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PUBLIC ENTERPRISES ACT

2007 Revised Edition

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PUBLIC ENTERPRISES ACT

AN ACT TO ESTABLISH THE OBJECTIVES, RULES AND PROCEDURES RELATING TO PUBLIC ENTERPRISES¹

Commencement [31st March 2003]²

PART I - PRELIMINARY

1 Short title

This Act may be cited as the Public Enterprises Act.

2 Interpretation

In this Act, unless the context otherwise requires —

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

“**Cabinet member**” means a person who is a member of Cabinet in accordance with section 12 of the Government Act (Cap 3);

“**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;³

“**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;

“**Government Policy Obligation**” means goods or services provided by a public enterprise, pursuant to a direction from Cabinet, for which the user fees are insufficient to cover the full costs of provision of the goods or services or both and provide a commercial return consistent with the principal objective of the public enterprise;

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

“**Minister**” means the Minister for Public Enterprises;⁴

“**public enterprise**” means an entity listed the Schedule to this Act.

“**public servant**” means a public service employee as defined in the Public Service Act 2002;

“**subsidiary**” means a statutory board, company or other entity in which a public enterprise has a controlling interest, either through the ownership of shares, or the vesting by Government or by the passage of Legislation.

“**user fees**” means fees charged by a public enterprise to a user of goods or services as consideration for the provision of those goods or services.”

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 Objective of Public Enterprises

The principal objective of every public enterprise and subsidiary shall be to operate as a successful business and, to this end, to be as profitable and efficient as comparable businesses that are not state owned.

4A Government Policy Obligations

- (1) The Cabinet may instruct a public enterprise to provide a Government Policy Obligation.
- (2) Where an instruction is issued under subsection (1), the Government and the public enterprise shall enter into a enforceable agreement which shall:
 - (a) be in writing;
 - (b) comply with any enactment applying to Government contracts and the Government's budgetary and procurement process;
 - (c) be subject to approval by Cabinet;
 - (d) record the nature and quantity of the goods and or services to be provided; and
 - (e) specify the total price to be paid for the goods or services.
- (3) For the purposes of subsection (2), the total price of a Government Policy Obligation shall be calculated as the total cost of provision of the goods or services by the public enterprise plus a margin to allow the public enterprise to meet its targeted return on equity as set by the Minister.
- (4) In the case where user fees are insufficient to cover the full cost of the goods or services, the balance of the total price shall be paid by the Government to the public enterprise.

5 Public Enterprises

- (1) The entities that are listed in the Schedule are public enterprises for the purposes of this Act.
- (2) The Minister may, with the consent of Cabinet, delete or add a public enterprise from or to the Schedule.

6 Relationship to the Companies Act

- (1) Where a public enterprise is registered under the Companies Act 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: Number and Remuneration

- (1) There shall be no fewer than three or more than seven directors appointed to a board, one of whom shall be appointed as Chairman.
- (2) The Minister shall, with the consent of Cabinet, fix the amount of remuneration directors shall receive.

13 Role of Directors

- (1) A director of a public enterprise and subsidiary shall act in good faith and in the best interests of the public enterprise, and shall —
 - (a) ensure that the public enterprise and subsidiary conducts its business and all decisions made by the board are in accordance with its principal objective;
 - (b) not act, or agree to the public enterprise and subsidiary acting, in a manner that contravenes the law or the constitution of the public enterprise;
 - (c) not agree to, cause or allow the business of the public enterprise and subsidiary to be carried on in a manner likely to create substantial risk of serious loss to the public enterprise's creditors; or
 - (d) not agree to the public enterprise and subsidiary incurring an obligation unless the director believes at the time on reasonable grounds that the public enterprise shall be able to perform the obligation when it is required to do so.

- (2) Section 138 and 144 of the Companies Act (“Transactions Involving Self-Interest”) shall apply to all directors of a public enterprise and subsidiary whether or not the public enterprise is registered under the Companies Act, and a reference in those provisions to a company shall be deemed to be a reference to a public enterprise and subsidiary.”

14 Appointment and termination of directors to boards of public enterprises

- (1) The Minister, with the consent of Cabinet, shall appoint persons as directors of public enterprises who, in the opinion of the Minister, will assist the public enterprise to achieve its principal objective.
- (2) Subject to this Act, no member of Cabinet or the Legislative Assembly shall be appointed or remain as a director of a public enterprise except in the case where a new public enterprise is established and Government sees the need to appoint Cabinet members for an interim period, not exceeding 12 months from the date the public enterprise is established, to establish the new public enterprise.
- (3) Except as provided in subsection (2) any director who registers as a candidate to the Legislative Assembly shall be deemed to have resigned from the board of the public enterprise upon the date of registration
- (4) Notwithstanding subsection (2), a person who is -
- (a) under 18 years of age;
 - (b) an undischarged bankrupt;
 - (c) prohibited from being a director under the Companies Act;
- or
- (d) not a natural person;
- shall be disqualified from being appointed as a director of a public enterprise.
- (5) Each director shall be appointed for a term of up to three years and may be reappointed.
- (6) A director may be removed from office by the Minister for incompetence, incapacity, bankruptcy, neglect of duty, misconduct, or failing to assist the public enterprise to act in accordance with the principal objective.
- (7) 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 when at least half of the members are present, and if the Chairman is not present, the directors forming the quorum will elect a chairman for that meeting.

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, 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 Additional Funding

A public enterprise may only receive funding from the Government in the form of:

- (a) equity;
- (b) interest-bearing debt;
- (c) debt guarantees; or
- (d) payment for the provision of goods or services.

