



Tonga

# **BANKING ACT 2020**

**Act 27 of 2020**





## BANKING ACT 2020

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# BANKING ACT 2020

Act 27 of 2020

## AN ACT TO PROVIDE FOR THE LICENCING AND SUPERVISION OF BANKS AND FOR PURPOSES CONNECTED THERETO

I assent,  
TUPOU VI,  
25<sup>th</sup> February 2021.

**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

This Act may be cited as the Banking Act 2020.

#### 2 Interpretation

In this Act, unless the context otherwise requires—

“**acting in concert**” means acting pursuant to an agreement, arrangement or understanding, whether formal or informal;

“**affiliate**” means a company wherein another company's shareholding is at least 20 percent but not more than 50 percent of the issued shares or where that

other company has the power to exercise significant influence over the policies of management of the company;

**“annual percentage rate”** means the aggregate rate per annum in percentage consisting of interest, processing fees, service charges and any other charges or fees realised by the bank on any loans provided to any customer;

**“associated person”** means a person in a bank who—

- (a) directly or indirectly controls the management;
- (b) owns directly or indirectly 20 percent or more in nominal value of the equity share capital, as defined in the Companies Act 1995;
- (c) is directly or indirectly controlled by the bank; or
- (d) owns directly or indirectly 20 percent or more of the equity share capital, as defined in the Companies Act 1995;

**“bank”** means any company engaged in banking business and other financial activities, as determined in the licence granted by the Reserve Bank under this Act;

**“banking business”** is as defined in the National Reserve Bank of Tonga Act (Cap 102);

**“Board”** is as defined in the National Reserve Bank of Tonga Act (Cap. 102);

**“close relatives”** means any person who is related to a director, officer or employee (“such persons”) of a bank- (a) by marriage, blood or kinship, including adopted children or foster children of such persons; and (b) the spouse, father, mother, brother or sister of such persons;

**“connected parties”** is as defined in subsection 35(1) of this Act;

**“creditor”** means a creditor who may be both secured and unsecured, where –

- (a) “secured creditors” have security over property of the bank; and
- (b) “unsecured creditors” are creditors who do not have security for the debt;

**“deposit”** means a sum of money paid to a bank on condition that it is to be repaid in full by that bank, with or without interest or premium either on demand or at an agreed time;

**“depositor”** means any person who holds a deposit with the bank;

**“director”** means a natural person occupying the position of a director, by whatever name called, of a body corporate, and “board of directors” or “directors” refers to the directors of a body corporate as a body;

**“disclosures”** means special information required to be included in the financial statements in accordance with internationally accepted accounting standards and applicable Acts and regulations, as determined by the Reserve Bank;

**“document”** is as defined in the Evidence Act (Cap. 15);

“**financial activity**” means an activity as defined under section 20 of this Act;

“**financial institution**” is as defined in the National Reserve Bank of Tonga Act (Cap. 102) ;

“**financial statement**” means the following documents- balance sheet (showing assets, liabilities and equity), income statement, cash flow statement and equity statement (showing changes in equity), in accordance with internationally accepted accounting standards, as determined by the Reserve Bank;

“**fit and proper**” means a person whose qualifications, background and experience, financial position, or business interests qualify that person in the judgment of the Reserve Bank to be a director, officer, employee, auditor or shareholder of a bank, as further prescribed in a prudential statement of the Reserve Bank;

“**group of interrelated persons**” means two or more persons holding exposures from a bank, whether on a joint or separate basis, who are considered as a single borrower because they meet at least one of the following criteria-

- (a) the exposure to those persons constitute a single exposure because of the fact that one of them directly or indirectly exercise control over the others;
- (b) although the persons to whom the bank is exposed are different entities, they are so interconnected that if one of them experiences financial difficulties, another one or all of them are likely to experience financial problems;
- (c) the persons are affiliates within the meaning of this Act; or
- (d) those persons have common control;

“**investor**” means any person who invests in any bond, note or any other security issued by the bank;

“**large credit exposure**” means any advance, credit facility, financial guarantee or other risk exposure or liability granted by a bank or its subsidiary to any person or company, or a group of interrelated persons that exceeds 20 percent but is not more than 25 percent of the bank capital as determined by the Reserve Bank;

“**licence**” means a licence granted or held under section 8;

“**manager**” means an officer of a bank who is the chief executive officer, country head of a foreign incorporated bank, any other officer who reports directly to the chief executive officer or the country head or any officer who has direct or matrix reporting responsibilities to the bank’s head office offshore;

“**minimum capital**” means the capital of a bank as prescribed under section 14 of this Act;

