

# **BANK OF NEW ZEALAND (TRANSFER OF UNDERTAKING) BILL 1997**

## **EXPLANATORY NOTE**

### **Introductory Note**

In November 1992, National Australia Bank Limited (“NAB”) acquired the Bank of New Zealand (“BNZ”), a New Zealand company. BNZ became a wholly owned subsidiary of NAB in February 1993. Part of BNZ’s business is a banking business in Australia, which operates with relative autonomy as a division of BNZ, under the name of BNZ Australia. BNZ has an authority as a licensed foreign bank under Division 1 of Part 11 of the *Banking Act 1959 (Cwlth)* to carry on banking business in Australia. As a result of the acquisition of BNZ by NAB, BNZ is required by the Reserve Bank of Australia to surrender its authority and, as such, it is necessary to transfer BNZ’s Australian undertaking to NAB.

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

### **Policy objectives of the Bill and the reasons for those objectives**

The primary policy objective of the Bill is to assist NAB and BNZ in the transfer of BNZ’s Australian undertaking to NAB by providing for the legislative transfer of BNZ’s Queensland assets and liabilities to NAB.

The main reasons in support of the policy objective include:

- the legislation will overcome the need for NAB and BNZ to identify and transfer numerous individual assets and liabilities;
- the legislation will facilitate continuity in customer relationships and staff entitlements;
- the legislation will provide protection for persons dealing with either bank in relation to the transferred assets and liabilities; and

- the legislation will establish clear guidelines in the above areas as to the rights and obligations of the acquiring entity.

A further reason in support of the Bill is that the assistance to be provided is similar to that provided for bank mergers and acquisitions in the past, as demonstrated recently by the *Challenge Bank (Transfer of Undertaking) Act 1996* and the *Bank Merger (Bank SA and Advance Bank) Act 1996*.

**The manner by which these policy objectives will be achieved by the Bill and why this method of achieving the policy objectives is reasonable and appropriate**

The primary policy objective is achieved by vesting the undertaking of BNZ in NAB, effectively transferring the relevant assets and liabilities, and by exempting the transfers from stamp duty, conditional upon the payment by NAB to the Consolidated Fund, of a lump sum in lieu of such stamp duty. The amount of the payment in lieu is to be determined by the Governor in Council.

This legislative approach is considered to be reasonable and appropriate because it achieves the transfer of BNZ's undertaking, but overcomes the burden of having to identify, transfer and pay transfer stamp duty on individual assets and liabilities. Also, the payment of the lump sum in lieu of individual stamp duty payments is considered reasonable as the amount is intended to equate the duty which would otherwise be payable and will be determined in consultation with the Office of State Revenue and NAB.

Continuity in customer relationships is achieved by deeming relationships between BNZ and each BNZ customer to be between NAB and the customer and by preserving the rights and duties under those relationships. Similarly, former BNZ employees are to be engaged by NAB.

Protection for third parties is achieved by removing the obligation of third parties to enquire as to the title of assets and liabilities.

**Alternative manner of achieving the policy objective**

It is considered that there is no practicable legislative alternative to achieve the policy objective of assisting NAB and BNZ in the transfer of the undertaking of BNZ in Australia.

The non-legislative alternative would be to identify and transfer individual assets and liabilities on an item by item basis, and for NAB to pay stamp duty on each individual transfer. Such a process would involve substantial administrative effort both for the parties and the relevant Government agencies. Additionally, the benefit of protection for third parties would be forgone. For these reasons the legislative alternative has been adopted.

### **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. The avoidance of the need to register and stamp individual transfers will avoid administrative costs which otherwise would be imposed on the relevant Government agencies.

### **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), the Ministerial Council for Corporations and the Queensland Office of Parliamentary Counsel. NAB also has been consulted extensively during formulation of the Bill. Consultation has revealed no objections to the Bill.

### **Purpose and Intended operation of each clause 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 sections 3 and 18 upon assent and the remainder of the Act on a day to be fixed by proclamation. If on that day, the gazette notice mentioned in section 18(4) has not been published, the remainder of the Act commences on the day the gazette notice is published.

*Clause 3* defines words and expressions used in the Act.

*Clause 4* provides that the Act binds the State and, as far as permitted, the Commonwealth and the other States.

*Clause 5* outlines the territorial application of the Act and provides that the Act does not apply to BNZ's undertaking outside Australia.

## **PART 2—VESTING OF BNZ'S UNDERTAKING IN NAB**

### *Division 1—Vesting*

*Clause 6* provides for the undertaking of BNZ to be transferred to, and vested in NAB.

*Clause 7* provides that all contracts binding on and enforceable by or against BNZ are, upon commencement, binding on and enforceable by or against NAB to the same extent. The clause does not apply to contracts relating to an excluded asset, the employment of a BNZ employee or certain benefit funds for BNZ employees. Also, the clause clarifies that a director, secretary or auditor of BNZ is not a director, secretary or auditor of NAB merely by virtue of the clause.

***Division 2—Consequential effects of vesting***

*Clause 8* provides that division 2 does not limit division 1. The clause also provides that this division applies only in so far as it relates to, or is referable to, transferred assets and transferred liabilities.

*Clause 9* provides that the relationship between BNZ and each of its customers becomes, upon commencement of the Act, a relationship between NAB and those customers.

*Clause 10* provides that each authority, instruction, mandate or order, given to BNZ by a BNZ customer and subsisting on, or given after, commencement of the Act is, until cancelled, taken to have been given to NAB.

*Clause 11* provides that securities held by BNZ immediately before commencement of the Act, as security for payment of debts or liabilities of a person, are transferred to NAB. However, the clause provides that the security is not security for any debts or liability of the person to NAB existing immediately before commencement. If the security extends to future liabilities, it is available to NAB as security for future liabilities of the person to NAB. The latter two provisions are subject to any agreement between NAB and the person.

