REPORT OF THE

LEGISLATION COMMITTEE

IN RELATION TO THE

Bank Mergers Bills 1997

Presented by the Hon Bruce Donaldson (Chairman)

Report 40 June 1997

Members of the Committee

Hon Bruce Donaldson MLC (Chairman)
Hon Derrick Tomlinson MLC
Hon Bill Stretch MLC
Hon John Cowdell MLC
Hon Mark Nevill MLC

Staff of the Committee

Stuart Kay (Deputy Clerk (Committees))
Jason Agar (Committee Clerk)

Terms of Reference

A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice... A referral under [this paragraph] includes a recommittal.

The functions of the Committee are to consider and report on Bills referred under this order.

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Report of the Legislative Council Legislation Committee

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1 Reference and Procedure

1.1 The *Bank Mergers Bill 1997* (the *Mergers Bill*) and the *Bank Mergers (Taxing) Bill 1997* (the *Taxing Bill*) were referred to the Legislation Committee on 27 May 1997 on a motion by the Hon Helen Hodgson MLC. The House resolved that the Committee report the *Bills* to the House not later than Wednesday, 11 June 1997.

1.2 Because of the short time the Committee was given to report the *Bills*, the Committee did not advertise for public submissions. It did, however, invite Hon Helen Hodgson to present her case to the Committee, and the Minister for Finance, Hon Max Evans, to explain the *Bills* to the Committee.

2 Purpose of the *Bills*

2.1 The purpose of the *Bills* is to facilitate private commercial transactions, specifically mergers of 2 or more banks.

2.2 Regulation of banking business in Australia is a matter falling within the legislative competence of the Commonwealth of Australia rather than the individual States and Territories: s 51(xiii) Commonwealth Constitution. The Commonwealth has provided for the regulation of banking by the *Banking Act 1959 (Cth)*. Banks are required by the *Banking Act 1959*[1] to be corporations, and therefore are also subject to the *Corporations Law*.

2.3 However, a bank operating in Australia must also undertake business in at least one State or Territory. In such a case, the bank is subject to individual State laws regarding particular transactions entered into by the bank within that State. State laws may relate to, for example, the creation of documentation for the transfer and registration of transfer of property, and the payment of taxes or duties on transactions taking place within the State.

2.4 When 2 or more banks merge, there may be a large number of transactions in respect of which documentation must be created and taxes paid under provisions of State laws. This means that it may be necessary to create hundreds or thousands of documents, each of which must individually be assessed for the payment of taxes, in order to effect the

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[1] Section 7.

merger of 2 banks, which might otherwise be regarded as a single transaction requiring fewer documents and a single assessment of tax payable on the whole of the merger.

2.5 In the past in Western Australia, mergers of banks have been facilitated by individual bills. For example, in 1996 the *Westpac Banking Corporation (Challenge Bank) Act 1996* facilitated the transfer of the business of Challenge Bank to Westpac. Such legislation permits banks which are merging to complete the merger utilising fewer documents and incurring a single assessment of taxation. However, due to increasing demands on Parliamentary time and uncertainties in securing the passage of individual merger legislation, an alternative means of facilitating mergers has been sought.

2.6 If enacted, the *Bills* will obviate the need for special bills to be passed for each bank merger as and when it occurs. Instead, facilitation of mergers will be effected by means of regulations or adoption of a relevant law of another State or Territory. The advantages of utilising regulations rather than special legislation are that:

2.6.1 from the banks' perspective, the process of creating operative regulations is likely to be faster than that of enacting special legislation and therefore is more responsive to commercial demands; and

2.6.2 from the Parliament's perspective, time is saved in dealing with a matter that may not have a large effect, or any effect, on general public policy (the process becomes one of Parliamentary scrutiny of regulations rather than enactment of legislation[2]).

2.7 In summary, the main purpose of the *Bills* is to permit the Government to adopt a mechanism - the making of regulations or the adoption of a law of another State or Territory - to reduce the paperwork burden and increase the commercial efficiency and certainty of the transaction when 2 or more banks wish to merge.

3 Private Legislation

3.1 The Committee notes that bills such as those which facilitate mergers of specific banks would once have been considered to be private legislation[3]. Whereas public legislation is legislation directly concerned with matters of public policy, private legislation is for the benefit of a particular person or persons (including corporations). It has been said[4]:

> It is not immediately obvious in a society in which government activity touches almost every facet of life, why there is a distinction between public and private bills. To find its causes one must look back to a time when legislative

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[2] Scrutiny of regulations usually is less time-consuming than enactment. As an accountability process, it is arguable whether scrutiny of regulations is more or less effective than the process of enacting legislation.

[3] For more information on private legislation, see Boulton, CJ, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st Edn, 1989, Butterworths, London, pp 439, 789 *et seq*.

[4] McGee, D, *Parliamentary Practice in New Zealand*, Government Printer, Wellington, 1985, pp 225-6.

