

EXTRAORDINARY



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## GOVERNMENT OF FIJI

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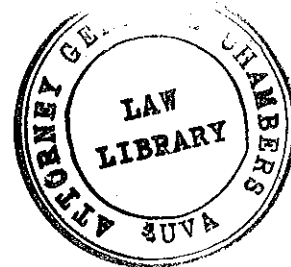
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### BANK OF SOUTH PACIFIC LIMITED (NATIONAL BANK OF FIJI LIMITED) DECREE 2011 (DECREE NO. 4 OF 2011)

IN exercise of the powers vested in me as President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—



TO PROVIDE FOR THE TRANSFER TO BANK OF SOUTH PACIFIC LIMITED  
OF THE UNDERTAKING OF NATIONAL BANK OF FIJI LIMITED AND FOR RELATED PURPOSES

PART I—PRELIMINARY

*Short title and commencement*

1. This Decree may be cited as the Bank of South Pacific Decree 2011 and comes into force on the date that it is published in the *Gazette*.

*Interpretation*

2.—(1) In this Decree, except insofar as the context or subject matter otherwise indicates or requires—

“appointed time” means 12.01 a.m. Fiji standard time on the first business day after the effective day;

“banking business” has the meaning given to it in the Banking Act 1995;

“BSP” means Bank of South Pacific Limited, a company duly incorporated in accordance with the laws of Papua New Guinea and registered in Fiji as a branch in accordance with Part X of the Companies Act (Cap. 247);

“CBA transaction” means the acquisition by BSP of all the issued shares of NBF;

“customer” shall include any person, proprietary unit, board, commission, committee, instrumentality or government with whom NBF conducted a banking or other business relationship immediately before the appointed time;

“document” means anything in which information of any description is recorded or stored;

“effective day” means the date specified by BSP in a notice published in the *Gazette*, which shall be a date within 18 months of completion of the CBA transaction;

“instrument” includes—

- (a) a document or instrument of any form or kind, including a security that creates, evidences, modifies, or extinguishes rights, interests, or liabilities, or would do so if it, or a copy of it, were lodged, filed, or registered under any written law; and
- (b) a judgment, order, or process of a court or tribunal; and
- (c) an undertaking, communication, notice, instruction, order, direction, mandate, authority, negotiable instrument, order for payment of money, register, and record;

“land” includes any estate, interest or right (whether legal or equitable) in, over or under land;

“liabilities” means duties and obligations of every description;

“NBF” means National Bank of Fiji Limited, a company duly incorporated in accordance with the laws of Fiji and trading in Fiji under the name and style “Colonial National Bank”;

“NBF business” means the banking business and every other business conducted by NBF immediately before the appointed time;

“NBF employee” means a person employed by NBF in the business immediately before the appointed time

“NBF liabilities” means all liabilities of NBF immediately before the appointed time;

“NBF property” means all property of NBF and all of its assets;

“NBF undertaking” means the NBF business, all NBF property and all NBF liabilities;

“property” means property as defined in section 2 of the Interpretation Act (Cap. 7);

“Registrar” shall mean unless the context otherwise requires the person holding office pursuant to any written law wherein the term is contained and defined;

“security” means a mortgage (whether legal or equitable), charge, debenture, bill of exchange, bill of sale, promissory note, guarantee, lien, deed, pledge or other means of securing the payment of a debt, whether present or future or the discharge of an obligation or liability, whether actual or contingent, and all such instruments created by and brought into existence by NBF before the appointed time evidencing the same;

“tax law” means any written law relating to taxation and including but not limited to the Income Tax Act (Cap. 201), the Value Added Tax Decree 1991, the Customs Act 1986, the Customs Tariff Act 1986 and the Land Sales Act (Cap.137);

“written law” means any Act, Decree, Promulgation, Regulations or other laws which includes all subsequent amendments and modifications to such written law.

(2) Subject to the provisions of this section, where:

- (a) any enactment other than an enactment in this Decree; or
- (b) any instrument whensoever or wheresoever made or executed;

contains any reference express or implied to NBF such reference shall, on and after the appointed time and except where the context otherwise requires, be read, construed and have effect as if it was a reference to BSP.