18 Business Plan

- (1) The Chairman of the board shall deliver to the Minister a draft business plan not later than two months 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).
- (4) Each business plan shall specify, in respect of the next financial year and the two years thereafter –
 - (a) a one-page summary of:
 - (i) how the objective of the public enterprise will be achieved;
 - (ii) the strategies to be pursued to achieve the objective; and
 - (iii) key performance targets, which shall include but not be limited to projections of revenues, net profit after tax and return on average equity;
 - (b) the nature and scope of the activities 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 objective;
 - (d) a forecast statement of the financial performance for each financial year of the plan;
 - (e) a forecast statement of financial position for each financial year of the plan;
 - (f) a statement of any anticipated borrowing;
 - (g) a statement of principles adopted in determining the annual dividend;
 - (h) any Government Policy Obligations from which the public enterprise seeks compensation from the Government;
 - (i) a statement outlining the governance policies and practices, including accountability standards and key performance indicators relating to the management of all subsidiaries;
 - (j) such other matters as are agreed by the Minister and the board; and

- (k) projections of cash flow for the following six years, or such longer term as agreed between the board and Minister, including explanations of the strategies and the key assumptions upon which the projections are based.”
- (5) Prior to the board adopting the business plan it shall be submitted to the Minister for review and the Minister shall submit comments to the board for consideration no later than 30 days of receiving the draft business plan.
- (6) A board shall consider any comments made on the draft business plan by the Minister and shall deliver the completed business plan to the Minister on or before the commencement of the financial year or such later date as the Minister may determine.

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 a comparison of the performance of the public enterprise with the business plan 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 business plan;
 - (b) state the dividend payable to the Government by the public enterprise for the financial year to which the report relates; and
 - (c) state the performance achieved against targets and total revenue received during the year by the public enterprise from the Government or other sources of consideration for undertaking an agreement in response to a Government Policy Obligation.

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 Cabinet, within one month of receiving them, the annual report of each public enterprise.”
- (2) The board of public enterprise shall cause a brief summary of the annual report of the public enterprise and any of its subsidiaries to be published within 2 months in a Tongan newspaper in both the Tongan and English language after the Annual Report is adopted by the board of the public enterprise. Such publication shall include:
 - (a) a comparison of revenues, net profit after tax, return on average equity, and non-financial performance targets with those projected in the business plan for the same year;
 - (b) projected revenues, net profit after tax, and return on average equity, and non-financial performance targets in the business plan for the next financial year;
 - (c) where the copy of the annual report can be obtained or inspected, including the fee prescribed by the Minister.
 - (d) a brief statement describing all financial transactions entered into between the public enterprise, its subsidiary and the Government in the preceding year, including:
 - (i) any injection of capital whether in the form of debt or equity, the amount, the rate of interest, if applicable, and any repayment terms;
 - (ii) the total amount of debt guarantees issued by the Government in favour of the public enterprise;
 - (iii) the total amount paid by the Government for the provision of goods or services and, where that amount exceeds 10 percent of the annual revenue of the public enterprise, a brief description of the goods or services purchased; and
 - (iv) any other payments made by the Government, and where such payments exceed 10 percent of the capital of the public enterprise, a brief description of the reason for the payment and whether the public enterprise must repay all or any of the payment made.

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

- (1) Every public enterprise shall engage, with the approval of the Minister, an auditor qualified under section 208 of the Companies Act⁵ to audit its financial statements.
- (2) The Minister may require the Auditor General to conduct an audit of a public enterprise. Upon receipt of such request in writing by the Minister, the Auditor General shall conduct an audit forthwith.

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 and available for public disclosure, 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) If any person seeks to challenge the decision of the board to withhold information under subsection (1) they shall present their arguments to the Minister, whose determination will be final.

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.

32 Additional provisions dealing with directors

A public servant may be appointed or continue to be a director in a public enterprise, subject to the following:

- (a) no more than one public servant shall be appointed or continue to serve on the board of any public enterprise at the same time, and if more than one public servant is serving on a board at the time this Act comes into force, the Minister shall determine which public servant may continue to serve and shall immediately notify the public servants and public enterprise of his determination in writing; and
- (b) no public servant may serve as chairman of a public enterprise.

33 Management of Public Enterprise Subsidiary

The board of public enterprise shall ensure that governance and management of every subsidiary is conducted in a manner that is consistent with the standards of governance and management that are established by this Act. In particular the board of the public enterprise shall ensure that:

- (a) each subsidiary prepare a business plan that includes the information set out in section 18(4) of this Act and any such other matter as may be agreed between the board of the public enterprise and the board of the subsidiary;
- (b) directors are appointed to the board of the subsidiary on the basis that the public enterprise believes on reasonable grounds that the person is the best qualified to assist that subsidiary achieve the principal objective; and
- (c) rules are adopted for every subsidiary dealing with the appointment and removal of directors, the constitution of a quorum of directors, the frequency of meetings, the conduct of director performance reviews and the remuneration of directors.

SCHEDULE

(section 5(1))

PUBLIC ENTERPRISE SUBSIDIARIES

1. Ports Authority
2. Shipping Corporation of Polynesia Limited
3. Tonga Airports Limited
4. Tonga Broadcasting Commission
5. Tonga Communications Corporation Limited
6. Tonga Development Bank
7. Tonga Investments Limited
8. Tonga Post Limited
9. Tonga Power Limited
10. Tonga Print Limited
11. Tonga Timber Limited
12. Tonga Water Board
13. Tongatapu Market Limited

ENDNOTES

¹ Act 25 of 2002

Amended by Act 13 of 2006, commencement 3 October 2006

² See LN 3/2003

³ Cap 40.06

⁴ Amended by Act 13 of 2006

⁵ Cap 40.06