> intervention was looked upon as a much more exceptional occurrence than it is today. When Parliament had not passed so many general laws it was necessary for persons to come to Parliament as suitors seeking parliamentary assistance by means of a change in the law to benefit their own circumstances. That assistance was sought in the form of legislation affecting only the individual suitor and not affecting the general public, which a public Act does; it was private legislation...
>
> Private legislation fills in the gaps left by the general law, for the benefit of individuals. It is true that today there are fewer gaps to be filled in... It remains the case, however, that there are occasions when legislation for the benefit of an individual or a small number of persons is necessary, for there is no redress or remedy in any other way... Paradoxically, a demand for a private bill can arise to exempt an individual from the large volume of public legislation which may have failed to take account of individual circumstances.

3.2 It is clear that the *Bills*, had they been for the benefit of specified corporations (as in the case of the *Westpac Banking Corporation (Challenge Bank) Act 1996*) would have been what would in earlier times have been classified as private bills[5]. Indeed, the *Joint Standing Rules and Orders of the Houses of Parliament Relating to Private Bills*[6] specifically contemplate bills "to amalgamate with any other company"[7]. However, the *Bills* are intended to be of general application to bank mergers and are not directed at a merger of specific banks. Rather, the *Bills* provide that it is the function of regulations to facilitate the merger of specific banks.

3.3 The effect of legislation passed to facilitate a commercial transaction between 2 or more private individuals or corporations on the rights of third parties affected by the transaction was a concern expressed by some members of the House. The Committee notes that, although procedures[8] in respect of private bills have fallen into disuse and would require modification for use today, those procedures can help to ensure, among other things, that the rights of third parties, which may inadvertently be neglected when

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5 Other bills which may be considered to be private bills would include such things as bills establishing private schools or bills amalgamating churches.

6 Adopted by the Legislative Council and Legislative Assembly in February 1891 and last reprinted in 1968.

7 *Joint Standing Rules and Orders of the Houses of Parliament Relating to Private Bills*, SO 1.

8 Private legislation is subject to different parliamentary procedures than public legislation and, although they are in some respects out-dated, they still exist. For example, because private legislation is promoted by an individual or organisation, that individual or organisation may be required to advertise the intent to legislate and notify third parties who are affected. The promoter must then petition the House for the bill's introduction. After the first reading the bill is referred to a select committee which must require proof of the "allegations contained in the preamble" and may conduct an adversarial hearing in which the promoter and persons opposing the promoter may be represented by counsel. If a select committee reports in favour of a private bill, it then proceeds in the same manner as a public bill. Interestingly, the member having charge of the bill must give a guarantee to the Clerk of the House that he or she will be responsible for all expenses incurred in the printing and passing of the bill. Normally these would be paid by the promoter. Furthermore, fees are payable by both the promoters and opponents of private bills.

a private bill is promoted by the Government, are taken into account or at least accorded a hearing.

3.4 The Committee suggests that the Government give consideration to re-establishing use of private bills to give effect to commercial transactions for private individuals[9].

4 Concerns Expressed by Members

4.1 A number of members expressed concerns with various aspects of the *Bills*. In particular, some members expressed the following concerns:

4.2 *That neither cl 18 of the* Mergers Bill *nor cl 3(3) of the* Taxing Bill *express any parameters or guidelines in respect of the exercise of the Treasurer's discretion to determine the principles upon which, or amount of, taxes or charges to be paid under merger regulations instead of the taxes or charges that would be paid under the general law of the State.*

Concern about this aspect was expressed in the House by Hon Helen Hodgson on 27 May 1997.

4.3 *That under some circumstances disallowance procedures in respect of regulations to be made under the* Bills *might not come into operation until the transactions to effect a merger had been completed.*

Concern about this aspect was expressed in the House by Hon Mark Nevill, Hon Helen Hodgson and Hon Jim Scott on 27 May 1997.

5 Parameters of Treasurer's Discretion

5.1 Clause 3(3) of the *Taxing Bill* provides that "the Treasurer may require one or more of the banks concerned [in a merger] to pay to the Treasurer instead of any duties... [or] charges... **an amount that is, in the opinion of the Treasurer, proper in the circumstances**" [emphasis added].

5.2 Similarly, cl 18 of the *Mergers Bill* provides:

> An amount payable to the Treasurer under section 3(3) of the Taxing Act is to be determined by the Treasurer in accordance with **such principles as the Treasurer thinks appropriate** [emphasis added].

5.3 In statements to the House and evidence to the Committee, Hon Helen Hodgson expressed concern that the Treasurer's discretion in determining the amount payable by a bank was completely unfettered. Although it may currently be understood and accepted that the Treasurer, and the Under-Treasurer and the Commissioner of State Revenue (either or both of whom may be advising the Treasurer), would determine appropriate principles and utilise appropriate calculations, this may not necessarily be

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[9] The private bill procedures are also consistent with current Government policy in relation to "user pays" principles in respect of Government services and also with National Competition Policy in terms of review of legislation which affects competition.

the case in the future. It is a necessary accountability mechanism that some parameters be created to guide or constrain the Treasurer's discretion.

