EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Reserve Bank Act 1959

Reserve Bank Regulation 2016

Section 89 of the *Reserve Bank Act 1959* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Paragraph 79A(4)(c) of the Act allows Reserve Bank (Bank) employees to disclose protected information or produce a protected document to any other person or body (including a foreign person or body) prescribed by the regulations, if they are satisfied that disclosure of the information, or the production of the document, will assist that other person or body to perform its functions or exercise its powers.

Amendments made in the *Reserve Bank Regulation 2016* (the Regulation) will assist the Bank in performing its functions by allowing it to disclose protected information and documents to a small number of important domestic and international bodies and agencies. The Regulation also remakes the existing *Reserve Bank Regulations* (the existing Regulations), which would otherwise 'sunset' on 1 April 2017.

Information sharing arrangements

The Bank is regularly faced with the need to share protected information with other official bodies in the execution of its functions and duties. The Act has secrecy provisions setting out the rules it must follow in doing so and defining the entities with which it is allowed to share such information.

Information is 'protected' for the purpose of section 79A of the Act if it:

a. is collected for the purpose of, or in performance or exercise of, the Bank's functions or powers under Part 7.3 of the *Corporations Act 2001* (licensing and regulation of clearing and settlement facilities);
b. is collected for the purpose of, or in performance or exercise of, the Bank's functions or powers under Part 7.5A of the *Corporations Act 2001* (licensing and regulation of derivative trade repositories); or
c. is obtained under or for the purpose of the Act, the *Banking Act 1959*, the *Payment Systems and Netting Act 1998* or the *Payment Systems (Regulation) Act 1998* **AND** relates to the affairs of:
    i. a financial institution;
    ii. a related body corporate of a financial institution; or
    iii. a person who is or has been a customer of a financial institution.

While the definition also refers to the repealed *Banks (Shareholdings) Act 1972,* in practice that legislation is not relevant. A 'protected document' is one containing protected information.

Existing provisions allow the Bank to share protected information and protected documents with 'financial sector supervisory agencies' and 'foreign central banks' where the Bank is satisfied that disclosure of the information, or the production of the

document, will assist that other agency or bank to perform its functions or exercise its powers. This covers many of the situations in which the Bank receives requests for, or needs to share, protected information and protected documents. However, there are a small number of important counterparties domestically and overseas which do not fall within those definitions (for example Australian Treasury). For those counterparties with which the Bank works on a regular basis, it is considered appropriate to use the regulation-making power provided by paragraph 79A(4)(c) of the Act to permit the exchange of protected information and protected documents. Where the need to exchange such information and documents arises on an exceptional basis, the Act provides other ways for authorising disclosure, for example by way of a special approval issued by the Bank's Governor or the Governor's delegate under subsection 79A(5) of the Act. This distinction was set out in the Explanatory Memorandum to the Corporations and Financial Sector Legislation Amendment Bill 2013, which introduced the provision permitting disclosure of protected information and protected documents by the Bank to persons or bodies prescribed by regulation, as follows:

"Subsection 79A(4) is expanded to include a power to prescribe other persons or bodies by regulation to whom the RBA may disclose protected information. This power would be used for entities with which the RBA exchanges information on an ongoing basis such as the Australian Treasury, New Zealand Treasury, the IMF and the FSB. It is considered that this is a preferable and more transparent approach to addressing the need for ongoing disclosure than using the general approval power provided to the Governor and specified delegates."

Collaboration in domestic and international bodies and with other regulators has become an important part of the work of all financial regulators, including the Bank. Experience in the Global Financial Crisis (GFC) and since has shown that supervision of the financial system has to be coordinated nationally and internationally in order to be effective. Sharing of information for regulatory purposes, including for purposes of crisis prevention and management, has therefore become an important precondition underlying much of the Bank's work.

A further, related reason for the increasing need to share information is the fact that many regulated entities in the financial sector have significant cross-border and cross-sectoral activities. In such circumstances effective supervision requires that information is shared among the various regulators overseeing a given entity. Requirements for joint supervision and sharing of information are now best practice and are standard principles underlying regulatory frameworks in the financial sector.

