

# Bank of Western Australia Amendment Bill 2012

## Explanatory Memorandum

### The Purpose of the Bill

When Bankwest was privatised in 1995, the *Bank of Western Australia Act 1995*, (the Act) entrenched certain requirements in the Bank's articles - specifically, provisions in section 23 that:

- require the Bank to be incorporated in Western Australia;
- require the Bank to carry on in Western Australia a banking business of essentially the same type as, and on a scale not significantly less than, the banking business conducted by the Bank immediately before the day of privatisation;
- require the head office of the Bank, that is the place where central control of the Bank is exercised, to be located in Western Australia;
- require that at least a majority of the board of directors of the Bank, and the managing director, while holding office be ordinarily resident in Western Australia; and
- prohibit the alteration of the mandatory articles by any means.

These provisions were a condition of privatisation of the Bank and were aimed at ensuring that the level of financial skills and expertise that are associated with the headquarters of a bank were retained in Western Australia.

The Commonwealth Bank of Australia (CBA) acquired Bankwest from its previous owner, HBOS, in October 2008.

Banks in Australia are regulated by the Australian Prudential Regulation Authority (APRA) and each bank (referred to technically as an Authorised Deposit-taking Institution or ADI) is required to hold an ADI Authority issued by APRA.

Currently, Bankwest operates under its own ADI Authority, separate from that under which the CBA operates, but APRA has advised that it has a long-standing policy that there be only one ADI authority within a conglomerate banking group. The objective of this is to maximise the protection for depositors by ensuring that all assets of the group are available to all depositors equally, and in priority to other creditors.

In line with this policy, APRA has advised that it requires the CBA and Bankwest to operate under a single ADI Authority. Complying with the APRA requirement will, amongst other things, require the assets and liabilities of Bankwest to be transferred from its existing corporate structure – the Bank of Western Australia Ltd - into the CBA.

However, the entrenched mandatory articles in the Act preclude such a transfer, and the APRA conditions for operating under a single ADI Authority cannot be met without amendment to the Act.

The *Bank of Western Australia Amendment Bill 2012* will amend the Act to facilitate the change required by APRA while retaining the substance of the benefits sought from the original 1995 provisions - that is maintaining Bankwest as a significant financial institution headquartered in Western Australia.

## **Part 1 - Preliminary**

This part specifies the name of the Act and provides for its commencement.

## **Part 2 – *Bank of Western Australia Act 1995* amended**

### **Clause 3**

Specifies that this Part amends the *Bank of Western Australia Act 1995*.

### **Clause 4**

Amends the long title.

### **Clause 5**

Replaces the definition of “Bank” in section 19 of the Act with a revised definition.

### **Clause 6**

Inserts in the Act a new section 26A, which provides for the expiry of Division 3 of Part 3 of the Act at the beginning of the transfer day. The provisions of that Division will be replaced by the new Part 5A inserted by clause 7 of the Bill.

### **Clause 7**

Inserts into the Act a new Part 5A – *provisions relating to transfer of BWA business and conduct of Bankwest business*. The provisions of Part 5A are outlined below:

### ***Division 1 - Preliminary***

#### ***Section 42A***

Defines the terms used in the Part.

### **Section 42B**

Provides for the transfer of the existing Bankwest business into the CBA under the Commonwealth *Financial Sector (Business Transfer and Group Restructure) Act 1999*.

### **Section 42C**

Provides that if there is, at any time, more than one owner of the Bankwest business, the provisions of Part 5A will apply to all owners, and be enforceable, jointly and severally.

## **Division 2 – Long term obligations**

This division imposes ongoing obligations regarding the Bankwest business following its transfer into the CBA.

### **Section 42D**

This section requires that the CBA must continue to carry on in Western Australia a banking business under the Bankwest name. Should the CBA sell the Bankwest business, this obligation will apply to any new owner or owners.

### **Section 42E**

This requires that the Bankwest owner (or owners collectively, in the event of a subsequent sale) to carry on a Bankwest business of a similar type, and of no less scale, as the business as at 30 June 2011. This compares with the requirement in section 23 of the Act, which it replaces, where the criterion was the type and scale of the business as at the date of privatisation in 1995. The type of business is similar at both dates, but the scale is substantially larger in 2011.