“**Ministry**” means the Ministry responsible for finance;

“**Parent Bank**”, in relation to a bank, means a financial institution which is able to exercise a significant influence over the direction and management of the bank or which has a controlling interest in the bank;

“**person**” means any individual or company, partnership, syndicate, association or body of persons, corporate or unincorporated;

“**policy rate**” means the rate that is used by the Reserve Bank to implement or signal its monetary policy stance;

“**prudential banking standard**” for the purposes of this Act and the National Reserve Bank of Tonga Act (Cap. 102), means a statement issued by the Reserve Bank in accordance with section 19 of this Act;

“**public holiday**” means a public holiday as defined in the Public Holidays Act;

“**regulatory capital**” means the amount of capital resulting from the application of the ratio of Total Capital-to-Risk-Weighted Assets or “capital adequacy ratio”, which shall be maintained at all times by a bank, individually or on a consolidated basis, as determined by the Reserve Bank;

“**Reserve Bank**” means the National Reserve Bank of Tonga established under the National Reserve Bank of Tonga Act (Cap. 102);

“**significant influence**” means having an interest in a person that makes it possible to exercise a direct or indirect power to determine the management or policies of such person;

“**significant ownership**” means a person, who holds, directly or indirectly, or otherwise has a beneficial interest in, more than 10percent of the share capital of a bank;

“**subsidiary**” means any legal person in which another person or group of persons acting in concert- (1) holds the equivalent of 50percent or more of the voting shares of such legal person; or (2) may exercise a significant influence that permits such other person or group of persons to determine the management or policies of such legal person;

“**supervision**” means to ascertain that regulations, rules, orders, directions, or prudential banking standards are complied with, investigating, inspecting or examining to determine whether an institution is conducting its business on a sound financial basis, and inquiring into the solvency and liquidity of the institution;

“**unsafe or unsound practice**” means an action or inaction in the operation of a bank that is contrary to generally accepted standards of banking and prudent operation, the likely consequences of which, if continued, would be a material risk of loss or danger to a bank, the depositors, creditors, and financial stability.

## PART II—LICENSING OF BANKS

### 3 Licence for banking business

- (1) No person shall conduct banking business, for which a licence is required, unless he has been issued with a licence under this Act or Regulation or any other Act or Regulation.
- (2) The Reserve Bank may require for examination, from any person, books, accounts and records if it has reason to believe he is in contravention of subsection (1).
- (3) Any person who contravenes the provisions of subsection (1) commits an offence and is liable on summary conviction –
  - (a) in the case of a bank, to a fine of \$200,000, and in the case of a continuing offence, to a further penalty of \$10,000 for each day on which the offence is continued after conviction;
  - (b) in the case of a director or a manager, to a fine of \$100,000 or to imprisonment for a term not exceeding 10 years or to both such fine and imprisonment and in the case of a continuing offence, to a further penalty of \$5,000 for each day on which the offence is continued after conviction.
- (4) A person holding funds which he has obtained in contravention of subsection (1) shall repay such funds as directed by the Reserve Bank. Any person who fails to comply with any such direction is guilty of an offence and is liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 10 years or to both and in the case of a continuing offence to a further \$5,000 for each of contravention continued after conviction.

### 4 Pyramid schemes

- (1) For the purposes of this section, a:
  - (a) “**Pyramid Scheme**” means, any person, who directly or indirectly, initiates, offers, advertises, conducts, finances, manages, supervises or directs a scheme where profits earned by participants in the scheme largely depend on increases in the number of participants in the scheme or in the size of their contributions to the scheme; and
  - (b) “**Ponzi Scheme**” means, any person, who directly or indirectly, initiates, offers, advertises, conducts, finances, manages, supervises or directs an investment operation that pays returns to its investors other than from profits of the bank,
- (2) Any person who conducts activities under subsection (1), commits an offence and such person shall be liable upon conviction to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding 30 years or both.

## 5 “Bank” name restriction

- (1) Every licensed bank shall use as part of its name the word “bank” unless the Reserve Bank otherwise permits.
- (2) The word “bank” or its derivative shall be used only by a bank licensed under this Act.
- (3) Notwithstanding subsection (2), the Reserve Bank may approve the use of the word “bank”—
  - (a) in the name of a foreign bank authorised by the Reserve Bank to establish a representative office in Tonga; or
  - (b) where its use is such that there is no risk of harm to the public from it.
- (4) No bank shall be granted a licence under a name which so closely resembles the name of an existing bank and is likely, in the opinion of the Reserve Bank, to mislead the public.
- (5) No bank shall change its name or use a name other than that under which it was licensed, without the prior written consent of the Reserve Bank.

