

1990

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMMONWEALTH BANKS RESTRUCTURING BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Treasurer
The Hon Paul Keating, MP)

COMMONWEALTH BANKS RESTRUCTURING BILL 1990

GENERAL OUTLINE

The central provisions of the Bill will:

- . provide (with the support of complementary Victorian legislation) for the Commonwealth Bank's succession to all the rights, property, staff and liabilities of the State Bank of Victoria (SBV);
- . restructure the statutory entities in the Commonwealth Bank group, and convert the Commonwealth Bank to a public company; and
- . establish special restrictions on foreign subscriptions to the Bank's first issue of shares to the public, on the holding of voting shares in it by other banking entities, on the size of individual interests in its voting shares, and on the proportion of voting shares and voting power to be held by persons other than the Commonwealth.

Many of the Bill's clauses are amendments to the Commonwealth Banks Act 1959, which is here referred to as the Principal Act.

SUCCESSION TO STATE BANK OF VICTORIA (SBV)

The set of provisions in part 5 of the Bill will operate at the time of completion of the contract between the Victorian Government and the Commonwealth Bank over the sale of SBV. The provisions will complement Victorian legislation which will authorise the transfer of all property, rights, liabilities and staff of SBV, dissolve SBV and make the Commonwealth Bank its successor in law. The Bill's provisions will vest all property and rights of SBV in the Commonwealth Bank, make all liabilities of SBV become liabilities of the Commonwealth Bank, transfer the staff of SBV to the Commonwealth Bank and make the Commonwealth Bank the successor in law of SBV. Further provisions will deal with other elements, including income tax aspects of the succession process.

CONVERSION OF COMMONWEALTH BANK INTO PUBLIC COMPANY

This will put the Commonwealth Bank in the appropriate legal form for the issue of shares to persons other than the Commonwealth.

Preliminary Steps

The Commonwealth Development Bank will be made a statutory company with share capital, and all its shares issued to the Commonwealth Bank. It will thereby be given the same legal status as the Commonwealth Savings Bank has at present.

A share capital will be created for the Commonwealth Bank. Its existing capital (as defined by the Principal Act) will be used to pay up them up and the shares will be issued to the Commonwealth.

Public Company

The Commonwealth Bank will be deemed to be registered as a public company under the Companies Act 1981, with consequential provisions including to establish its memorandum and articles of association. Provisions in the Principal Act which will thereafter be redundant or inappropriate will be repealed, leaving in place:

- . section 9, stating the functions (or "charter") of the Commonwealth Bank;
- . section 11, containing power for the Government to overrule the Board in a matter of policy, which can include the Commonwealth Bank's corporate plan;
- . a power for the Treasurer directly to appoint the Secretary to the Treasury as a member of the Board;
- . a power for the Treasurer to intervene in recommending the Bank's dividend; and
- . section 117, through which the Commonwealth guarantees all the liabilities of the Commonwealth Bank to persons other than the Commonwealth.

Restrictions on Subscribing to or Holding of Shares

It will not be open to any foreign persons to subscribe to shares in the Commonwealth Bank in the first public issue of shares. The term "foreign person" will be defined as in the Foreign Acquisitions and Takeovers Act 1975, so that (in brief terms) it will mean natural persons not ordinarily resident in Australia or companies controlled by non-residents.

The proportion of voting shares to be held in aggregate by persons other than the Commonwealth will be limited to 30 per cent through an amendment to the Principal Act. In addition the Commonwealth will be prohibited from selling any of its shares in the Bank.

Through amendments to the Banks (Shareholdings) Act 1972, interests in voting shares in the Commonwealth Bank will be limited in the following ways:

- (i) domestic and foreign banks will not be permitted to have any interest, directly or through associate relationships, unless exempted as in (ii);
- (ii) an exemption will permit the holding of voting shares by entities within banking groups which are managers or trustees on behalf of other beneficial owners;
- (iii) no person (apart from the Commonwealth) is to have an interest exceeding five per cent of voting shares; and
- (iv) it will not be available to the Governor-General or the Treasurer to set higher limits for specified persons, as the Banks (Shareholdings) Act allows in respect of other banks.

General Functions

The Commonwealth Bank is to continue to be authorised by the Principal Act (and not by the Banking Act) to carry on general banking business. That aside, after the operation of the Bill its objects and powers will be conferred through its memorandum of association under company law.

Dividend

A provision will be retained in the Principal Act, essentially similar to the present section, giving the Treasurer the power, after the Board has recommended an annual dividend, either:

- . to accept the Board's recommendation, or
- . to determine a different amount of dividend, subject to the restriction that it be not more than 45 per cent of the consolidated profits of the Commonwealth Bank and all its subsidiaries.

The Treasurer will be required to try to reach agreement with the Board before a dividend is determined.

FINANCIAL IMPACT STATEMENT

Acquisition of State Bank of Victoria (SBV)

The Commonwealth Bank's acquisition of SBV follows a commercial judgement by the Board that this acquisition would be worthwhile, in the sense that the investment represented by the purchase price would earn an adequate return through time as SBV's business is developed and integrated with that of the Bank. The Government similarly believes that the acquisition is worthwhile in terms of its likely effect on the long-term return from its investment in the Commonwealth Bank.

Introduction of Non-Government Shareholders

This is being done in order to raise additional equity capital needed to finance the acquisition of SBV. The Government expects that the value of its own equity interest in the Commonwealth Bank will not be materially altered by the direct effects of this step, and will be improved by its long-term effects.

Compensation Payment to Victoria

The Victorian Government's acceptance of the Commonwealth Bank's offer for SBV related in part to a commitment by the Commonwealth Government that it would, on certain conditions ensuring neutrality of the overall effect on Commonwealth income tax revenue, make two compensation payments to the Victorian Government totalling \$413 million. The Bill will enable the Treasurer, when an agreement has been made with the Victorian Government comprehending those conditions and the manner of payment, to authorise a payment to Victoria. The Bill will also appropriate the necessary funds. The Victorian Government intends the payment to be used to redeem Commonwealth Government securities held on account of Victoria.

State Taxes and Charges

The Bill will remove the current exemption of the Commonwealth Bank from State taxes and charges. It is intended that the removal will take effect only after the integration of the Commonwealth Savings Bank into the Commonwealth Bank. The Government also intends that when the removal of the exemption takes effect, the consequent additions to State revenue will be offset by adjustments to the Commonwealth's financial assistance grants. The overall financial impact will therefore be small.