(3) Notwithstanding anything in the preceding subsection where in pursuance thereof a reference to NBF in any instrument constituting or relating to any pension scheme, provident fund or officers’ guarantee fund of NBF in force immediately before the appointed time is to be read, construed and have effect as a reference to BSP, for the purpose of ascertaining and calculating the right to benefit thereunder, service or employment with NBF before the appointed time shall be taken into account as if it were service or employment with BSP, but the coming into force of this section shall not of itself give rise to any claim to benefit under any such scheme or fund or operate to cause a person to become a member of another pension scheme, provident fund or officers’ guarantee fund.

(4) Without prejudice to the generality of subsection (2) of this section, where by any order of the Court or by any trust deed, settlement, covenant or agreement or where by any will whether made or executed before, on or after the appointed time, NBF (whether alone or with any person) was or is granted letters of administration or probate or appointed trustee, executor, guardian or in any other fiduciary capacity, such order, trust deed, settlement, covenant, agreement or will shall not fail by reason of anything in this Decree but shall as from the appointed time be read and construed and have effect as if, for any reference therein to NBF, there was substituted a reference to BSP.

(5) Without limiting or prejudicing the generality of any other provisions of this Decree any act or omission by NBF before the appointed time in relation to:

- (a) any customer of the NBF business;
- (b) NBF property;
- (c) the NBF undertaking;
- (d) any security; or
- (e) any other matter or thing

shall on and after the appointed time be deemed to be an act or omission of BSP as the case may be, provided always that this provision shall not affect or otherwise modify the position inter se of BSP and NBF.

## PART II—VESTING OF INTERESTS

### *Vesting of NBF undertaking in BSP*

3. At the appointed time the NBF undertaking in Fiji shall be deemed by virtue of this Decree to have been divested from NBF and vested in BSP absolutely.

### *Vesting of contracts, liabilities, etc*

4.—(1) At the appointed time:

- (a) all instruments and property whether or not recorded in an instrument (including without limitation all securities, contracts, agreements, conveyances, deeds, leases, licences and undertakings) entered into by or made with or given to or by or delivered to or by or addressed to NBF (whether alone or with any other person) in force shall on and after the appointed time, to the extent that they were at any time before that time binding upon enforceable by or against NBF, be deemed to be binding and of full force and effect in every respect in favour of or against BSP as fully and effectually as if, instead of NBF, BSP had been a party to them or bound by them or entitled to the benefit of them; and
- (b) BSP is deemed to have assumed all actual and contingent liabilities of NBF (whether alone or with any other person) in force at the appointed time.

(2) All instruments brought into existence for the purpose of evidencing, recording or effecting the matters referred to in subsection (1) shall be exempt from stamp duty under the Stamp Duties Act (Cap. 205) as amended. Without limiting the generality of the foregoing, the Stamp Duties Act shall not—

- (a) apply to any agreement brought into existence for the purpose of recording, evidencing or effecting any transfer of NBF property or security to BSP or the vesting of any such property or security in BSP;
- (b) apply to any instrument recording, evidencing or effecting anything which is the subject of this Decree; or
- (c) operate to impose or attract any duty, fine, impost, penalty or assessment required or reasonably necessary to give effect to the purpose and intent of this Decree.

(3) Without limiting the generality of any other provision of this Decree, the provisions of this Decree have effect notwithstanding anything to the contrary contained in the State Acquisition of Lands Act (Cap. 135), State Lands Act (Cap. 132), Forest Decree 1992, Land Sales Act (Cap. 137), Land Transfer Act (Cap. 131), Native Lands Trust Act (Cap. 134), Companies Act (Cap. 247), Consumer Credit Act 1999, Property Law Act (Cap. 130) or any other written law or any rule of the common law or equity or any instrument or other security, contract, agreement, undertaking or property.

(4) No further consent, permit, certification, ratification, fees or charges, registration fees of any kind, filing fees, lodgement fees, or fees of any kind whatsoever shall be required to be given in respect of any instrument sought to be registered for the purpose of evidencing, recording or effecting the matters referred to in this Decree notwithstanding anything to the contrary in any written law or rule of law or equity or any instrument or other security, contract, agreement, undertaking or property.