## 6 Existing banks deemed licensed

- (1) The banks specified in the Schedule to this Act are banks for purposes of this Act.
- (2) Notwithstanding the provisions of any other law, a Notice by the Reserve Bank shall be published in the Gazette to add or remove a bank.

## 7 Application

- (1) Any person may apply for a licence under this Act to operate a banking business, for which a license is required, as determined by the Reserve Bank.
- (2) An application for a licence under this section shall be—
  - (a) made in writing to the Reserve Bank in the prescribed form; and
  - (b) accompanied by the prescribed application fee.
- (3) Every person who makes an application under subsection (2)(a) shall furnish such information, and documents, as the Reserve Bank may specify.
- (4) Any person who knowingly furnishes false or misleading information or document, in connection with an application under this Act, is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000, and the licence may not be granted.

## 8 Consideration of application

The Reserve Bank in considering any application for a licence made under section 7 under this Act, shall consider —

- (a) the ability of the applicant to carry on the proposed business, that the proposed directors and management are fit and proper in accordance with prudential banking standards issued by the Reserve Bank, and those persons who will own 5 percent or more of the voting shares of the applicant;
- (b) the proposed legal and managerial structures that may hinder effective supervision, including supervision on a consolidated basis;
- (c) the effectiveness of accounting, internal controls, audit and risk management systems that the applicant will put in place;
- (d) where the applicant is a bank and an overseas company, evidence of—
  - (i) incorporation in home country;
  - (ii) current bank licence in home country;
  - (iii) relevant law and regulatory requirements relating to licensing and supervision of bank in home country; and
  - (iv) being subject to comprehensive supervision and regulation on a consolidated basis by the appropriate authorities in home country and such authorities have no objection to the applicant carrying on banking business in Tonga;
- (e) the proposed legal and managerial structures does not hinder effective supervision, including supervision on a consolidated basis; and
- (f) such other matters as the Reserve Bank considers relevant.

## 9 Outcome of application

- (1) The Reserve Bank shall, within three months of receipt consider the application and inform the applicant of its decision.
- (2) The Reserve Bank shall, where the decision under subsection (1) is in favour of the applicant, issue to the applicant a licence subject to terms and conditions as may be specified in the licence.
- (3) A copy of the licence issued under this section shall be displayed conspicuously in places of business of the bank.
- (4) The licence shall remain valid unless revoked under this Act.
- (5) The Reserve Bank may charge and collect a licence fee for each year that a license is in effect and which shall be paid by a bank on the anniversary of the date of its licence being granted.

- (6) Where a bank fails to pay the annual licence fees as prescribed under subsection (5), the bank is liable to a penalty equivalent to three times the annual licence fee and a further penalty of \$1,000 for each day of default.

## 10 Requirements and limits on licence

- (1) No person other than a company shall be granted a licence to do banking business under this Act.
- (2) Financial institutions shall be licensed either as banks or as non-bank financial institutions where non-bank financial institutions are required to be licensed as determined by the Reserve Bank in accordance with this Act or Regulations or any other Act or Regulations.
- (3) A licence issued under this Act cannot be assigned or transferred and any purported assignment or transfer shall be null and void.

## 11 Revocation of licence

- (1) The Reserve Bank may revoke any licence to carry on banking business if the bank –
  - (a) fails to commence operations within a period of twelve months following the granting of the licence;
  - (b) in connection with the application for the licence, provided false, misleading or inaccurate information or suppressed material information;
  - (c) to comply with the conditions of its licence or the measures required by the Reserve Bank in accordance with section 8 of this Act;
  - (d) is in breach of any of the provisions of this Act which is applicable;
  - (e) fails to maintain sufficient capital or liquidity to meet its liabilities;
  - (f) has not fulfilled or is unlikely to fulfil the minimum criteria for licensing under this Act;
  - (g) merges or amalgamates with another company or bank and the licence is no longer required; or
  - (h) loses or the parent company of the bank loses its authorization to conduct banking business or business of a financial nature in its home jurisdiction or bankruptcy or insolvency proceedings have been or are to be initiated.
- (2) Where the decision referred to in subsection (1) is to revoke the licence, the bank shall be notified and such notice shall include a statement of the reasons for the decision.
- (3) Notice under subsection (2) shall be served at the last known address of the bank.
- (4) Where a licence to carry on banking business has been revoked, the Reserve Bank shall, as soon as possible cause a notice of the revocation to be published

in the Gazette and a newspaper circulating in the country and cause such other steps to be taken as it considers necessary to inform the public of the revocation.