NOTES ON CLAUSES

Clause 1 - Short title

Self explanatory.

Clause 2 - Commencement

Apart from its formal clauses, the provisions of the Bill will commence on days or at times to be fixed by proclamation. This is so that they can be made to coincide with other events, in particular the settlement of the agreement for the succession of the Commonwealth Bank to SBV. It is envisaged that the order of major steps will be -

the transfer of staff from the Commonwealth Banking Corporation to the Commonwealth Bank;

- . the acquisition by the Commonwealth Bank of all the assets and liabilities of SBV, the transfer of staff, and a tax compensation payment to Victoria;
- . creation of share capital in the Commonwealth Development Bank and the issue of shares in it to the Commonwealth Bank;
- . preliminaries to the Commonwealth Bank conversion; and
- . conversion of the Commonwealth Bank into a company.

The reference in subsection 2(4) to a 'time' is to allow proclamations to state, for example, that a particular provision is to commence 'immediately after' another provision.

Clause 3 - Interpretation

Self explanatory.

Clause 4 - Extension to external Territories

Self explanatory.

Clause 5 - Crown to be bound

Self explanatory.

PART 2 - AMENDMENTS OF THE COMMONWEALTH BANKS ACT 1959

Clause 6 - Principal Act

Self explanatory.

Clause 7 - Title

Provides for the long title of the Commonwealth Banks Act 1959 (the principal Act) to become 'an Act relating to the constitution and operations of the Commonwealth banks'.

Clause 8 - Interpretation

Amends definitions in the principal Act to make them appropriate for the restructuring of the Commonwealth banks and for the conversion of the Commonwealth Bank into a company, as effected by the Bill's other provisions. Separate subsections enable groups of amendments to be made at the different stages to which they correspond.

Clause 9 - Heading to Part II

Self explanatory.

Clause 10 - The Commonwealth Banking Corporation

Alters the name and functions of the Commonwealth Banking Corporation while continuing its existence. The Corporation currently has two main functions - as an employer of the staff of the three Commonwealth banks and its subsidiaries, and as the body owning the property of the Officers Superannuation Fund and conducting the fund.

Subclause (a) amends the name in subsection 7(1) of the Principal Act. Subclause (b) redefines the Corporation's function as the single one of conducting a superannuation fund, complementing the provisions in Part 4 of this Bill.

Clause 11 - Relocation of sections 7 and 7A

Self explanatory.

Clause 12 - Repeal of section 8 and substitution of new sections

- . Proposed section 8 - Powers and functions of the Commonwealth Bank Board and Managing Director.

Essentially of an explanatory nature.

- . Proposed section 8A - Treasurer's nominee on Board.

Gives the Treasurer power to make the Secretary to the Treasury a member of the Board of the Commonwealth Bank, with the function of representing the views of the Treasurer in addition to those of a director deriving from the Companies Act 1981 and other relevant law. Proposed subsection 8A(3) permits the Secretary to delegate to another Treasury officer the functions conferred by this section and the proposed section 8B.

- . Proposed Section 8B - Confidentiality of information obtained by the Treasurer's nominee on the Board.

Permits 'protected information' - defined in proposed subsection 8B(6) - to be passed by the Treasurer's nominee to the Treasurer or other Commonwealth officers, or recorded, and to be passed or recorded by them in turn; but -

- . only in the course of the official duties of the Treasurer's nominee (as director or as Secretary) and of the others concerned, and
- . subject to a duty imposed by proposed subsection 8B(3) that they not divulge, communicate or record the protected information except as the section allows.

'Commonwealth officer' is defined in proposed subsection 8B(5) as having the meaning given by section 3 of the Crimes Act 1914 for the purposes of section 70 of that Act. One effect of this is that breaches by Commonwealth officers of the duty created by this section would represent offences under that Act.

Clause 13 - Functions of Board

Amends section 9 of the Principal Act to reflect -

- . the reduction in functions of the Corporation (see Clause 10 above),
- . the derivation of the Board's power to determine the policy of the Commonwealth Bank from the Companies Act 1981 after its conversion into a company; and
- . the existence, subject to the Principal Act, of duties on the part of the Board to shareholders and other persons under the Companies Act 1981 and other relevant law.

In other respects section 9, including the 'charter' in subsection 9(2), remains as before.

Clause 14 - Differences of opinion on questions of policy

Amends section 11 of the Principal Act by -

- . omitting references to the Corporation, which will be inappropriate upon its reduction in functions;
- . omitting stipulations about procedures over varying a corporate plan (subsections 11(2E), 11(2G) and 11(2H)) which may not be appropriate in circumstances where the Commonwealth Bank has shareholders other than the Commonwealth, although the omission of these subsections is not intended to preclude any of these procedures in the future; and
- . omitting other stipulations (in subsections 11(2D) and 11(2F)) which, while not inappropriate, are unnecessary;

while retaining the other provisions concerning a corporate plan and settlement of differences of opinion.

Clause 15 - Repeal of section 12

Repeals the section of the Principal Act providing for management of the Corporation, reflecting the fact that after conversion of the Commonwealth Bank into a company these powers will be provided under company law by its constitutive documents.

Clause 16 - Delegation by the Managing Director

Omits from section 12A of the Principal Act an inappropriate reference to the Corporation. The section as a whole remains, because the Managing Director continues to have powers and functions under the Principal Act in respect of the Commonwealth Development Bank and Commonwealth Savings Bank.

Clause 17 - Managing Director and Secretary to Treasury to establish liaison

Amends section 13 of the Principal Act which requires the Managing Director and the Secretary to the Treasury to establish a close liaison with each other, omitting a reference to the Corporation which is redundant.

Clause 18 - Repeal of Part III

Repeals sections of the Principal Act concerning the Board of the Corporation which will be redundant upon conversion of the Commonwealth Bank to a company, since these matters will generally be provided for by its articles of association and by company law.

Clause 19 - Insertion of heading

Self explanatory.

Clause 20 - Repeal of Division 1A of Part IV

Repeals the division containing section 27 of the Principal Act, which will become redundant when the Commonwealth Bank is converted to a company.

Clause 21 - Insertion of new Division

Division 1 - Preliminary Steps before Conversion of Commonwealth Bank into a Public Company.