Limiting the Bank's ability to share information would have unfavourable consequences in a number of areas. It would restrict the Bank's ability to collaborate with its domestic and international counterparties in the course of its work as a supervisory agency and as a participant in policy discussions within important international organisations. This could consequently lead to sub-optimal policy advice to government. It would also impede the sharing of information in the event of a financial system crisis, which would not be conducive to the preservation of financial system stability in Australia. On the international side, the Bank's inability to take part in a range of discussions and groups could affect its influence and reputation as a willing participant in the international effort to coordinate the effective regulation of the global financial system. It may also prevent the Bank from fully arguing Australia's case when international financial policy settings are discussed and agreed.

It is therefore considered appropriate to ensure that the Bank is able to share protected information with those important counterparties with whom it collaborates on an ongoing basis but that do not fall within the definitions of 'financial sector supervisory agencies' and 'foreign central banks'. The Regulation specifies that the Bank is able to share protected information and protected documents with seven prescribed entities, including three domestic entities (Australian Treasury, the Australian Bureau of Statistics and the Australian Competition and Consumer Commission) as well as four overseas bodies (New Zealand Treasury, the International Monetary Fund, the Bank for International Settlements and the Financial Stability Board). Details concerning the relations of the Bank with each of these entities are set out in the Attachment.

It is noted that the information collected by the Bank is generally institutional in nature, given the Bank's focus on financial system stability and security. It is extremely unlikely that the Bank will use its proposed powers to disclose personal information to the prescribed entities.

Sunsetting

The *Legislation Act 2003* (LA) provides that all legislative instruments, other than exempt instruments, progressively 'sunset' according to the timetable set out in the LA. Agencies are required to review legislative instruments that are due to sunset and decide on an appropriate course of action, depending on a range of factors including the instrument's functions, its fitness for purpose and the quality of its drafting. Generally speaking options include allowing the instrument to sunset, remaking it without amendments and remaking it with amendments.

A sunsetting review of the existing Regulations was conducted and it was found that they continue to be required, as they prescribe matters that are required by the primary legislation as well as, following the latest amendments made in the Regulation, matters that are important for the proper functioning of the Bank. The Regulation concludes the sunsetting review by replacing the existing Regulations with the *Reserve Bank Regulation 2016*.

The Regulation repeals the current *Reserve Bank Regulations*. A provision prescribing forms to be used by persons joining the Reserve Bank Board or the Payments System Board to make a declaration of secrecy as required by the Act is retained, with minor drafting amendments. A redundant provision in the existing Regulations regarding the Bank's operating hours is omitted. Following making of the Regulation the existing *Reserve Bank Regulations* have been replaced and superseded by the *Reserve Bank Regulation 2016*.

Details of the proposed amendments are set out in the Attachment.

Consultation

Targeted consultation was conducted on the Regulation by providing it in draft form to the peak bodies representing the banking industry. All of these entities supported the Regulation in the form proposed and did not suggest any changes. The Regulation is accordingly unchanged from the draft provided to stakeholders.

The Office of Best Practice Regulation (OBPR) has confirmed that no Regulatory Impact Statement is required for remaking the *Reserve Bank Regulations* as part of a sunsetting review (OBPR ID 20114) or for prescribing the seven entities with which the Bank will be able to share protected information (OBPR ID 19920), because

neither of these two measures imposes any regulatory costs on businesses, community organisations or individuals.

The Regulation commences on the day after it is registered.

ATTACHMENT

Details of the *Reserve Bank Regulation 2016*

Part 1 - Preliminary

Section 1 – Name

This section provides that the title of the Regulation is the *Reserve Bank Regulation 2016* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Reserve Bank Act 1959* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 - Definitions

This section provides that in the Regulation the term ***Act*** refers to the *Reserve Bank Act 1959*.

Part 2 - Secrecy

Section 6 – Declarations of secrecy

This section provides that the prescribed form to be used for a declaration of secrecy by a member of the Reserve Bank Board, as required by subsection 16(1) of the Act, is the form set out in Schedule 1. Also, the form to be used for the same purpose by a member of the Payments System Board is the form in Schedule 2.

Section 7 – Prescribed bodies – disclosure of protected information or documents

This section prescribes the seven entities with which the Bank can share protected information and documents. The Bank's relationship with each of these entities is summarised below, including the reasons for the need to share protected information and documents with each.