(5) The exercise by BSP of any right, power, remedy or benefit under any instrument or other security, contract, agreement, undertaking or property vested in BSP by virtue of this Decree (including, without limitation, any power of sale, re-entry, seizure or foreclosure) shall be valid and effective at law and in equity notwithstanding that the vesting of the right, power, remedy or benefit in BSP by operation of this Decree might not have complied with any written law or rule of the common law or equity or with any instrument or other security, contract, agreement, undertaking or property.

(6) NBF and BSP shall not be liable to any customer for any common law, contractual or statutory breach of privacy or confidentiality resulting from the operation of this Decree.

*Transfer of business*

5. Without prejudice to the generality of the foregoing provisions of this Decree, the following provisions shall have effect with relation to the business of NBF—

- (a) the relationship between NBF and a customer at any office or branch of NBF shall on and after the appointed time be between BSP and such customer and shall give rise to the same rights and the same duties (including rights of set-off) as would have existed before that time as if such relationship had been between BSP and the customer, and so that any instruction, order, direction, mandate or authority given by such customer to NBF and subsisting at or given after the appointed time shall, unless and until revoked or cancelled, be deemed to have been given to BSP;
- (b) any security held by NBF as security for the payment of debts or liabilities (whether present or future, actual or contingent) of any person shall be transferred or deemed to be transferred to BSP at the appointed time and shall be held by and be available to BSP as security for the payment of such debts and liabilities to BSP; and where the said security extends to future advances or to future liabilities of such person, the security shall as at and after that time be held by and be available to BSP as security for future advances to the said person by, and future liabilities of the said person to, BSP to the same extent to which future advances by, or liabilities to, NBF were secured by them at any time before that time;
- (c) BSP shall, in relation to any security transferred or deemed to have been transferred to it in accordance with or by virtue of the provisions of this Decree and the moneys thereby secured, be entitled to the same rights and priorities and subject to the same obligations and incidents as NBF would have been entitled and subject to if the same had continued to be held by NBF;

- (d) the custody of any document, goods or thing held by NBF as bailee for any other person at any office or branch of NBF shall be transferred or deemed to be transferred to BSP at the appointed time and the rights and obligations of NBF under any contract of bailment relating to such document, goods or thing shall be transferred or deemed to be transferred at that time to BSP;
- (e) any negotiable instrument or order for payment of money whether drawn, given, accepted or endorsed before, at, or after the appointed time, which is expressed to be drawn on, or given to, or accepted or endorsed by, NBF, or payable at any place of business of NBF shall have the same effect at and after the appointed time as if it had been drawn on, or given to, or accepted or endorsed by, or payable at the same place of business of BSP;
- (f) nothing in or about the operation of this Decree shall disturb the priority before the appointed time of any security or other right relative to those held by any third party other than NBF and BSP;
- (g) notwithstanding the operation of this Decree all advances and payments made by BSP to or for the benefit of former depositors or customers of NBF shall be deemed to be lawfully made and may be charged to the account of any such depositor or customer;
- (h) nothing in this Decree shall in any way affect or alter the respective rights and obligations of any party other than in respect of the business as defined in this Decree.

*Assumption of responsibility for NBF employees*

6.—(1) From the appointed time and notwithstanding any written law relating to employment, BSP must assume responsibility as employer for each NBF employee.

(2) Without limiting subsection (1), BSP will regard the service of each NBF employee with NBF as being continuous with the employee's service with BSP for the purposes of any entitlement to leave (including but not limited to annual leave, sick leave or long service leave) accrued, but not taken, by BSP employee while an employee of NBF.

(3) From the appointed time, for all purposes, BSP and each NBF employee have the same rights, entitlements, responsibilities and liabilities in respect of each other as NBF and such NBF employee had to each other immediately before the appointed time under any collective agreement between NBF and a NBF Fiji employee's trade union or any written or other contract of employment.

(4) An NBF employee is not entitled under any contract of employment, collective agreement or written law to receive any payment or other benefit by reason only of ceasing, by operation of this Decree, to be an employee of NBF.

*Release and discharge of NBF*

7. At the appointed time NBF is released and discharged from all further actual and contingent liabilities and obligations in respect of the business to any person to whom under the provisions of this Decree BSP is bound in law provided always that this provision shall not affect or otherwise modify the position inter se of BSP and NBF.

