

CHALLENGE BANK LIMITED (TRANSFER OF UNDERTAKING) BILL 1996

EXPLANATORY NOTE

Introductory Note

In December 1995, Westpac Banking Corporation (Westpac) acquired 100% of the issued share capital of Challenge Bank Limited (Challenge). Challenge therefore is required under Reserve Bank regulations to surrender its banking licence. It is thus necessary to transfer Challenge's undertakings to Westpac.

Westpac has requested assistance from the States and Territories to pass complementary legislation to facilitate the transfer of specific assets and liabilities within each jurisdiction.

Further, since Commonwealth legislation is not being passed, inconsistencies between this Bill and various Commonwealth Acts such as the *Privacy Act*, *Cheques Act* etc may arise. The Act is to be gazetted for the purposes of Section 38A of the *Banking Act 1959* in order to remove any possible inconsistencies between this Bill and such existing Commonwealth legislation. It is envisaged that gazettal will take place after passing and before commencement of the Bill.

The aim of these notes is to explain the operation of the legislation.

Policy objectives of the Bill and the reasons for those objectives

To provide for the transfer of the undertaking of Challenge to Westpac by:

- providing for the transfer of assets and liabilities in Queensland from Challenge to Westpac, without the usual written documents;
- providing for certain exemptions from Queensland taxes (including stamp duty and debits tax) and charges, conditional upon agreement to, and payment of, a lump sum in lieu of such taxes and charges, the amount of which will be determined by the Governor in Council, on the advice of the Treasurer; and

- requiring the Queensland Registrar of Titles and other relevant authorities to register certain transactions on application by Westpac.

In addition, the legislation creates certain safeguards for third parties who are affected by the merger. This is desirable in ensuring no person suffers loss or damage as a result of the merger.

The way these policy objectives will be achieved by the Bill and why this way of achieving the policy objectives is reasonable and appropriate

The primary objective is achieved by vesting the undertaking of Challenge in Westpac, effectively transferring the assets and liabilities, and by allowing exemption for stamp duty and other charges, conditional upon the payment of a lump sum in lieu of such charges. A legislative approach such as this overcomes the need to identify, transfer ownership and pay duty on the conveyance of individual assets and liabilities.

Protection for third parties is achieved by removing the obligation of third parties to enquire as to the title of assets and liabilities, continuing customer relationships with Westpac, continuing legal proceedings by or against Westpac and providing for transitional administrative arrangements. Legislating in these areas establishes clear guidelines as to the rights and obligations of the merged entity.

Alternative way of achieving the policy objective

The alternative method to transfer the banking business of Challenge to Westpac is to identify and transfer individual assets and liabilities by conveyance, and for Westpac to pay stamp duty on each individual transfer. Accordingly, assistance would not be provided to the merging banks and the benefit of protection for third parties would be forgone.

Administrative costs for Government implementation of this Bill

The administrative costs arising from this Bill are insignificant and are able to be met from current appropriations.

Consistency with fundamental legislative principles

Care has been taken in drafting this Bill to ensure that no aspects of the Bill infringe upon fundamental legislative principles.

Consultation

Consultation has taken place with Treasury Department (Office of State Revenue), Justice Department (Office of Consumer Affairs), Department of Natural Resources (Titles Office) and Premiers Department (Office of Parliamentary Counsel). Westpac also has been consulted extensively during formulation of the Bill.

Preamble provides a background to the Act as an aid to interpretation.

PART 1—PRELIMINARY

Clause 1 specifies the short title.

Clause 2 provides for the commencement of the Act at 12.00 noon on a date to be fixed by proclamation.

Clause 3 defines words and expressions used in the Act.

Clause 4 provides that the Act binds the Crown.

**PART 2—VESTING OF UNDERTAKING OF
CHALLENGE IN WESTPAC*****Division 1—Vesting and its general effect***

Clause 5 provides for the undertaking of Challenge to be transferred to, and vested in, Westpac at the time of commencement of this Act.

Clause 6 provides that all contracts binding on and enforceable by or against Challenge before commencement time are transferred to Westpac immediately after commencement time and are then binding on and

enforceable by or against Westpac. The clause does not apply to contracts relating to excluded assets, nor does a director, secretary or auditor of Challenge become a director, secretary or auditor of Westpac by virtue of the clause.

Division 2—Other consequential effect of vesting

Clause 7 provides that Division 2 is subject to Division 1, that is the more specific provisions of Division 2 do not limit the provisions of Division 1.

Clause 8 provides that the relationship between Challenge and each of its customers becomes a relationship between Westpac and those customers.

Clause 9 provides that each authority, instruction, mandate or order given to Challenge by a customer of Challenge by or after commencement time is taken to have been given to Westpac.

Clause 10 provides for the transfer of securities of Challenge held immediately before commencement time to Westpac.