- Australian Treasury: It is noted that the expression 'Department' is to be interpreted according to subparagraph 19A(3)(d)(ii) of the *Acts Interpretation Act 1901*, which states that it designates the Department that is administered by the Minister administering the provision, i.e. the Australian Treasury. Bank and Australian Treasury staff meet regularly to discuss policy issues and possible responses. For example, both entities are members of the Council of Financial Regulators (CFR), which is the coordinating body for Australia's main financial regulatory agencies. Among other things, CFR members 'share information, discuss regulatory issues … and advise Government on the adequacy of

Australia's financial regulatory arrangements'.[1] Prescribing Australian Treasury will allow information to be exchanged that will be helpful in analysing policy issues and related responses. Furthermore, the CFR Memorandum of Understanding on Financial Distress Management sets out expectations that members will share information giving rise to concerns about the stability of a financial institution or market. The ability to share protected information with Australian Treasury will greatly assist with policy analysis and formulation, and will be critical in the event of a crisis in the financial sector.

- Australian Bureau of Statistics (ABS): The Bank regularly communicates with the ABS on data collection issues, including with respect to specific financial sector entities. Sharing of protected information is essential for the Bank to collaborate with the ABS in a meaningful manner. The Governor has accordingly approved the disclosure of protected information to the ABS, but given the regular basis on which the need to share such information occurs it is considered more appropriate and transparent for the ABS to be prescribed in regulations, as explained above.

- Australian Competition and Consumer Commission (ACCC): The Bank and the ACCC share responsibility for competition and access in payment systems. The Bank holds a substantial amount of information relating to payment systems, including payments data collected from financial institutions. The ability to disclose such information to the ACCC will be very helpful for the discussion of current issues and possible policy responses.

- Bank for International Settlements (BIS): The BIS is the international organisation representing the world's central banks (the Bank is a member of the BIS). Its mission is to serve central banks in their pursuit of monetary and financial stability, to foster international cooperation in those areas and to act as a bank for central banks. The BIS is a central player in the formulation of the international regulatory framework applying to the financial sector, especially with respect to banks and other critical financial institutions such as systemically important payment systems, securities settlement facilities and central counterparties. The Bank's inability to share protected information with the BIS could constrain its ability to fully participate in its work. This may limit the influence the Bank is able to exert with regard to the matters debated and decided within the BIS, and may prevent the Bank from fully arguing and supporting positions that are important for Australia.

  – Much of the day-to-day work of the BIS is done through a number of important committees. In order to clarify beyond doubt that the Bank is allowed to disclose protected information in the course of its work in these committees, including in any working or other groups formed under the committees, they are separately prescribed as follows: The Basel Committee on Banking Supervision; the Committee on the Global Financial System; the Committee on Payments and Market Infrastructures; and the Markets Committee.

[1] See CFR website at www.cfr.gov.au

- Financial Stability Board (FSB): The FSB is the international organisation endorsed by the Group of Twenty (G20) to assume the key role in promoting the reform of international financial regulation in the wake of the GFC. Australia is represented by the Bank and Australian Treasury. The FSB was originally tasked by G20 leaders to develop reforms in four key areas: building resilience of financial institutions; ending the problem of banks that are too-big-to-fail; transforming shadow banking into transparent and resilient market-based financing; and making derivatives markets safer. Work in these areas continues, but the FSB has also expanded its scope to cover a number of related topics. FSB projects generally culminate in the promulgation of international standards which directly impact on the regulation of the financial sector and its constituent institutions in Australia. As in the case of the BIS, prescribing the FSB will allow the Bank to fully participate in its work and enable it to better represent Australian interests and positions in developing the reforms promoted by the FSB.

  – As in the case of the BIS, most of the FSB's day-to-day work is done through a number of committees, working groups and consultative groups. As these may be subject to change, depending on the particular focus of the FSB's work, any such committees or groups operating under the FSB's charter are prescribed in addition to the FSB itself.

- International Monetary Fund (IMF): The Bank regularly meets with IMF staff as part of the annual Article IV consultations during which an IMF team of economists visits Australia to assess economic and financial developments and discuss the country's economic and financial policies with government and central bank officials. The IMF's monitoring work is intended to identify weaknesses that are causing or could lead to financial or economic instability. The IMF also conducts Financial System Stability Assessments of the Australian banking and financial system on a regular basis, as well as ad hoc surveys on various topics. The IMF reports setting out its assessments, conclusions and recommendations are public documents, and are very influential in forming global public opinion on the state of the Australian economy, the stability of the financial system and the quality and adequacy of the financial regulatory architecture. It is in the national interest to ensure that the IMF is given all the information it requires to make a full and balanced assessment of these matters. Prescribing the IMF will allow the Bank to more fully respond to its requests for information, which will assist the IMF in better understanding the Australian economy, financial system and related regulatory architecture, and contribute to more accurate assessments and recommendations in its reports.