*Deemed consents etc. for vesting*

8.—(1) Any consent, approval, permit, certification or ratification required by or under any written law or rule of common law or equity or any instrument—

- (a) for the vesting of any NBF property to which BSP has become entitled by this Decree;
- (b) for the vesting of any transfer made or security given to NBF to which BSP has become entitled by this Decree;
- (c) for the vesting of any transfer made or security given to NBF to secure any loan or interest on any loan or any remedy for the enforcement of any loan to which BSP has become entitled by this Decree;
- or
- (d) for the vesting of any other right or benefit of NBF to which BSP has become entitled by this Decree,

is deemed to have been granted at the appointed time, so that the property the subject of the transfer or security (or any part of it) or other right or benefit can be vested in BSP by this Decree.

(2) From the appointed time BSP may enforce any transfer or security, enforce any right and obtain any benefit referred to in section (1), including the exercise of any power of sale, re-entry, seizure or foreclosure or any other right as if it were named in the relevant instrument and in any relevant register in place of NBF.

*Actions etc not to abate*

9.—(1) Any action, arbitration or proceeding and any cause of action, arbitration or proceeding which shall at the appointed time be pending or existing by, against, or in favour of NBF shall not abate or be discontinued or be in any way prejudicially affected by reason of the provisions of this Decree, but the same may be prosecuted, continued and enforced by, against or in favour of BSP as and when it might have been prosecuted, continued and enforced by, against or in favour of NBF if this Decree had not been made.

(2) At the appointed time, the rights and liabilities of NBF in respect of each action, arbitration, proceeding and cause of action referred to in sub-clause (1) vest in BSP and BSP is substituted for NBF as the party to each such action, arbitration, proceeding or cause of action.

*Use of information*

10. Notwithstanding—

- (a) any right under any written law or common law or equity relating to privacy of information or customer confidentiality;
- (b) the provisions of any contract relating to privacy of information of customer confidentiality; or
- (c) any banking code of practice or standard of conduct to which NBF or BSP are party;

any information, of whatsoever nature, given or deemed to have been given by a customer, contracting party or any other person to NBF for use by NBF in the business shall be deemed to be information properly given to BSP for the same purpose.

## PART III—CONSEQUENTIAL MATTERS

*Evidence*

11. Any book or other document which if this Decree had not been made, would have been evidence in respect of any matter for or against NBF shall, on and after the appointed time, be admitted in evidence in respect of the same matter for or against BSP.

*Bankers' Books Evidence Act*

12.—(1) Notwithstanding the transfer of the business to BSP under and in terms of this Decree, the provisions of the Bankers' Books Evidence Act (Cap. 45) shall continue to apply with respect to the books of NBF which are transferred to BSP by virtue of this Decree and to entries made in such books before the appointed time.

(2) In this section, "books" include ledgers, day books, cash books, account books, microfiche, computer disks, software programmes and such other electronic and magnetic records and retrieval systems compiled by NBF and all other books and records used in the NBF business.

*Directions to Registrars to record entries and memorials*

13.—(1) Upon application, lodgment and payment of the prescribed fee for registration by BSP in respect of any grant or certificate of title, security, lease or other instrument, the Registrar of Titles and Registrar of Deeds respectively must make—

- (a) all such entries upon the instruments under his or her control or in his or her custody that are necessary or expedient in consequence of the transfer of property under this Decree; and
- (b) any other memorials or entries in any public record under his or her control or in his or her custody that are necessary or expedient to record the transfer of property to BSP under this Decree.

(2) Upon application and the payment of the prescribed fee by BSP, the Registrar of Companies must make all entries upon or in relation to any security and to the register of charges under the Companies Act (Cap. 247) that are necessary or expedient to record the vesting of property in that security to BSP under this Decree.

(3) Upon application and the payment of the prescribed fee by BSP, a person holding the office of Registrar pursuant to any written law (other than the Registrar of Titles, Registrar of Deeds and the Registrar of Companies) is hereby authorised and directed to make all entries and records with respect to any transfer of property or security in any public record or register under the person's control that are necessary or expedient to record the transfer of property or security to BSP under this Decree.

