



Tonga

# **PUBLIC ENTERPRISES ACT 2002**

**No. 25 of 2002**





## PUBLIC ENTERPRISES ACT 2002

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# PUBLIC ENTERPRISES ACT 2002

No. 25 of 2002

## AN ACT TO ESTABLISH THE OBJECTIVES, RULES AND PROCEDURES RELATING TO PUBLIC ENTERPRISES

I assent,  
TAUFA'AHAU TUPOU IV,  
23rd December, 2000

[21st of October 2002]

**BE IT ENACTED** by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

### PART I - PRELIMINARY

#### 1 Short title and commencement

- (1) This Act may be cited as the Public Enterprises Act 2002.
- (2) This Act shall come into force on a day to be proclaimed by His Majesty in Council.

#### 2 Interpretation

In this Act, unless the context otherwise requires:

“**board**” means the board of a public enterprise that is subject to this Act;

“**Chief Executive Officer**” means the head of a public enterprise appointed by the board of a public enterprise under this Act;

“**company**” means a company registered under the Companies Act 1995;

“**dividend**” means the payment designated by the board of directors of a public enterprise to be distributed pro rata among the shareholders and in the case of a statutory board the payment designated by a board of directors pro rata to the owners of the enterprise;

“**generally accepted accounting practice**” means standards and practices as prescribed by the Minister by Regulation.

“**interest**” means the ownership, or shareholding in a company, entity or ownership of or title to that shareholding which the Government has in a public enterprise;

“**Minister**” means the Minister of Finance;

“**public enterprise**” means a statutory board, company or other entity in which the Government holds a controlling interest and is listed in the First or Second Schedule in accordance with section 5;

“**subsidiary**” means a statutory board, company or other entity in which a public enterprise has an interest and for which the public enterprise shall account for and comply with the provisions of this Act as if that subsidiary were a public enterprise listed in the Schedule.

## PART II - SCHEME OF ACT

### 3 Effect or application

- (1) This Act shall bind the Crown.
- (2) All public enterprises shall be subject to this Act.

### 4 Non-commercial activities

- (1) When the Government requires a public enterprise to provide goods or services to any persons, at a certain price, the Government and the public enterprise shall enter into an agreement under which the public enterprise shall provide the goods or services in return for the payment by the Government of the whole or part of the agreed price.

- (2) An agreement under subsection (1) shall be in writing and disclose the parties respective financial accounts and shall comply with any enactment applying to Government contracts and tenders.

## **5 Additions and deletions of public enterprises from the Schedule**

- (1) For the purposes of this section “financial assistance” shall exclude a payment made by the Government to a public enterprise under section 4.
- (2) Public enterprises that receive financial assistance from the Government or have existed for less than three years shall be listed in the First Schedule.
- (3) Public enterprises that do not receive financial assistance from the Government and have existed for three years or more shall be included in the Second Schedule.
- (4) Public enterprises listed in the First schedule shall comply with all the provisions of this Act and those listed in the Second Schedule shall be subject only to sections 4, 6, 7, 8,13,15,16, 19, 20, 21, 22, 24, 25, 26, and 27 of this Act.
- (5) The Minister may, with the consent of Privy Council delete or add a public enterprise from or to the First or Second Schedule.

## **6 Relationship to the Companies Act**

- (1) Where a public enterprise is registered under the Companies Act 1995 the provisions of this Act shall apply in addition to and not in substitution of the Companies Act.
- (2) Subject to the Constitution, where the provisions of this Act conflict with the provisions of any other enactment, the provisions of this Act shall prevail.

# **PART III - FORMATION AND OWNERSHIP OF PUBLIC ENTERPRISES**

## **7 Transfer of assets**

Every asset in a public enterprise vested in or held on behalf of the Government shall, on the coming into force of this Act, immediately vest in the public enterprise to which the asset relates and transfer of the asset shall be recorded in accordance with this Act.

**8 Government to hold interest in public enterprise**

- (1) The interests of the Government in all public enterprises shall be held in the name of the Kingdom of Tonga and documents relating to the title in such interests deposited with the Minister of Finance.
- (2) The Minister shall, with the consent of Privy Council, on behalf of the Government sign all documents relating to the title, transfer, assignment, or change in status, of any interests in a public enterprise.

**9 Role of the Minister**

- (1) Subject to the provisions of this Act, the Minister shall, with the consent of Privy Council, exercise all of the rights and powers of the shareholder and owner of the Government's interests in public enterprises.
- (2) The Minister shall be responsible for the exercise or performance of the powers, duties and functions conferred or imposed on him by this Act.