- . Division 1 provides for transforming the Commonwealth Bank into an entity which can be converted into a public company. This ensures there is continuity of the corporate entity whilst the Commonwealth Bank conforms, as far as possible, with the registration requirements of the Companies Act 1981.

- . Proposed section 27A - share capital of the Commonwealth Bank

Provides for the Commonwealth Bank to have a share capital. The shares are to have a \$2 nominal value unless a different value is prescribed by regulation. Proposed subsection 27A(3) provides for different classes of shares. Proposed subsection 27A(4) provides for rights to be attached to particular classes of shares.

. Proposed section 27B - shares to be paid up and issued

Requires the Commonwealth Bank to apply the capital it has (as defined in section 30 of the Principal Act) in paying up in full shares in the Commonwealth Bank. The shares are to be issued to the Commonwealth as soon as practicable after the calculation of the capital of the Commonwealth Bank. Proposed subsection 27B(4) provides that the shares are to be taken to have been issued for valuable consideration other than cash. Proposed subsection 27B(5) ensures that the Commonwealth is not to be taken to be a member of the Commonwealth Bank prior to the registration of the Commonwealth Bank as a company.

. Proposed section 27C - Commonwealth Bank to apply to be registered as company etc

Requires the Commonwealth Bank to apply to the Securities Commission for registration as a company limited by shares and to provide supporting documentation, including a proposed memorandum and articles of association. Proposed subsection 27C(5) is to ensure that the name 'Commonwealth Bank of Australia' is reserved by the Securities Commission.

Clause 22 - Insertion of new Divisions and heading

. Proposed section 27D - Commonwealth Bank taken to be registered under Companies Act

Provides for the Commonwealth Bank to be converted into a public company limited by shares with the name 'Commonwealth Bank of Australia' by deeming the Securities Commission to have been required to grant the Commonwealth Bank's application for registration as a company under the Companies Act 1981.

. Proposed section 27E - Memorandum and articles of Commonwealth Bank

Provides for the proposed memorandum and articles of association of the Commonwealth Bank, lodged with the Securities Commission under proposed section 27C, to be the memorandum and articles of the Bank and to apply as if they had been registered under the Companies Act 1981.

. Proposed section 27F - Membership of the Commonwealth Bank

Deems the Commonwealth to be a member of the Commonwealth Bank at the time of conversion and puts the Commonwealth in the same position as if it had become a member under the memorandum and articles. This provision is necessary because for purposes of sections 85 ff of the Companies Act 1981 the Commonwealth Bank is being treated in a parallel manner to a foreign company converting to a company.

Proposed section 27G - Application of certain provisions of Companies Act

Provides that, where the Commonwealth is beneficial owner of all the shares in the Commonwealth Bank, certain provisions of the Companies Act 1981 shall not apply. The major effect of this section is that, while the Commonwealth is the sole shareholder of the Commonwealth Bank, the requirement that there must be at least five shareholders in a public company does not apply.

Proposed section 27H - Commonwealth Bank not a public authority etc

Provides that after conversion the Commonwealth Bank shall not be a Commonwealth authority or otherwise come under the shield of the Crown for the purposes of a law of the Commonwealth or State or Territory unless express provision is made to the contrary. This will mean that a number of Commonwealth Acts will cease to apply to the Commonwealth Bank, although others will still apply by their own force.

Proposed section 27J - Operation of section 25B of Acts Interpretation Act

Provides that nothing in this Act or the Companies Act 1981 affects, or is affected by, section 25B of the Acts Interpretation Act 1901 concerning the continued existence of a body, the name or constitution of which is altered by an Act of Parliament. This provision ensures the continuation of the Commonwealth Bank's rights and obligations, despite the changes which the Bill effects to the Bank's constitution.

Proposed section 27K - Foreign persons not to apply for issue of shares in the Commonwealth Bank

The main effect of the proposed section is to prohibit applications for the issue of shares in the Commonwealth Bank to any foreign person, in respect of the first issue of shares to persons other than the Commonwealth. Through proposed subsection 27K(12) 'foreign person' is given the same meaning as by section 5 of the Foreign Acquisitions and Takeovers Act 1975.

Proposed subsection 27K(3) exempts any person applying in the capacity of trustee or manager of a fund which is predominantly Australian owned, defined by whether the interests of foreign persons represent not more than 40 per cent of total interests in the fund. The operation of this subsection may be modified by regulations. Proposed subsection 27K(4) allows other exceptions to or modifications of the prohibition through regulations.

Proposed subsections 27K(5) to (10) refer to penalties and procedures for offences, and for the most part are self-explanatory. One effect of proposed subsection 27K(5) is that the Proceeds of Crime Act 1987 may apply to offences under this proposed section.

Proposed subsection 27K(11) prevents the legality of the issue of shares from being affected by contraventions of the proposed section.

Proposed section 27L - Commonwealth to retain ownership and control of the Commonwealth Bank

Contains the requirements:

- (i) that the Commonwealth not transfer any of its shares in the Commonwealth Bank,
- (ii) that the Commonwealth hold continuously shares with voting rights that represent at least 70 per cent of the voting rights attached to voting shares in the Commonwealth Bank, and
- (iii) that the Commonwealth control continuously the exercise of that much of the voting rights attached to voting shares.

Requirements (ii) and (iii) are applied through proposed subsection 27L(2), which prohibits the Commonwealth and the Commonwealth Bank from causing any departure from them. Proposed subsection 27L(4) provides that if the Bank becomes aware of a situation at variance with the requirements in proposed subsection 27L(2), it must within two months take all reasonable steps within its power to remedy the situation.

Proposed subsection 27L(5) prevents any act or transaction (for example, a purchase of shares or of rights to shares) involved in a contravention of the section from thereby being invalidated.

Through proposed subsection 27L(6) 'voting shares' is given the same meaning as in the Banks (Shareholdings) Act 1972, with one effect being that preference shares in their normal form are not included in the restrictions in proposed subsection 27L(2). However, the separate restriction in proposed subsection 27L(1) relates to any issued shares in the capital of the Commonwealth Bank owned by the Commonwealth..

Clause 23 - General functions of Commonwealth Bank

Amends section 28 of the Principal Act, leaving unamended subsection 28(1) through which the Commonwealth Bank continues to be authorised to carry on general banking business. The substituted subsection 28(2) continues without qualification the additional function of providing insurance services. The substituted subsection 28(3) is self explanatory.