5.4 In discussions with the Committee, the Minister for Finance, Hon Max Evans, and officers of the Treasury Department and State Revenue Department indicated that they had no objection to constraining the Treasurer's discretion by requiring that the amount to be paid in respect of a merger under regulations instead of taxes and charges must be equivalent to the amount of taxes and charges that would be payable in the absence of special legislation or regulations. They stated that it was in any event contemplated that the principles that would guide the Treasurer in determining the amount of taxes and charges payable would be those embodied in the relevant current legislation[10]. Consequently, the Minister agreed to have an appropriate amendment to the *Bills* drafted.

5.5 The Committee considers that such an amendment is desirable. It would confirm that the purpose of the *Bills* is to facilitate the merger transaction by reducing the number of assessments of taxes and charges, but nevertheless ensures preservation of the State's revenue base. The Committee understands that the Minister for Finance has instructed Parliamentary Counsel to draft appropriate amendments and he will be moving them during the committee stage of the *Bills*.

Recommendation 1

The Committee recommends that the *Bills* be amended to constrain the Treasurer's discretion by requiring that the amount to be paid in respect of a merger under regulations instead of taxes and charges must be equivalent to the amount of taxes and charges that would be payable in the absence of special legislation or regulations. This may require, in respect of the *Taxing Bill*, that a message be sent to the Legislative Assembly requesting that it make the appropriate amendment to the *Taxing Bill*.

6 Scrutiny of Regulations

6.1 As has been noted, concerns were expressed about the ability of Parliament effectively to scrutinise regulations made under the *Bills*. In particular, a concern was expressed that it may be the case that regulations to facilitate a future merger may be made and the transactions giving effect to the merger may be completed before the Parliament has an opportunity to scrutinise the regulations made. This could happen, for instance, in the case of a long Parliamentary recess such as that which may occur as a result of a general election.

6.2 Following consideration of a number of options dealing with the concerns expressed, the Committee considers that the *Bills* should proceed subject to inclusion of a sunset clause which would terminate their operation within a fixed period. The general result

[10] In respect of this matter, an Assistant Under-Treasurer advised the Committee that the Treasurer would not issue the certificate the Treasurer is required to issue under cl 20 of the *Mergers Bill* except on advice from the Treasury Department and State Revenue Department. The advice would be provided to the Treasurer after negotiations between the State Revenue Department and the private parties concerned.

of this would be to require each relevant merger to be facilitated by special legislation - the current position. The reason for adopting this course is that it ensures Parliamentary scrutiny of any such merger scheme. The principal disadvantage is that it may not meet the commercial demands of banks for a fast response and certainty of outcome. However, that is presently the case and banks to date have nevertheless considered it a preferable, more efficient and perhaps more cost-effective process to seek special legislation than to have to comply with the general law of the State.

6.3 The reason that it wasn't decided simply to recommend that the *Bills* not be proceeded with is that, allowing them to proceed subject to inclusion of a sunset clause will permit facilitation of the imminent completion of the merger of the National Australia Bank and the Bank of New Zealand. In other words, it will be possible to facilitate that specific merger by means of regulations without the need to create a special enabling Act. However, this course prevents any further mergers from taking place under the *Bills* after 30 June 1997.

Recommendation 2

The Committee recommends that the *Mergers Bill* be amended as follows:

Clause 22

Page 12, lines 1 - 11 - to delete the clause and substitute the following -

"Expiry of powers under this Act

22 No regulation or order can be made under this Act after 30 June 1997. ".

7 Uniform Legislation

7.1 Hon Mark Nevill raised in the House the question of adoption of a law of another State or Territory for the purposes of facilitating a merger. The relevant provisions are contained in Part 3 (clauses 14 - 17) of the *Mergers Bill*.

7.2 The Committee notes that cl 15(5) of the *Mergers Bill* provides that an order adopting a law of another State or Territory is deemed to be a "regulation" for the purposes of s 42 of the *Interpretation Act 1984*. This means that it must be published in the *Gazette*, tabled in both Houses of Parliament and is subject to the normal disallowance procedures.

7.3 As the Committee has recommended that no regulations or orders may be made under the *Mergers Bill* after 30 June 1997, the Committee makes no further comment on these matters.

8 Clauses Not Commented Upon

8.1 The Committee makes no comment on the following clauses:

8.1.1 *Mergers Bill*: 1 - 5, 7 - 14, 16, 17, 19, 20. [Note: The Committee anticipates that the Minister for Finance will be moving amendments to cll 18 & 21.]

8.1.2 *Taxing Bill*: all clauses. [Note: The Committee anticipates that the Minister for Finance will be proposing an amendment to cl 3.]