**10 Minister may subscribe or acquire shares in public enterprises**

- (1) The Minister may, with the approval of Privy Council, subscribe for or acquire shares in a public enterprise to be formed.
- (2) All money required to be paid by the Government in subscribing or acquiring shares shall be paid out of money appropriated by the Legislative Assembly for that purpose.

**11 Powers of Minister relating to corporate intent**

- (1) Notwithstanding any other provision of this Act, the Minister may, by written notice direct the —
  - (a) board to include in, or omit from, a statement of corporate intent for that public enterprise any provision or provisions as specified in section 18(4), (a) - (f);
  - (b) Chairman of the board to include in the statement of corporate intent for that public enterprise, such provision as the Minister considers necessary —
    - (i) to fulfil any obligation or undertaking arising from any international convention, agreement or arrangement to which the Government is a party; or
    - (ii) to implement any policy of the Government in respect of the Government's international relations;



and any board to whom such a notice is given shall comply with the notice.

- (2) The Minister shall, before giving any notice under this section, consult the board concerned.

## PART IV - DIRECTORS

### 12 Directors

- (1) A person holding office as a Chairman, Director, Chief Executive Officer or other officer in a public enterprise immediately before the commencement of this Act shall continue to hold that position as if that person had been appointed under this Act subject to termination or confirmation at a date to be fixed by the Minister.
- (2) Where a person has not been appointed to a vacancy created under subsection (1), the Minister may, with the approval of Privy Council, appoint a member to fill that vacancy.
- (3) The Minister shall, with the consent of Privy Council, fix the amount of remuneration directors shall receive.
- (4) There shall be no less than 3 and no more than 7 directors appointed to a board, one of whom shall be appointed as Chairman.

### 13 Directors roles

A director shall act in good faith in the best interests of the public enterprise and shall —

- (a) not act, or agree to the public enterprise acting, in a manner that contravenes the law or the constitution of the public enterprise;
- (b) not agree to, cause or allow the business of the public enterprise to be carried on in a manner likely to create a substantial risk of serious loss to the enterprise's creditors;
- (c) not agree to the enterprise incurring an obligation unless the director believes at the time on reasonable grounds that the enterprise shall be able to perform the obligation when it is required to do so.

## **14 Appointment and termination of directors to boards of public enterprises**

- (1) The Minister shall, with the consent of Privy Council, appoint directors to the boards.
- (2) The Minister may, with the consent of Privy Council, appoint any person as a director by virtue of his holding a specific public office and where that person ceases to hold such office he shall be replaced by the person assuming that office.
- (3) Each director shall be appointed for a term of 3 years and may be re-appointed.
- (4) A director may be removed from a board by the Minister for incompetence, incapacity, bankruptcy, neglect of duty, or misconduct on the advice of and after investigation by the Attorney General.
- (5) Where a public enterprise fails to comply with its obligations under Part IV and Part V a director, as a member of the board of the enterprise concerned, may be removed from the board by the Minister.

## **15 Board meetings and quorum**

- (1) A board shall meet at least once every two months and at such other times as the Chairman may require.
- (2) A board meeting shall have a quorum of the Chairman and at least half of the other members.

## **16 Powers of board**

- (1) A board shall have all of the powers provided for in the public enterprise's governing Act or in its constitution and the Companies Act 1995, which shall include the power:
  - (a) to hold, improve, manage, develop, alter, extend, equip, furnish, repair and maintain that public enterprise;
  - (b) to enter into any covenants or agreements in respect of the public enterprise;
  - (c) to sell or dispose of, turn to account or otherwise deal with any property vested in the public enterprise;
  - (d) to direct the board of a subsidiary where it has a controlling interest, by written notice to amend the statement of corporate intent to be consistent with that of the public enterprise.
  - (e) in a subsidiary where the public enterprise has a controlling interest determine by written notice the amount of dividend payable by that

- subsidiary in respect of any financial year or years and a subsidiary to whom such notice is given shall comply with the notice;
- (f) to exercise any functions or rights and undertake and perform any liability in respect of or in connection with the public enterprise as if the public enterprise were a natural person;
  - (g) to borrow money for the purposes of the commercial enterprise; and
  - (h) to do all such other things as are incidental or conducive to the exercise of the power of the public enterprise.
- (2) Before giving any notice under subparagraphs (d) and (e) a board shall:
- (a) except in the case of an emergency consult with the board of the subsidiary, if that board has members other than members of the board of the public enterprise as to the matters to be referred to in the notice;
  - (b) send a copy within 14 days after it is given to the Minister who shall transmit a copy of the notice to Cabinet within 14 days.