## **12 Reserve Bank to authorize changes to the constitution**

- (1) A bank, who intends to alter its constitution concerning a matter prescribed under this Act, shall obtain prior authorization from the Reserve Bank. The bank shall furnish any other information required by the Reserve Bank.
- (2) A bank shall provide a copy of its amended Constitution to the Reserve Bank within 7 days of the amendment being adopted.
- (3) A bank that purports to amend its Constitution without first obtaining the approval of the Reserve Bank for a matter that requires prior approval of the Bank, the amendment will be deemed to be void.
- (4) A bank that acts in contravention of this section is, if convicted, guilty of an offence and is liable to a fine not exceeding \$100,000.

## **13 Reserve Bank to authorize changes**

- (1) A bank shall obtain prior authorisation from the Reserve Bank, in the event of an application to the Court under the Companies Act to propose a compromise or arrangement involving that bank. A bank shall also furnish the Reserve Bank, as the case may be, with –
  - (a) a notice of every meeting ordered by the Court; and
  - (b) a statement explaining the effect of the compromise or arrangement under the Companies Act.
- (2) A bank incorporated in Tonga may, with the written consent of the Reserve Bank —
  - (a) effect a merger
  - (b) amalgamate;
  - (c) consolidate; or
  - (d) purchase and assume assets of, any other bank.
- (3) The applicant under subsection (1) shall furnish the Reserve Bank with any information required.
- (4) The Reserve Bank shall consider whether —
  - (a) the proposal will result in a substantial lessening of competition, in financial services;
  - (b) the bank will comply with this Act as a result of the transaction; and
  - (c) the transaction is consistent with the public interest.

- (5) Any bank, its directors or managers, who act in contravention of this section, commits an offence and shall be liable upon conviction to a fine not exceeding \$100,000.

## **PART III—CAPITAL AND RESERVES**

### **14 Minimum capital**

- (1) Every bank licensed under this Act shall maintain—
- (a) if incorporated in Tonga, paid up capital and reserves; and
  - (b) if incorporated abroad, assigned capital and reserves in Tonga;
- in such minimum amount and proportion as the Reserve Bank may specify having regard to internationally accepted capital standards. Such proportion shall not be less than 8percent of the total risk weighted assets for a licensee incorporated in Tonga.
- (2) The minimum amount specified under subsection (1) for the issue of a licence under section 8 of this Act shall not be less than \$2,000,000.
- (3) The Reserve Bank may specify minimum capital standards for the consolidated group in the case of a bank incorporated in Tonga.

### **15 Restrictions on dividends**

- (1) No bank shall declare or pay any dividend or make any other transfer or remittance from profits—
- (a) if this would contravene section 14 or section 33 of this Act; and
  - (b) where the payments would exceed earnings in the year to which they relate without the prior approval of the Reserve Bank.
- (2) Any bank which contravenes subsection (1), is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000.

### **16 Transfer of shares**

- (1) Subject to subsection (2), a bank may, with the prior written approval of the Reserve Bank, implement a transfer of its share capital.
- (2) The Reserve Bank shall determine a transfer of share capital under subsection (1) by considering the following—
- (a) any agreed sale, transfer or other disposition of share capital, and issue or allotment of any new share capital;
  - (b) any proposed compromise or arrangement where application has been made to the Court under the Companies Act; and

- (c) any other event or scheme which directly or indirectly affects transfer of ownership or powers exercisable over the paid up shares.
- (3) The application under subsection (1) shall include such documents and information as the Reserve Bank may require.
- (4) In determining an application under subsection (1), the Reserve Bank shall -
  - (a) assess the expected effects on the financial soundness of the bank; and
  - (b) conduct a background check of the applicants and satisfy itself as to the identity and character of the proposed owners.
- (5) The Reserve Bank shall not approve any application if -
  - (a) it is not satisfied as to any of the matters in subsection (3);
  - (b) anti-competitive effects will be clearly outweighed by the transactions expected positive effects;
  - (c) the proposed change will result in an environment of unhealthy competition or monopolistic practices;
  - (d) the transaction will be detrimental to the banking or financial system of the Kingdom; or
  - (e) the ownership or control structure hinders effective supervision on a solo or consolidated basis, and may at any time, add to, vary or revoke any term or condition imposed on the bank.
- (6) A bank that –
  - (a) is or becomes aware of a proposed acquisition of control under subsection (1) shall give a notice to the Reserve Bank, as soon as practicable, but no later than 30 consecutive days from the date of its awareness, indicating in such notice the grounds of the respective proposed transaction; or
  - (b) becomes aware of circumstances that indicate that any of the proposed owners or the present owners and, in particular, owners exercising a control over the bank, are no longer fit and proper persons, shall notify the Reserve Bank within 10 days of such knowledge.