Clause 24 - Repeal of section 29

Repeals the section of the Principal Act conferring powers on the Commonwealth Bank, which will be redundant when it is converted into a company and its objects are conferred by its memorandum and articles of association and through company law.

Clause 25 - Capital

Operates in two steps. Subclause (1) amends subsection 30 of the Principal Act, redefining the capital of the Commonwealth Bank to include the nominal value of its shares in the capital of the Commonwealth Development Bank. In the second step subclause (2) repeals section 30, which will be redundant as soon as the capital of the Commonwealth Bank has been applied in paying up shares.

Clause 26 - Repeal of section 30A

Repeals the section permitting transfers from reserves of the Commonwealth Bank to its capital, which will be redundant upon conversion into a company.

Clause 27 - Repeal of section 31

Repeals the section constituting the Commonwealth Bank Reserve Fund, which will be redundant upon conversion into a company.

Clause 28 - Repeal of section 32 and substitution of new section**Proposed section 32 - Payment of dividends by Commonwealth Bank.**

Provides a dividend-setting mechanism which is essentially similar to that currently provided in the Principal Act, but adapted to the intended situation of the Commonwealth Bank as a public company operating in most respects under normal company law and with a minority of non-government shareholders.

The proposed section addresses only the annual dividend, leaving interim dividends to be determined by the Board according to its powers under the articles of association of the company. Any interim dividends paid would be taken into account in determining what further payment is owed to shareholders when an annual dividend is declared.

Proposed subsection 32(1) distinguishes the recommending of a dividend for the financial year, by the Board and the Treasurer, from declaration of the dividend by a general meeting. It is intended not to prevent the operation of any arrangements for different classes of shares or of any special rights as to dividends which the Bank might come in the future to adopt.

Proposed subsection 32(2) confers on the Treasurer a power to recommend a dividend varying from the recommendation of the Board, but limits that power by stating that an amount specified by the Treasurer must not exceed 45 per cent of the consolidated profit (excluding abnormal items of a capital nature and extraordinary items and after income tax expense) of the Commonwealth Bank and all its subsidiaries. That limitation operates irrespective of what may have been the level of dividend recommended by the Board.

Proposed subsection 32(3) requires the Treasurer, before deciding to vary a dividend recommendation of the Board, to try to reach agreement with the Board and take into consideration its reasons for the recommendation.

Proposed subsection 32(4) prevents the general meeting from declaring a dividend greater than has been recommended to it.

Clause 29 - Repeal of section 33

Repeals the section permitting crediting of amounts to the Commonwealth Bank Reserve Fund, which will be redundant upon conversion into a company.

Clause 30 - Repeal of section 35

Repeals the section about management of the Commonwealth Bank, which will be redundant upon conversion into a company.

Clause 31 - Repeal of section 36

Repeals the section providing for the Commonwealth Bank to pay expenses of the Corporation, which will be redundant upon conversion into a company.

Clause 32 - Repeal of section 37

Repeals the section about payments by the Commonwealth Bank to the Commonwealth Savings Bank and Commonwealth Development Bank for services, which will be redundant upon conversion into a company.

Clause 33 - Repeal of section 38

Repeals the section about amalgamation of other banks with the Commonwealth Bank, which will be redundant upon conversion into a company.

Clause 34 - Profits of Savings Bank

Little amendment is being made to Part V of the Principal Act, which concerns the Commonwealth Savings Bank (Savings Bank), since it is not being restructured or converted into a company and the conversion of the Commonwealth Bank will have no effect on the Savings Bank's constitution under the Principal Act. Only this and the following clause amend sections in Part V.

Clause 34 adds to section 44 of the Principal Act, which concerns determination of annual dividends to be paid by the Savings Bank to the Commonwealth Bank, a requirement for the Board to take into account the requirements of section 32 concerning determination of annual dividends to be paid by the Commonwealth Bank.

Clause 35 - Management of Savings Bank

Amends section 47 of the Principal Act with the effect of no longer requiring, but still allowing, the designation of a person other than the Managing Director to manage the Savings Bank.

Clause 36 - Insertion of new section

Clauses 36 to 42 amend Part VII of the Principal Act, which concerns the Commonwealth Development Bank (Development Bank). The main effect of these clauses is to change the constitution of the Development Bank from being a bank separate from the Commonwealth Bank but having the same Board directing it and the same Managing Director responsible for its management, to being a wholly-owned subsidiary of the Commonwealth Bank in the same manner as the Savings Bank has been and remains through this Bill.

Proposed section 74A - Share capital

The proposed section is in terms almost identical to section 42A of the Principal Act referring to the share capital of the Savings Bank, differing substantively only in not specifying how the capital of the Development Bank immediately before commencement of the section is to be calculated, since that is provided by section 75 of the Principal Act.

The main provisions of proposed section 74A are in subsection 74A(4), requiring the Development Bank to pay up shares in full, and in subsection 74A(5) deeming those shares to have been issued to the Commonwealth Bank. Proposed sub-section 74A(6) allows the Board of the Commonwealth Bank thereafter to increase or reduce the share capital of the Development Bank; proposed subsection 74A(7) allows the Board to direct a subscription by the Commonwealth Bank to additional shares in the Development Bank at their nominal value; and proposed subsections 74A(8), (9) and (10) allow the Board to use an amount in the Development Bank Reserve Fund, or in a specified reserve of the Development Bank, to pay up shares in the Development Bank which will thereupon be taken to have been issued to the Commonwealth Bank.

The proposed subsections 74A(11) and 74A(12) ensure that the Development Bank remains wholly owned by the Commonwealth Bank, as subsections 42A(10) and 42A(11) provide for the Savings Bank.

Clause 37 - Repeal of section 75

Repeals the section of the Principal Act defining the capital of the Development Bank. It is intended that this clause will have effect immediately after the Development Bank has complied with the proposed subsection 74A(4) by applying its capital in paying up shares.

Clause 38 - Commonwealth Development Bank Reserve Fund

Subclause (a) is formal. Subclause (b) omits subsection 76(2) of the Principal Act which is made redundant by proposed subsection 74A(8).

Clause 39 - Repeal of sections 77A and 78 and substitution of new section

Subclause (1) replaces two sections of the Principal Act providing for payment of dividends by the Development Bank and crediting of amounts to the Development Bank Reserve Fund.