## PART V - ACCOUNTABILITY

### 17 Balance sheet

- (1) The Chairman of the board shall, within 6 months of the coming into force of this Act, deliver to the Minister, in accordance with generally accepted accounting practice, a balance sheet of the public enterprise that shall include its estimated value.
- (2) The Chairman shall provide, where it is not possible to fix an estimated value in the public enterprise –
  - (a) a statement explaining why the estimated value cannot be fixed; and
  - (b) a statement advising within what period the Chairman expects to be able to provide the estimated value of the public enterprise or Government's interest in the public enterprise.
- (3) The Chairman of the board shall provide a full valuation of the public enterprise within 12 months of the coming into force of this Act.
- (4) The Minister shall within 14 days after the balance sheet is provided, table a copy in Cabinet.

**18 Statement of corporate intent**

- (1) The Chairman of the board shall deliver to the Minister a draft statement of corporate intent not later than 1 month before the commencement of each financial year.
- (2) The board shall cause a subsidiary, in which the public enterprise has a controlling interest, to deliver its draft statement of corporate intent to the board in sufficient time to enable the board to consider, review and submit that draft statement together with the public enterprise's draft statement in accordance with subsection (1).
- (3) Where it is not practicable for a board to supply a draft statement in accordance with subsection (1), the Chairman of the board shall provide to the Minister its reasons for not doing so in writing.
- (4) Each statement of corporate intent shall specify, in respect of the next financial year —
  - (a) the objectives of the public enterprise;
  - (b) the nature and scope of the activity to be undertaken;
  - (c) the performance targets and other measures by which the performance of the public enterprise may be judged in relation to its objectives;
  - (d) a statement of financial performance;
  - (e) a statement of financial position;
  - (f) a statement of anticipated borrowing;
  - (g) a statement of the principles adopted in determining the annual dividend;
  - (h) any activity from which the public enterprise seeks compensation from the Government;
  - (i) such other matters as are agreed by the Minister and the board; and
  - (j) a projection of corporate intent for the following two years.
- (5) Each statement of corporate intent shall also include the estimates of the current commercial value of the Government's investment in the public enterprise and a statement of the manner in which the value was assessed.
- (6) A board shall consider any comments made on the draft statements of corporate intent by the Minister no later than 14 days before the commencement of the financial year, and shall deliver the completed statement of corporate intent to the Minister on or before the commencement of the financial year or such later date as the Minister may determine.
- (7) A statement of corporate intent may be modified at any time by the board provided —

- (a) that the Minister has received written notice of the proposed modification; and
- (b) the Minister's comments made thereon have been conveyed to the board within 1 month of the date from which the notice was given.

## **19 Half-yearly reports**

- (1) The Chairman of the board shall deliver to the Minister a report of the operations of the public enterprise within 2 months after the end of the first half of each financial year.
- (2) The report required under subsection (1) shall include the information to be provided in the statement of corporate intent required under this Act.

## **20 Annual report and accounts**

- (1) The Chairman of the board shall deliver to the Minister —
  - (a) a report of the operations of the public enterprise and the consolidated financial statements for that financial year consisting of statements of financial position, financial performance, changes in financial position, and any other necessary statements within 3 months of the end of each financial year; and
  - (b) an audit report on the financial statements within 6 months of the end of the financial year.
- (2) The reports under subsection 1(a) shall:
  - (a) contain such information as is necessary to enable an informed assessment of the operations of the public enterprise including a comparison of the performance of the public enterprise with the relevant statement of corporate intent; and
  - (b) state the dividend payable to the Government by the public enterprise for the financial year to which the report relates.

## **21 Dividends**

- (1) A board shall pay dividends to the Government.
- (2) The board shall meet with the Minister six months after the end of each financial year and agree upon the principles upon which the dividend for that year shall be paid.
- (3) The dividend shall be paid into the General Revenue Account.

**22 Information to be presented to the Legislative Assembly**

- (1) The Minister shall table in Privy Council and the Legislative Assembly, within 28 days of receiving them and if the Legislative Assembly is not in session forthwith at the next ensuing session, the following documents in respect of each public enterprise —
  - (a) the annual report; and
  - (b) the half yearly report.
- (2) The Minister shall within 1 week of tabling them before the Legislative Assembly publish a notice in the Gazette where the documents can be inspected and the prescribed fee.

