoddy record keeping (then the responsibility of the Reserve Bank under the rules) in a scheme with multi-decade effects has been brought to light,
- disconcertingly weak standards as regards legal advice were brought to light (it remains astonishing that throughout the reform period trustees (on behalf of members) and the Bank were advised by the same lawyers, even though the two parties had manifestly different, potentially conflicting, interests),
- a material breach of the Superannuation Schemes Act was discovered, acknowledged, and apologised for,
- a major rule change from 1988 was found never to have been an option legally open to trustees and the Bank (and yet had been approved by the regulatory agency, the Government Actuary, one of the forerunners to today's Financial Markets Authority) and has since been fixed (trustees and the Bank having for decades done nothing about a failure they'd been first advised of in 1991),

- two successive firms of lawyers, and trustees themselves, have acknowledged that members could have been adversely affected by the 1988 rule change (the test in the rules at the time), trustees accepting that, thus, consent should "probably" have been sought,
- trustees have acknowledged that in seeking consents for a major package of rule changes in 1994/95, of significant financial benefit to the Bank in response to a large actuarial surplus, members' attention should have been drawn more directly to the fact that the Bank had no legal or economic interest in any surplus (see 4th bullet above).

One might add to that the process had forced into the open the fanciful nature of the stories - dreamed up for trustees by "useful" law firms (playing much the same role as economic consultancies dreaming up economic impact reports to help clients) - that trustees have had to fall back on, when they explained themselves at all, to defend their choice to do nothing more.

And, of course, the utter uselessness of the Financial Markets Authority has been brought to light. Sceptical as I often am about the case for financial sector regulation, if there is any case at all it has to be strongest for multi-decade retail contracts/schemes that members were compelled to join. There is no way to look into the soul of those involved at the FMA - from Gavin Quigan upwards - but it is difficult not to conclude that they don't care at all about small schemes (no good headlines) and care even less when asking hard questions might reflect poorly on their own institutional past. There was a good reason why rule changes to superannuation schemes needed Government Actuary agreement. Whether the fact that the FMA works closely with the Reserve Bank routinely played any part, conscious or otherwise, is impossible for outsiders to tell. But for an agency allegedly concerned with good conduct/culture and going above and beyond the chosen indifference is not a good look at all.

Twelve people have served as trustees (or alternates) over the decade since July 2014 (including 4 as chair). Two are newcomers since the 2022 decisions, and have revealed little to date of their views (although are now fixed with knowledge of the substantive concerns).

A consistent majority of trustees has always been appointed, ex officio or discretionarily, by the Bank. The LIT is appointed by the other trustees, three of five of whom serve at the pleasure of the Bank's Board. I think I am safe in saying that not one of those trustees, in the eight years from 2014 to 2022, ever displayed any convincing signs of acting as if his primary duty was to the best interests of members (nor does Ms Owen now).

Since I cannot see into their individual souls, I cannot know with certainty. Perhaps it was just a desire to let sleeping dogs lie when at all possible. But the evidence pointing to an unfavourable verdict is that there was never a time - not once - when any of them ever, faced with a clash between possible interests of members and the probable interests of the Bank (contemporaneous), went with interpretations that might have favoured the members.

Many of the people involved were in most respects decent people, holding senior appointments (in one case being honoured by the Crown for board service to the state), but they simply refused to recognise the inescapable conflicts of interest they faced. Choices were observationally equivalent to those that would have been made if these trustees had deliberately been in the interests of the Bank. Tough calls are the ones that reveal character.

That doesn't, of course, mean that nothing at all was done (see the bullet point list above) but none of the limited number of actions or statements by then represented any sort of jeopardy to the Bank. Majority trustees consistently and repeatedly refused to consider resort to an independent party, and routinely proved reluctant to engage on substance (either with members raising issues or with

former trustees). There was a significant commitment of time - the released bits of the minutes run to well over 100 pages, papers for the meetings of the last decade probably stand now a metre tall - but never any sign of a determination to get to the bottom of things, or to do the right thing.

The approach of the LIT was rarely, if ever, any better.

What of the Reserve Bank itself (Governors and Board)? Graeme Wheeler was a trustee of the scheme until the end of 2016, and so is directly party to the decisions and choices made then. More generally, the Board-appointed trustees cannot, of course, be given directions by the Board or management, and those trustees could not accept such directions were they to be given. Nonetheless that does not absolve Governors (Wheeler, Orr since 2014) or the Board (chairs since 2014 Rod Carr and Neil Quigley) of responsibility. They are responsible for the people they appointed, and if they thought those people were not doing a good job those appointees could and should be replaced[10] (as it is, one has been in office for more than 20 years and in my 16 years as a trustee he has never once uttered a word even slightly against the interests of the Bank).

Neither management nor the Board can credibly claim not to have been aware of the issues, including because the chair of trustees routinely briefs the Board on superannuation scheme issues, including ones under active consideration (and scheme annual reports are public documents). The Bank's responsibility is not just as the entity appointing half the trustees, since the Bank itself is an executing party to all the deed amendments, and was the champion of each of the three relevant packages of changes. If mistakes were made that should concern the Bank (notably as a statutory body with responsibilities for financial sector regulation etc, not unknown to have openly beaten drums about culture and conduct in the financial sector).

It is a story of (at best) the active indifference of the powerful. Among the indifferent powerful are the Financial Markets Authority, the regulatory body which states - at the very top of the front page of its website that "We stand for a strong and trusted financial sector that treats people fairly".

Coda

As the documentary record (notably the minutes) will show I have never championed a particular outcome. I am convinced that the entire 1988 package of amendments was invalidly made, am confident on the overwhelming balance of probabilities that the specific 1991 amendment (to the definition of "salary" for the DB division) was not validly made, and do not believe the consents in 1994 were generally fully informed. Quite what taking those views should mean at this late date is much less clear (I, for one, think the 1991 issue has no substantive implications), and so when I have moved motions on these matters they have consistently been to recognise the past failures but then to open discussions with the Bank and the FMA on resolution, perhaps seeking the direction of the courts. As a member, I personally might be quite content with a full and genuine apology and acknowledgement of serious past errors. Others might not be.

[10] In the same way that members are free to (for any reason or none) replace trustees they have elected, but in that case only at the expiry of a member-elected trustee's fixed term.

But my interest here is not as a member[11], but as a trustee with legal and moral duties, to see the law and the deed followed, to acknowledge and fix mistakes, to serve the best interests of members, and to be open and accountable. Injustice does not become justice (even if the adversely affected may no longer have remedies at law) simply by the passage of time.

[11] And since I only joined the scheme in early 1983 the adverse effect on my interests in the Fund as at the time of the 1988 rule changes was pretty limited.