Proposed section 77A - Profits of Development Bank

Similar in effect to section 44 of the Principal Act referring to the Savings Bank. Reflecting the constitution of the Development Bank as a wholly-owned subsidiary, it confers on the Board of the Commonwealth Bank a power to determine the Development Bank's transfers to its Reserve Fund and its payments of dividend to the Commonwealth Bank.

Proposed subsection 77A(2) requires the Board to take into account the requirements of proposed section 32.

Subclause (2) applies the amendment to net profits for the current financial year and thereafter.

Clause 40 - Management of Development Bank

Amends section 80 of the Principal Act with the effect of no longer requiring, but still allowing, the designation of a person other than the Managing Director to manage the Development Bank.

Clause 41 - Repeal of section 81

Repeals the section referring to payment by the Development Bank of a share of expenses of the Corporation, which is made redundant by the change in the constitution of the Development Bank.

Clause 42 - Repeal of section 82

Repeals the section referring to payment for services by the Development Bank to the Commonwealth Bank and Savings Bank, which is made redundant by the change in the constitution of the Development Bank.

Clause 43 - Substitution of new heading

Reflects the change in the function of the Corporation through clause 10 of this Bill.

Clause 44 - Repeal of section 87

Repeals an interpretation section which is no longer necessary.

Clause 45 - Repeal of section 87A

Repeals the section concerning application of the merit principle and prohibiting patronage, which it is no longer necessary to state in the Principal Act in view of the power given to the Commonwealth Bank in section 88 (as amended by clause 46 of this Bill) to determine the terms and conditions of employment of officers.

Clause 46 - Repeal of section 88 and substitution of new section

. Proposed section 88 - Appointment of officers.

differs from the present section 88 by -

- . substituting the Commonwealth Bank for the Corporation, to reflect the change made in the functions of the Corporation by clause 10 of this Bill; and
- . designating the officers appointed as the Commonwealth Banks Service.

Clause 47 - Repeal of Division headings

Self explanatory.

Clause 48 - Superannuation fund

Amends section 110 of the Principal Act. The existing subsection 110(1), requiring there to be a superannuation fund of the Corporation, is retained. The existing subsection 110(2), conferring a power to make rules for the superannuation fund, is replaced through subclause (a) by proposed subsections 110(2) to (7).

- . Proposed subsection 110(2) continues the rules in force before the commencement of the proposed section.
- . Proposed subsections 110(3) to (7) provide for two situations which are likely to occur in chronological succession:
 - a situation where the Commonwealth Bank exercises power to amend the rules or make new rules, subject to a requirement for approval by the Minister for Finance, and with the ability to determine that that power will be exercised differently; and

- a situation where guidelines apply under the Superannuation Benefits (Supervisory Mechanisms) Act 1990, and where those guidelines may deal with the question of how, or by whom, the rules may be made or amended, and so may modify the first situation.

- . Proposed subsection 110(5) confirms the applicability to the Commonwealth Bank's superannuation fund of the Supervisory Mechanisms Guidelines, as defined in proposed subsection 110(7).

Subclauses (b) and (c) omit from the proposed subsections 110(3) and (4) references to approval by the Minister for Finance, and are intended to come into operation when the first Supervisory Mechanisms Guidelines come into force.

Clause 49 - Repeal of section 110A

Repeals the section dealing with benefits for retired officers, which will be redundant given the application to the superannuation fund of the Commonwealth Bank Service of the Superannuation Benefits (Supervisory Mechanisms) Act 1990.

Clause 50 - Repeal of section 114 and substitution of new section

This clause substitutes a new interpretation section in Part IX of the Principal Act, which contains miscellaneous provisions. The definitions in the proposed section are self explanatory.

Clause 51 - Appointment of attorneys

Self explanatory.

Clause 52 - Repeal of section 118 and substitution of new section

This clause deals with the application to the Commonwealth Bank, the Savings Bank and the Development Bank of Part VI of the Companies Act 1981, which deals with accounts and audits. The existing provisions dealing with these matters in the Principal Act (sections 118 and 120-122) are to be repealed.

- . **Proposed section 118 - Application of Part VI of the Companies Act**

Applies the relevant provisions of the Companies Act 1981 to the Savings Bank and the Development Bank as if they were public companies incorporated in the Australian Capital Territory. Proposed subsection 118(2) makes certain modifications to the application of the provisions to take account of the fact that these two Banks will lack certain of the characteristics of a public company. For instance,

references in the provisions to the directors of the Banks are to be read as references to the persons managing the Banks, since neither Bank will have a board of directors. The application of the provisions to the Commonwealth Bank is, of course, much more straightforward, since the Commonwealth Bank is actually to become a public company.

- . The Commonwealth Bank, in addition to complying with the Companies Act requirements, will be obliged to forward copies of financial documents for the group to each House of Parliament for tabling (proposed subsections 118(3) and (4)).
- . The Auditor-General is deemed by proposed subsection 118(5) to be the auditor of all three Banks, but is protected by proposed subsection 118(7) from any criminal liability in respect of this matter.

Clause 53 - Taxation

Subclause (1) amends section 119 of the Principal Act by omitting subsection 119(1) which exempts the Corporation, the Commonwealth Bank, the Development Bank and the Savings Bank from taxation under any law of a state or territory to which the Commonwealth is not subject. The financial effect of the removal of this exemption is described above in the Financial Impact Statement. It is envisaged that this sub-clause will come into operation at a considerably later time than other clauses of the Bill, when the Commonwealth Bank has had the opportunity, under proposed legislation still to be submitted to the Parliament, to integrate the Savings Bank. Subclause (2) is formal.

Clause 54 - Repeal of sections

Repeals sections 120, 121, 121A and 122 of the Principal Act which will become redundant with the conversion of the Commonwealth Bank into a company and the commencement of the proposed substitute section 118 (see above, clause 52).

Clause 55 - Power to improve property and carry on business

Amends references in section 123 of the Principal Act to the Commonwealth Bank which will become inappropriate on its conversion into a company.

Clause 56 - Execution of contracts

Amends section 124 of the Principal Act to confine its application to the Development Bank and Savings Bank, reflecting the reduction in the functions of the Corporation and the conversion of the Commonwealth Bank into a company.