- New Zealand Treasury: Entities owned by Australian banks dominate the New Zealand banking market, and in turn represent significant exposures for Australia's major banks. Bank staff therefore regularly meet with New Zealand Treasury staff, as both entities are members of the Trans-Tasman Council on Banking Supervision, to discuss matters of concern and policy issues in the Australian and New Zealand financial and banking markets. Both entities are parties to the Memorandum of Cooperation on Trans-Tasman Bank Distress Management. As with Australian Treasury, the ability to share protected

information with New Zealand Treasury will greatly assist with policy analysis and formulation, and will be critical in the event of a crisis in the financial sector in Australia or New Zealand.

Schedule 1 – Form for declaration of secrecy by Reserve Bank Board member

Schedule 1 prescribes the form to be used by a member of the Reserve Bank Board to make the declaration of secrecy referred to in subsection 6(1) of this Regulation. The form itself is the same as that set out in the existing *Reserve Bank Regulations*. Minor drafting amendments are made to the title of the provision.

Schedule 2 – Form for declaration of secrecy by Payments System Board member

Schedule 2 prescribes the form to be used by a member of the Payments System Board to make the declaration of secrecy referred to in subsection 6(2) of this Regulation. The form itself is the same as that set out in the existing *Reserve Bank Regulations*. Minor drafting amendments are made to the title of the provision.

Schedule 3 - Repeals

Item 1 of Schedule 3 repeals the whole of the existing *Reserve Bank Regulations*, which are replaced and superseded by the Regulation. It is noted that the Regulation does not replicate Regulation 7 'Office hours' of the existing Regulations, which states that branches and agencies of the Reserve Bank shall be open for business during such hours and on such days as determined by the Reserve Bank. This regulation is not replicated because it is unnecessary.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Reserve Bank Regulation 2016

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Amendments made through the *Reserve Bank Regulation 2016* (the Regulation) will assist the Bank in performing its functions by allowing it to disclose protected information and documents to a small number of important domestic and international bodies and agencies. The Regulation also remakes the existing *Reserve Bank Regulations* (the existing Regulations), which would otherwise 'sunset' on 1 April 2017.

Human rights implications

The power for the Bank to disclose protected information may interfere with the right to privacy, if it involves the disclosure of personal information.

The Bank collects limited 'protected information' and 'protected documents' which is or which contain 'personal information' as defined in section 6 of the *Privacy Act 1988*. The main source of such information is the 'large exposure' data for financial institutions which the Bank receives from the Australian Prudential Regulation Authority (APRA). There are instances each quarter in which smaller deposit taking institutions report large exposures to natural persons.

The entities that are prescribed in the Regulation are concerned with the stability and/or security of the financial system, or with financial sector data or competition in and efficiency of payment systems. The information that the Bank may need to share with these entities for the purposes of assessment of financial stability, crisis prevention, crisis management, co-operative oversight and effective collaboration and development of policy responses is aggregated information about the system as a whole or segments of the system, or information about specific institutions. The nature of the respective mandates of the Bank and the prescribed bodies, and the purposes for which information sharing with them would occur, means that the sharing of information about natural persons is extremely unlikely. The Bank does not contemplate that any personal information will need to be, or will be, shared with the bodies prescribed in the Regulation.

Section 79A(4), for which section 7 of the Regulation is made, has been drafted narrowly enough to ensure that protected information is not disclosed unless the Reserve Bank is satisfied that disclosure is necessary for a prescribed body to perform its functions or exercise its powers. That qualifier means that the disclosure of personal information is in practice extremely unlikely to occur and, if it did occur, it would be justified by legitimate reasons and only to the extent required by those reasons, and the recipient would be a reputable domestic or global organisation using the information for the exercise of its functions or powers.

Conclusion

This Legislative Instrument is compatible with human rights as the Bank does not contemplate that any personal information will need to be, or will be, shared with the bodies prescribed in the Regulation and, even if it were, it would be limited information disclosed in circumstances that would be justified by legitimate reasons and only to the extent required by those reasons.