*Clause 12* preserves the rights, liabilities and priorities of BNZ in relation to a transferred security and money secured by the security, for the benefit of NAB.

*Clause 13* provides for the custody of all documents, goods or things held by BNZ, immediately before commencement as bailee for a customer, to be transferred to NAB, together with BNZ's rights, duties and liabilities under any related contract of bailment.

*Clause 14* provides that negotiable instruments or orders for the payment of money drawn, given, accepted or endorsed by BNZ before, at or after commencement of the Act have the same effect after commencement as if drawn, given, accepted or endorsed by NAB.

*Clause 15* provides for information relating to a customer, held immediately before commencement of the Act by BNZ, to be available for, and used by, NAB on and after commencement.

*Clause 16* preserves NAB's rights, priorities and liabilities in relation to a security held by NAB, before commencement of the Act, over money on deposit with BNZ. It also provides that NAB will assume BNZ's rights, priorities and liabilities where BNZ held a security over money on deposit with NAB.

### ***Division 3—Employees***

*Clause 17* provides that persons employed by BNZ immediately before commencement are to be engaged in providing services to NAB. The provision is subject to any law or determination of an industrial authority under the *Workplace Relations Act 1997*.

## **PART 3—GENERAL**

*Clause 18* provides for the exemption from Queensland stamp duty payable in relation to the transfer of assets and liabilities from BNZ to NAB, subject to the payment by NAB to the Consolidated Fund of an amount in lieu of the duty. The amount is to be determined by the Governor in Council and is intended to approximate the duty which would otherwise be payable. 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 NAB and payment of the appropriate fee, to register or record the transfer of an asset or liability under the Act. Also, the registering authority may, without formal application, register the transfer. Where an asset or liability is registered in BNZ's name, the registering authority may register a dealing relating to the asset or liability without having to enquire whether the asset or liability is transferred under this Act.

For land vested in NAB under the Act, of which BNZ is taken to be the registered proprietor, NAB is to be taken to be the registered proprietor for the purposes of the *Land Title Act 1994*, subject to the same defects in title as any to which BNZ was subject.

*Clause 20* provides that section 268(1) of the *Corporations Law* (Notice of change of chargee) is to be taken to have been complied with if there is lodged with the Australian Securities Commission a certificate signed by the chief executive officer of NAB stating that the undertaking of BNZ has become vested in NAB. The certificate is of no effect unless it is accompanied by the fees that would be payable if the certificate were a notice under the *Corporations Law*, section 268(1)(a). This provides NAB with a simple method of meeting its obligations regarding notification of a change in chargee.

*Clause 21* provides that if any property, becomes under the Act the property of NAB and any person or authority has responsibility under an Act for keeping a register in respect of property of that kind, then a requirement of that Act relating to the transfer of property is taken to have been complied with if there is lodged with the relevant authority, a certificate signed by the chief executive officer of NAB stating that the undertaking of BNZ has vested in NAB.

*Clause 22* provides for any reference to BNZ in any Act, document or register applying to a transferred asset or transferred liability to be, if the context permits, a reference to NAB.

*Clause 23* the chief executive officer of NAB may certify a matter in relation to the operation of clause 20 or 21 by signed certificate.

*Clause 24* provides that for all courts, tribunals and proceedings a certificate under this Act is evidence of the matter 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 25* provides that any person dealing with NAB or BNZ is not obliged to enquire whether any property, the subject of a transaction, is an excluded asset. If NAB enters into a transaction with a person in relation to an excluded asset, it is to be taken, in favour of the person, that NAB has full power and authority to enter into that transaction as if the excluded asset had vested in NAB under the Act. However, the clause does not affect the liability of NAB to BNZ in relation to an excluded asset. Nor does the clause validate a transaction, if the party dealing with NAB or BNZ has actual or constructive notice that the property is an excluded asset.

*Clause 26* provides that service of a document on NAB is a service on BNZ and vice versa, until such time as BNZ ceases to be a related body corporate of NAB under section 9 of the *Corporations Law*.

*Clause 27* provides for any proceeding by, against or in favour of BNZ to be continued as if it were by, against or in favour of NAB. It also allows the making and enforcement of any judgement, order or award for the payment of an amount of money made against NAB to be made against both BNZ and NAB. This clause does not apply to any proceeding relating to an excluded asset, the employment of a BNZ employee or a provident, benefit, superannuation or retirement fund relating to BNZ employees.

*Clause 28* provides that, where NAB has erroneously been made a party to a proceeding relating to an excluded asset or a BNZ employee, documents may be amended by substituting the name of BNZ for the name of NAB. No order is to be made against any party so amending to pay to NAB or BNZ any costs incurred as a result of the amendment and the proceeding is to be continued as if BNZ had originally been made a party to it.

*Clause 29* provides that nothing done or allowed under the Act will constitute a civil or criminal wrong, a breach of contract, duty of confidence or an Act or 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 30* provides that a book or document that would have been evidence about a matter for or against BNZ is admissible in evidence about the same matter for or against NAB. This section applies only in so far as the book or document relates to a transferred asset or liability.

*Clause 31* provides that except to the extent that an exemption is directly contemplated by, or is a necessary consequence of the Act, nothing in the Act exempts NAB from the provisions of any Act relating to companies carrying on the business of banking.

*Clause 32* provides that section 20A of the *Acts Interpretation Act 1954* applies to this Act. This provides for the continuation of the effectiveness of the Act after its expiry.

*Clause 33* 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 NAB should a need arise.