Clause 57 - Affixing of seals

Amends section 124A of the Principal Act to confine its application to the Development Bank and Savings Bank, reflecting the reduction in the functions of the Corporation and the conversion of the Commonwealth Bank into a company.

Clause 58 - Insertion of new section**Proposed section 128 - Use of certain names.**

Establishes a scheme of protection for the Commonwealth Bank's future use of two groups of names - those currently in use by the State Bank of Victoria and those currently in use by the Commonwealth Bank itself.

Proposed subsection 128(1) confers on the Commonwealth Bank the right to operate under a protected name - terms both defined in proposed subsection 128(6) - in the States and Territories even if the name is not registered under the relevant State or Territory law.

Proposed subsection 128(3) restricts other persons, except with the written consent of the Commonwealth Bank, from using a protected name in the ways it specifies. Proposed subsection 128(4) restricts the operation of subsection (3) so as to uphold certain rights conferred by the Trademarks Act 1955 or Design Act 1906. Proposed subsection 128(5) restricts the operation of subsection (3) so as to uphold, in the ways it specifies, the rights of existing users of protected names.

Subclause (2) is intended to come into operation when the Commonwealth Bank is converted into a company. It amends the proposed section 128 by adding two names used by the Commonwealth Bank, and providing that for two months each protected name (which will include those currently used by the State Bank of Victoria) is to be regarded as the company name for the purposes of subsection 218(1) of the Companies Act 1981.

Clause 59 - Regulations

Amends section 129 of the Principal Act to confine its application to the Development Bank and Savings Bank, reflecting the reduction in the functions of the Corporation and the conversion of the Commonwealth Bank into a company.

Clause 60 - Transitional provision - accounting records of Commonwealth Bank

Enables section 267 of the Companies Act 1981 to be applied to the accounts and records kept by the Commonwealth Bank under section 118 of the Principal Act before its repeal through Clause 52.

Clause 61 - Transitional provision - accounts of Commonwealth Bank

Complements Clause 60 and enables provisions of the Companies Act 1981 and the Companies (Transitional Provisions) Act 1981 concerning profit and loss accounts to be applied to the reports and financial statements prepared by the Commonwealth Bank under section 121 of the Principal Act before its repeal through Clause 54.

PART 3 - CONSEQUENTIAL AMENDMENT OF OTHER ACTS

Clause 62 - Amendment of other Acts

Notes on these amendments are set out, in the sequence used in the Schedule to the Bill, at the end of these notes on clauses.

PART 4 - TRANSFER OF STAFF OF THE COMMONWEALTH BANKING CORPORATION TO THE COMMONWEALTH BANK

Clause 63 - Interpretation

Self explanatory.

Clause 64 - Transfer of staff

Transfers to the Commonwealth Bank the employment of all officers previously employed by the Corporation, without affecting their terms and conditions of employment or their entitlements to benefits, and preserving the continuity of their employment. This clause complements the effect of clause 10 reducing the functions of the Corporation. It is intended to come into operation immediately before the transfer of staff of the State Bank of Victoria to the Commonwealth Bank.

PART 5 - COMMONWEALTH BANK TO BECOME SUCCESSOR IN LAW OF THE STATE BANK OF VICTORIA

This Part provides for the Commonwealth Bank succeeding in law to the State Bank of Victoria ('the State Bank') in respect of all rights and liabilities. This part of the Bill will be complemented by similar legislation to be enacted by the Victorian Parliament.

Clause 65 - Interpretation

This clause contains a number of definitions used in Part 5, most of which are self-explanatory. 'Liabilities', 'property' and 'rights' are broadly defined. The 'succession day' is defined to be the day upon which the Part commences, which is to be the day upon which the undertaking of the State Bank will be transferred to the Commonwealth Bank.

Clause 66 - Extra-territorial operation of Part

To the maximum extent of the Federal Parliament's power, this clause gives effect to the succession of the Commonwealth Bank to the State Bank in relation to land and things situated outside Australia and acts, transactions and matters occurring outside Australia. In respect of any matters in foreign countries which may be beyond the legislative reach of the Federal Parliament, reliance will be placed on the rules of private international law, which should result in the succession described in clause 67 being given effect by the relevant foreign law.

Clause 67 - Commonwealth Bank to become successor in law of the State Bank

This clause is the central provision in this Part. It provides for the Commonwealth Bank to become the successor in law of the State Bank on the succession day, and further provides that from that day all property, rights and liabilities of the State Bank become those of the Commonwealth Bank. It will be mirrored by a provision in the planned Victorian legislation.

Clause 68 - State Bank instruments

This clause ensures that all State Bank instruments (defined in clause 65 to include legislative instruments or any other documents to which the State Bank was a party, that were given in favour of the State Bank, or that refer to the State Bank) continue to have effect on and after the succession day, but in such a way that references to the State Bank are read as references to the Commonwealth Bank.

Clause 69 - Places of business

This clause ensures that any place of business of the State Bank before the succession day will, after that day, be a place of business of the Commonwealth Bank.

Clause 70 - Pending proceedings

This clause substitutes the Commonwealth Bank for the State Bank as a party to any legal proceedings to which the latter was a party before the succession day.

Clause 71 - Registration of interests in land

This clause enables State and Territory Registrars to register any change in title to land that has, under Part 5, become land belonging to the Commonwealth Bank. Registration can take place upon lodgment of a certificate signed by an authorised person (which is defined in clause 65 to be the Treasurer or a person authorised by the Treasurer).

Clause 72 - Transfer of State Bank staff to Commonwealth Bank

Subclause (1) provides for the transfer of State Bank staff to the Commonwealth Bank from the succession day. The clause goes on to preserve the rights, accrued entitlements and continuity of service of such employees.

Clause 73 - Application of Income Tax Assessment Act

This clause will ensure that tax concessions in respect of withholding tax exemptions for interest on certain loans raised outside Australia by the State Bank and those held by partnerships of which the State Bank was a partner will not be lost when these assets are acquired by the Commonwealth Bank. For constitutional reasons the State Bank cannot be continued in existence to hold these assets as a wholly-owned subsidiary.

Subclause (1) will provide for interest paid on debentures raised overseas by the State Bank that currently qualifies for a withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 to continue to qualify for that exemption. The exemption afforded by section 128F is available only for interest paid by a company, State or Commonwealth or State authority that issued the debentures. Since the debentures were not issued by the Commonwealth Bank, interest paid on them would cease to be exempt from withholding tax without this provision.