(4) Upon application and the payment of the prescribed fee by BSP, a person maintaining any register required by any written law (other than a person holding the office of Registrar referred to in subsections (1), (2) and (3))

must make all entries and records with respect to any property or security in the register maintained by the person that are necessary or expedient to record the transfer of property or security to BSP under this Decree.

(5) Nothing in this Decree shall prejudice or adversely affect BSP or BSP's rights under any instrument or security transferred to it by operation of this Decree in any manner whatsoever for failure to make an application to a Registrar or person maintaining a register in terms of subsection (4).

*Holders of instruments to produce them for recording*

14. Upon application by BSP to a Registrar or person maintaining a register in terms of section 13(4) in respect of any grant or certificate of title, mortgage, lease or other instrument for the purpose of the Registrar making the entries required by section 13, the holder of the relevant instrument must on payment of any production fee produce it to such Registrar or person maintaining a register in terms of section 13(4) for that purpose.

*Effect of entry into possession by BSP not to affect legal rights*

15.—(1) The entry by BSP upon, or the use, enjoyment or occupation by BSP of any land which prior to the appointed time was used, enjoyed or occupied by NBF as tenant, subtenant or licensee does not constitute an assignment, transfer, underletting, devolution, parting with possession or other disposition of that land for the purpose of any instrument in existence at the appointed time and relating to that land containing a provision which relates to assignment, transfer, underletting, devolution, parting with possession or disposition of that land.

(2) The vesting and transfer effected by this Decree do not constitute a default nor invalidate, discharge or otherwise render unenforceable any deed, contract or security and do not constitute an assignment, transfer, devolution, parting with possession or other disposition of an interest in any deed, contract or security for the purpose of any instrument in existence at the appointed time containing a provision which relates to assignment, transfer, devolution, parting with possession or other disposition of any interest in the deed, contract or security.

*Operation of the Decree*

16.—(1) This Decree operates to the exclusion of any other written law relating to or affecting the transfer of property, land titles or securities or companies or the keeping of public records, and to the extent of any conflict or inconsistency between this Decree and any other written law, this Decree prevails.

(2) This Decree is binding on the State and all persons, and has effect notwithstanding anything in the instruments constituting NBF and BSP or in their respective articles of association or other rules.

*Irregularities concerning transfer and vesting*

17. The transfer and vesting of any right or obligation by this Decree is not invalidated by any accidental omission or procedural irregularity.

*Taxation consequences of transfer and vesting*

18.—(1) No liability is created, or is deemed to be created under any tax law for NBF or BSP by—

- (a) the divesting by NBF of the NBF business and NBF property and the vesting of the NBF business and NBF property in BSP; and
- (b) the assumption by BSP of the NBF liabilities .

(2) For the purposes of a tax law, BSP is deemed, at and from the appointed time in respect of the assets, property and rights vested in the NBF liabilities assumed by, BSP under this Decree—

- (a) to be in the same position as NBF was in immediately before the appointed time; and
- (b) without limiting sub-paragraph (a), to become subject to all liabilities and obligations, and entitled to all benefits and advantages, to which NBF was subject, or entitled.

(3) To avoid doubt—

- (a) the retained earnings of NBF prior to the appointed time shall—
  - (i) to the extent that they have been charged to income tax before the appointed time, be deemed after the appointed time to be the retained earnings of BSP charged to the same amount of income tax;
  - (ii) not be subject to branch profits remittance additional normal tax under section 7C of the Income Tax Act; and

- (iii) not be subject to non-resident dividend withholding tax under section 8 of the Income Tax Act.
- (b) the vesting of the NBF undertaking in BSP shall not give rise to any liability under section 8 of the Income Tax Act.

*Costs, charges and expenses*

19. Without limiting any other provision of this Decree, all the costs, charges and expenses preliminary to, and of and incidental or otherwise in relation to, the preparing, applying for, obtaining and passing of this Decree shall be paid by BSP.

**PART IV – REGULATIONS**

*Regulation-making power*

20. The Minister of Finance may make Regulations for the purpose of giving better effect to the purposes and provisions of this Decree.

Given under my hand this 29th day of January 2011.

**EPELI NAILATIKAU**  
President of the Republic of Fiji