**23 Other information**

- (1) Subject to subsection (2), the board shall supply to the Minister or any other person, such information relating to the affairs of the public enterprise as the Minister shall direct.
- (2) The Chairman of any board may direct an officer or employee of a subsidiary over which it holds a controlling interest, or in any other case with the consent of the board of the subsidiary, to comply with a direction under subsection (1).
- (3) No person who acts in accordance with this section shall be liable under any other Act, as a result of complying with a direction under subsection (1).

**24 Audits and the role of the Auditor General**

Every public enterprise shall engage, with the approval of the Minister, an auditor qualified under section 208 of the Companies Act 1995 to audit its financial statements.

**25 Protection from disclosure of sensitive information**

- (1) Nothing in this Act shall be construed as requiring any public enterprise or subsidiary of a public enterprise to include in any report required under this Act any information which in the opinion of the board could damage the commercial interests of the public enterprise or its subsidiary and could, except for the provisions of this Act, be properly withheld.
- (2) Should the person requiring the information challenge a refusal by the board to disclose any information, the question may be referred to the Supreme Court by either party.

- (3) On receipt of a question under subsection (2), the judge shall allow the parties 14 days to make submissions in writing and shall give his ruling within 28 days of first receiving the question and such decision shall be final.
- (4) For the determination of any such question, the judge may require the information from the party refusing disclosure but shall not disclose it to the other party.

## **PART VI - CHIEF EXECUTIVE OFFICER**

### **26 Chief Executive Officer**

- (1) The board shall with the approval of the Minister, appoint a Chief Executive Officer who shall be responsible for managing the public enterprise and implementing the decisions of the board.
- (2) The Chief Executive Officer shall be employed under a written performance based contract of employment with the public enterprise which shall contain the following minimum provisions:
  - (a) the objectives to be achieved by the public enterprise;
  - (b) the performance expected of the public enterprise;
  - (c) a review of the performance of the Chief Executive Officer;
  - (d) adherence by the Chief Executive Officer to the public enterprise statement of corporate intent produced under this Act.

### **27 Support staff**

The Chief Executive Officer may, with the approval of the board, employ such support staff as are necessary for the effective and efficient administration of the public enterprise.

## **PART VII - MISCELLANEOUS**

### **28 Transfer of interests**

- (1) The Minister shall, on behalf of the Government, execute all transfers or assignments to the public enterprise under section 7.
- (2) The transfer or assignment under this section shall not entitle any person to terminate, alter, or in any way affect the rights or liabilities of the

public enterprise, the transferee or assignee under any other Act or agreement.

### **29 Provision of information by subsidiary to public enterprise**

Every subsidiary shall supply to the public enterprise holding the controlling interest, such information as is necessary to enable the public enterprise to fulfil and comply with the public enterprise's reporting responsibilities under this Act.

### **30 Appointments in contravention of this Act**

- (1) The appointment of a person as director or Chief Executive Officer in contravention of the provisions of this Act shall be void.
- (2) A director appointed in good faith in contravention of this Act shall be deemed to have resigned his office from the date that he is advised of that fact by the Minister.
- (3) A Chief Executive Officer appointed in good faith in contravention of this Act shall be deemed to have resigned his office from the date that he is advised of that fact by the Chairman of the board.

### **31 Regulations**

The Minister may, with the consent of Cabinet, make Regulations for the proper and efficient administration of this Act.

Passed in the Legislative Assembly this 21st day of October, 2002.



**FIRST SCHEDULE**

(section 5(2))

**PUBLIC ENTERPRISES SUBJECT TO ALL OF THE PROVISIONS OF  
THIS ACT:**

International Dateline Hotel Ltd.

Royal Tongan Airlines Ltd.

Shipping Corporation of Polynesia Ltd.

Tonga Corporation

Tonga Broadcasting Commission

Tonga Electric Power Board

Ports Authority

Tonga Water Board

Leiola Duty Free Ltd.

Tonga Timber Ltd.

Tonga Investment Ltd.

Tonga Development Bank

**SECOND SCHEDULE**

(Section 5(3))

**PUBLIC ENTERPRISES SUBJECT TO CERTAIN PROVISIONS OF  
THIS ACT:**

Tonga Communications Corporation Ltd.