Subclause (2) will preserve the continuity of the partnerships of which the State Bank was a member. Without this provision the acquisition by the Commonwealth Bank of the interest in any partnership previously held by the State Bank would dissolve that partnership and a new partnership with the Commonwealth Bank as a member would be formed. This could result in tax detriments being suffered by other members of the partnership due to the loss of tax concessions that could not be carried forward into the reconstituted partnership.

Clause 74 - Payment to Victoria

Authorises a payment by the Commonwealth to the State of Victoria as compensation for the expected effects on Victoria's revenues of the sale of the State Bank to the Commonwealth Bank, with the related separation of Tricontinental Holdings Limited from the State Bank. As is noted in the Financial Impact Statement in another part of this memorandum, the compensation payment will be made by the Commonwealth in the expectation of greater income tax revenues resulting from the Commonwealth Bank's acquisition, and hence without any overall financial detriment to the Commonwealth.

Subclause (1) empowers the Treasurer to authorise a payment to Victoria not exceeding \$413 million for the purpose of giving effect to an agreement between the two Governments. It is envisaged that the agreement will:

- (i) establish conditions for the payment which relate to measures on the part of the Victorian Government aimed at ensuring both that the business of the State Bank bought by the Commonwealth Bank can be expected to generate normal levels of assessable income for the purpose of Commonwealth income tax, and that the tax loss position of Tricontinental Holdings in August 1990 will not be utilised by the Victorian Government as its continuing owner, either directly or through enabling it to be accessed by a taxpaying entity or entities; and

- (ii) establish the terms of the payment, including a procedure whereby the Victorian Government will apply the amount it receives through the National Debt Sinking Fund for the redemption or repurchase of Commonwealth Government securities on allocation to Victoria, for which at present the Victorian Government bears debt-service obligations.

Subclause (2) makes the appropriation necessary for this payment.

Clause 75 - Regulations

This clause gives the Governor-General a power to make regulations in relation to the preservation of rights of transferred employees. It provides against the possibility that there may be other Commonwealth legislation the operation of which, in the absence of this clause, could not be modified in order to preserve the rights of the employees concerned.

PART 6 - MISCELLANEOUS

Clause 76 - Compensation for acquisition of property

This clause requires the Commonwealth Bank to pay reasonable compensation to any persons from whom property may be acquired as a result of the operation of the Bill. The terms 'acquisition of property' and 'just terms' are given the same meanings as they are given in paragraph 51(31) of the Constitution.

Clause 77 - Exemption from taxes and charges

Establishes an exemption from tax under Commonwealth, State or Territory laws (not including income tax under Commonwealth law) for anything done in the operation of the Bill or in giving effect to it.

Clause 78 - Franking debit to arise for Commonwealth Bank and Development Bank

Both the Commonwealth Bank and the Development Bank are companies for the purposes of the Income Tax Assessment Act 1936 with the result that their tax liabilities since 1 July 1987 have generated franking credits under the imputation system. However, dividends paid to the Commonwealth by the Commonwealth Bank under section 32 of the Principal Act and by the Development Bank under section 77A of the Principal Act are not dividends for income tax purposes. Thus, these dividends were not frankable dividends. The franking account surplus which has arisen from tax liabilities and the receipt of franked dividends has not been reduced as a result of these distributions of profit.

The effect of clause 78 will be that the surplus in the franking account will be reduced to an amount that would have been the franking surplus if the dividends paid under sections 32 and 77A of the Principal Act had been frankable.

If these dividends had been frankable dividends but had not been franked to the extent required, a franking debit would have arisen under section 160APX of the Income Tax Assessment Act. The amount of the franking debit that arises under that section is the required franking amount calculated under section 160AQE. In the case of the Commonwealth Bank and the Development Bank the required franking amount for each dividend paid to the Commonwealth will be determined by reference to the surplus in the franking account on the day the dividend was paid to the Commonwealth.

By virtue of subclause (1) the amount of the franking debit that will arise for the Commonwealth Bank and the Development Bank is the difference between:

- . the franking surplus of each Bank at the time it acquired a shareholder, before it is reduced by this provision (paragraph (a)); and
- . the amount that would have been the franking surplus at that time if the dividends paid by each Bank to the Commonwealth between 1 July 1987 and the day the Bank acquires a shareholder had been frankable dividends (paragraph (b)).

Subclause (2) is a drafting measure and defines the terms used in subclause (1). The effect of the subclause is that:

- . the day on which the franking debit arises under subclause (1) for the Commonwealth Bank is the day on which the Commonwealth becomes a shareholder of the Commonwealth Bank; and
- . the day on which the franking debit arises under subclause (1) for the Development Bank is the day on which the Commonwealth Bank becomes a shareholder of the Development Bank.

SCHEDULE

Amendment to Administrative Decisions (Judicial Review) Act 1977

The proposed amendment exempts the Commonwealth Bank, the Savings Bank, the Development Bank and the renamed Corporation from any application of the Act.

Amendment to Banking Act 1959

The proposed amendment is consequential to the name and organisational changes included in the Bill.

Amendments to Banks (Shareholdings) Act 1972

The amendments to subsection 6(1) will -

- . substitute a definition of 'bank' which differs from the existing definition by including the Commonwealth Bank;
- . insert a definition of 'banking entity' which extends beyond the definition of 'bank' in this Act and includes any other person, whether inside or outside Australia, carrying on banking as the principal business of the person; and
- . define 'Commonwealth Bank' as the Commonwealth Bank of Australia.

The amendment to section 10 is self explanatory.

The proposed section 10A imposes two limitations on shareholdings in the Commonwealth Bank:

- . a general limitation to 5 per cent of voting shares; and
- . a prohibition (subject to exemption) of any interest in voting shares on the part of banking entities.

Proposed subsection 10A(1) provides that subject to the section, a banking entity must not have an interest in any voting share of the Commonwealth Bank. Interests in shares are defined in section 8 of this Act.

Proposed subsection 10A(2) exempts from the limitation in proposed subsection 10A(1) an interest which a banking entity has only because it is, or because an associate of it is, a trustee or manager of a fund.