### **Section 42F**

Requires the head office of the Bankwest business to be maintained in Western Australia.

### **Section 42G**

Requires that the managing officer (currently the managing director), while holding office, must be ordinarily resident in Western Australia.

### **Section 42H**

This applies to the owner of Bankwest a provision equivalent to section 26 of the Act.

### **Section 42I**

Requires the Bankwest owner to keep in Western Australia sufficient records to allow it to provide information that the Minister may require for compliance monitoring under section 42O.

### ***Division 3 – Obligations relating to a 5 year period after transfer day***

This Division applies a set of obligations in addition to those included in Division 2 above. These obligations will apply for a period of five years from transfer day.

#### ***Section 42J***

This section (in association with the definitions in section 42A) requires the Bankwest owner to maintain at least 88 “point of presence” (branches, stores and business centres) in Western Australia, for five years after transfer day, unless the minister approves otherwise. A reduction below the threshold can only be approved if the Minister is satisfied it is consistent with market trends in the financial services industry.

#### ***Section 42K***

This section precludes the closure of points of presence in regional areas for five years after transfer day except for amalgamations or relocations within a local area. “Regional areas” is defined as all areas other than the metropolitan region and the Mandurah local government area.

#### ***Section 42L***

This provides that four specified senior positions must be maintained in the Bankwest head office for five years from transfer day. This is in addition to the provision regarding the managing officer in section 42G above.

#### ***Section 42M***

Requires that the Bankwest business continue expenditure on local sponsorship and community development activities at no less than current levels for five years after transfer day.

### ***Division 4 – Monitoring compliance***

#### ***Section 42N***

This section requires the Bankwest owner to provide the Minister with an annual certificate regarding its compliance with the obligations imposed by part 5A. The certificate must be given by the specified senior officers of Bankwest and the CBA and verified by statutory declaration.

#### ***Section 42O***

This provides the Minister with a discretionary power to require the Bankwest owner to provide information to allow the Minister to assess the Bankwest owner’s compliance with the provisions of Part 5A. Recognising that much of the information that may be required is likely to be commercially sensitive, confidentiality provisions are included.

## ***Division 5 – Enforcement of Divisions 2, 3, and 4***

### ***Section 42P***

This specifies that separate enforcement mechanisms will apply for:

- the ongoing obligations in Divisions 2 and 4; and
- the five-year obligations in Division 3.

### ***Section 42Q***

This section provides the enforcement provisions for the ongoing obligations in Divisions 2 and 4. The Minister is empowered to seek injunctions, including interlocutory injunctions, in the Supreme Court if the Minister believes there is a contravention of those obligations. That continues the enforcement mechanism in the current legislation.

### ***Section 42R***

This section provides the enforcement powers relating to the five-year obligations in Division 3 – that is, sections 42J to 42M above. For these provisions, enforcement is by a fixed monetary penalty of \$2 million per contravention.

A two-step process is specified:

- If the Minister believes on reasonable grounds that a contravention has occurred or is occurring, the first step is for the Minister to issue a contravention notice to the Bankwest owner, specifying the contravention or contraventions suspected to be occurring. The Bankwest owner then has 28 days to satisfy the Minister that a contravention is not occurring or has not occurred; and
- If the Bankwest owner cannot satisfy the Minister in this regard, the second step is the issue by the Minister of a penalty notice requiring the Bankwest owner to pay to the Minister a fixed penalty of \$2 million for each such contravention.

Provision is also made for enforcement of any such penalties through the Supreme Court, and for penalty amounts received to be paid into the Consolidated Account.

## ***Division 6 – Other provisions***

### ***Section 42S***

This section requires a notice of the transfer day to be published in the Government Gazette, and also provides that a failure to publish such a notice does not invalidate the other provisions of Part 5A.

### ***Section 42T***

This is a machinery provision that ensures that the operation of Divisions 2 and 3 is not compromised by potential conflicts with Commonwealth corporations legislation.

## ***Part 3 – Freedom of Information Act 1992 amended***

### **Clause 8**

Identifies that Part 3 amends the *Freedom of Information Act 1992* (FOI Act).

### **Clause 9**

Replaces clause 4A of Schedule 1 of the FOI Act with an updated provision to protect confidential information provided to the Minister under section 42O.