Clause 11 provides for the transfer of rights, liabilities and priorities in relation to a security of Challenge to Westpac.

Clause 12 provides for the transfer of custody of documents, goods or things held by Challenge as bailee to Westpac at commencement time.

Clause 13 provides that negotiable instruments or orders applicable to Challenge become applicable to Westpac after the commencement time.

Clause 14 provides for information held by Challenge relating to a customer to be available for, and used by, Westpac.

Clause 15 provides that Westpac continues to have rights in relation to security held by Westpac over money on deposit with Challenge. It also provides that Westpac will assume Challenge's rights where Challenge has security over money on deposit with Westpac.

Division 3—Transitional period

Clause 16 requires the Minister to decide the end of the transition period, advise the day by gazette notice and provide a copy of the notice to Westpac. It is envisaged that the transition period will not exceed three months and will conclude when procedural matters relating to the transfer are completed, such time being determined by the Treasurer, having regard to the advice of the Chief Executive Officer of Westpac.

Clause 17 provides that Westpac may carry on business under the business name “Challenge Bank Limited” during the transition period.

PART 3—GENERAL

Clause 18 provides for the exemption of State taxes and charges payable in relation to the transfer of assets and liabilities from Challenge to Westpac, subject to the payment by Westpac to the Treasurer of an amount in lieu of all such State taxes and charges. No person is to have an obligation to lodge a statement or return relating to these matters. Payment of the sum is to be notified by gazette notice.

Clause 19 requires any person or authority who has statutory responsibility for registering or recording transactions affecting assets or liabilities, on application by Westpac, to make any amendments to the register in respect of an asset or liability. This is so whether or not Westpac has been registered as the proprietor of the asset or liability. The registering authority is not required to enquire whether the asset or liability is transferred under the Act.

Clause 20 removes from any person dealing with Westpac or Challenge any obligation to enquire into whether any property the subject of the dealing is an excluded asset. Further, Westpac is taken, in favour of the person, to have full power and authority to enter into that dealing as if the excluded asset had vested in Westpac under the Act. The consequence of that dealing will be that the transaction is legally effective. However, the clause does not affect the liability of Westpac to Challenge in relation to an excluded asset. Nor does the clause validate a transaction if the party dealing

with Westpac or Challenge has actual or constructive notice that the property is an excluded asset.

Clause 21 provides that service of a document on Westpac is a service on Challenge and vice versa, until such time as Challenge ceases to be a related body corporate of Westpac under section 9 of the Corporations Law.

Clause 22 provides for any action by, against or in favour of Challenge to be continued as if it were by, against or in favour of Westpac. It also allows the making and enforcement of any judgement, order or award against both Challenge and Westpac, which was previously against Westpac, at the request of the recipient. This clause does not apply to any action relating to an excluded asset.

Clause 23 provides that, where Westpac has erroneously been made a party to an action, arbitration or proceeding relating to an excluded asset, documents may be amended by substituting for the name of Westpac the name of Challenge. No order is to be made against any party so amending to pay to Westpac or Challenge any costs incurred as a result of the amendment and the action is to be continued as if Challenge had originally been made a party to it.

Clause 24 provides that nothing done or allowed under the Bill will constitute a breach of contract, an Act or any other law, or allow a party to terminate an agreement or release a surety or other obligee. Any advice or consent of any person necessary to carry out any action authorised by the Act also is taken to have been given.

Clause 25 provides that section 268(1) of the *Corporations Law* (Assignment and Variation of Charges) is to be taken to have been complied with if Westpac lodges with the Australian Securities Commission a certificate signed by the Queensland Treasurer stating that the undertaking of Challenge has become vested in Westpac. This provides Westpac with a simple method of meeting its obligations regarding registration of changes in interests in company assets.

Clause 26 provides that the Chief Executive Officer of Westpac can certify a matter in relation to the operation or effect of the Act.

Clause 27 provides that a book or document that would have been evidence about a matter for or against Challenge is admissible in evidence about the same matter for or against Westpac.

Clause 28 provides that for all courts, tribunals and proceedings, a certificate under this Act is evidence of the matters certified. A document purporting to be a certificate under this Act is to be taken to be a certificate and to have been properly given unless the contrary is established.

Clause 29 provides that except as expressly provided in, or as a necessary consequence of, this Act, nothing in this Act exempts Westpac from the provisions of any Act relating to companies carrying on the business of banking.

Clause 30 construes any reference to Challenge in any written law, document or register as, where the context permits, a reference to Westpac.

Clause 31 provides that section 20A of the *Acts Interpretation Act 1954* applies to this Act. This provides for the continuation of effectiveness of the Act after its expiry.

Clause 32 provides for the Act to expire in 20 years. This provides a reasonable period during which the Act remains on the statute books and is accessible by Westpac should a need arise wherein a defence needs to be mounted against such charges as for example, the effect of the Act having contravened a provision of another law.