Proposed subsection 10A(3) requires any person, other than a banking entity to which the proposed subsection 10A(1) applies, not to have an interest in voting shares of the Commonwealth Bank exceeding 5 per cent of the aggregate nominal amount of voting shares. This limitation to 5 per cent can be compared with the limitation to 10 per cent generally applying to interests in voting shares of banks through subsection 10(1) of this Act.

The powers capable of being exercised by the Treasurer and Governor-General under subsections 10(2) and 10(4) respectively of this Act, to substitute for specified persons higher percentage limits than the general 10 per cent, will not apply in respect of limitations on shareholdings in the Commonwealth Bank, but the power in paragraph 8(9)(d) will apply.

Proposed subsection 10A(4) defines non-compliance with proposed subsections 10A(1) or 10A(3) as an offence carrying a maximum penalty of \$10,000 for a natural person or \$50,000 for a body corporate.

The amendments to subsections 12(1) and 13(1) are consequential.

Amendment to Freedom of Information Act 1982

The proposed amendment reflects the name change of the Corporation through clause 10 and involves no change in policy.

Amendment to National Crime Authority Act 1984

The proposed amendment reflects the name change of the Corporation through clause 10 and involves no change in policy.

Amendment to Papua New Guinea (Transfer of Banking Business) Act 1973

The proposed amendment reflects the management and staffing arrangements flowing from the conversion of the Bank to a public company.

Amendments to Reserve Bank Act 1959

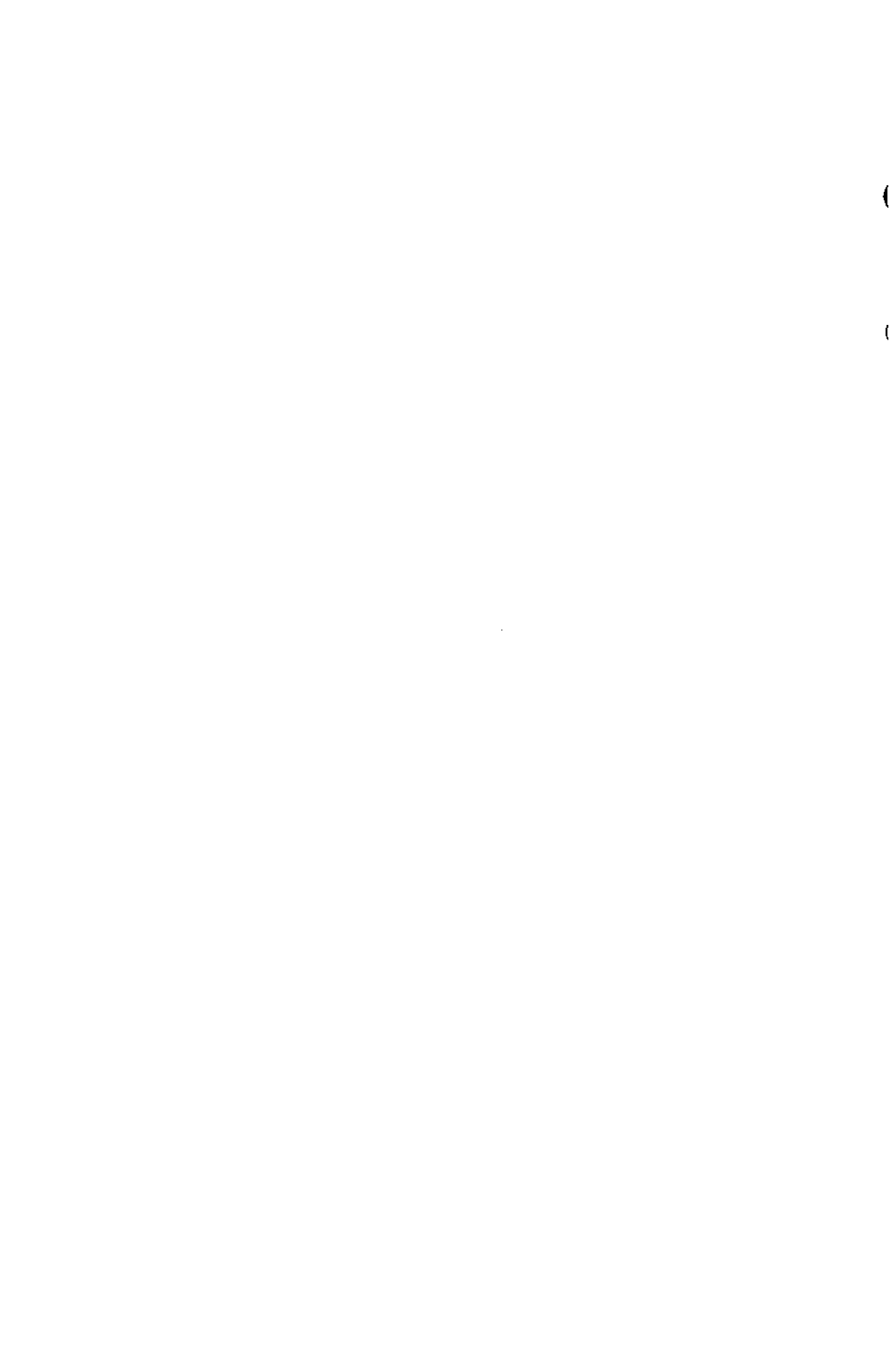
The amendment to subsection 5(1) is consequential to the repeal of section 27 of the Principal Act.

The proposed amendment to section 17 continues the prohibition on appointment of persons associated with a bank to the Reserve Bank Board, but simplifies the wording by eliminating separate references to directors and officers of the Commonwealth Bank. The Secretary of the Treasury will continue to be permitted to be a member of the Board of both the Commonwealth and Reserve Banks.

The proposed amendment to subsection 74(2) is a drafting measure involving no change in policy.

Amendment to the Sales Tax Assessment Act (No.1) 1930

With the conversion of the Commonwealth Bank to a public company it will be liable to sales tax in the same way as other companies. Amendments to the Sales Tax Assessment Act in 1987 provided that the Commonwealth Banking Corporation should become liable for sales tax. While the drafting of the 1987 amendments did not specifically include the Commonwealth Bank (as distinct from the Corporation), the Savings Bank and the Development Bank, the three Banks have been paying sales tax from that time. The proposed amendment formalises this position for the Savings Bank and the Development Bank, removing any doubt that sales tax should be paid by all three Banks and the Corporation.



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