## 17 Sanctions

- (1) In the event that the Reserve Bank, determines that any person has contravened section 16 of this Act, the Reserve Bank may take one or more of the following actions –
  - (a) issue an order requiring the divestment of so much of the offending interest as is necessary to secure compliance with the provisions of section 16 of this Act;
  - (b) prohibit the payment of dividends in respect of the shares; or
  - (c) prohibit the issue of bonus shares or rights issue in respect of the shares

- (2) Where the Reserve Bank has issued an order under paragraph (1)(a), the owner or nominee of the owner of the offending interest shall be prohibited from exercise of voting rights in respect of the shares.
- (3) Any purported transfer of shares made in contravention of section 14 of this Act shall be null and void.

## **18 Preservation of assets**

- (1) Where a bank is –
  - (a) unable to meet its obligations or suspending payment; and
  - (b) incorporated outside Tonga, in the event of its liquidation, bankruptcy or dissolution in its country of incorporation,
  - (c) the assets of the bank in Tonga shall be applied to meet its deposit liabilities in Tonga in priority to all other liabilities.
- (2) Every bank shall at all times hold assets in Tonga of a value not less than the total amount of its deposit liabilities in Tonga.

# **PART IV—SUPERVISION OF BANKS**

## **19 Reserve Bank to supervise banks**

- (1) The Reserve Bank shall undertake prudential supervision of banks in order to maintain public confidence in the operation and stability of the financial system and to protect the interests of depositors, investors, and creditors.
- (2) The Reserve Bank may require banks and any affiliates or subsidiaries or associated persons or those persons exercising control as defined under this Act to file with the Reserve Bank such returns, financial accounts or information relating to their business as may be specified by the Reserve Bank.
- (3) The Reserve Bank may issue in writing prudential banking standards under section 99 of this Act, guidelines, directives, and other acts on regulatory and supervisory matters, including requirements for licensing, ownership and management of banks.

## **20 Permitted financial activities**

- (1) Banks may only engage in the following activities—
  - (a) receiving deposits of money or other repayable funds from the public;
  - (b) including but not limited to extending credits, consumer and mortgage credit and financing of commercial transactions;
  - (c) buying and selling for its own account or customers' account money market instruments and debt securities;

- (d) providing money transmission services;
  - (e) with the prior approval of the Reserve Bank, buying and selling foreign currencies, including contracts for the future purchase or delivery of foreign currencies;
  - (f) issuing and administering means of payment, such as credit cards, travellers' cheques or bank drafts;
  - (g) safekeeping and administration of valuables, including securities;
  - (h) providing credit reference services; and
  - (i) any other activities approved by the Reserve Bank.
- (2)
- (a) A bank shall apply to the Reserve Bank to own subsidiaries that engage in other activities of a financial nature.
  - (b) The Reserve Bank in considering an application under paragraph (a) shall consider the following—
    - (i) whether the applicant has the financial and managerial resources to engage in the activities applied for in a manner consistent with the public interest; and
    - (ii) the risks which the activity would pose to the bank.
- (3) The Reserve Bank may authorise by directive or prudential banking standard, any prudential requirements and measures to be applied to banks, individually or on a consolidated basis, such as those relating to internal control policies, liquidity, capital, net worth, operations, exposures, classification of assets, interest rate risk, credit risk, currency risk, investment risk or other risks, as required under this Act and any other Act, or as determined by the Reserve Bank in accordance with international sound practices and standards.

## **21 Information to be supplied to Reserve Bank**

- (1) The Reserve Bank may require from a bank for the purposes of section 19 in the specified form—
- (a) not later than 15 business days after the last working day to which it relates, or within such other time period as may be prescribed by the Reserve Bank, a monthly statement of assets and liabilities;
  - (b) not later than 15 business days after the last working day to which it relates, or within such other time period as may be prescribed by the Reserve Bank, a monthly statement of profit and loss;
  - (c) not later than three months after the end of each financial year of the bank, a copy of its audited balance sheet and profit and loss account for that year;
  - (d) a certificate of compliance with section 31(1) and verification that no director or manager (or person specified by the Reserve Bank as

- employed in a management capacity), holds office contrary to section 31 or any directive, prudential banking standards, or any act or decision issued by the Reserve Bank on the matter concerned; and
- (e) such other information as the Reserve Bank may require for the purposes of this Act.
- (2) If any information supplied or item produced is false in any material particular, the bank, affiliate, subsidiary or associated person commits an offence and shall be liable upon conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 5 years or to both.

## **22 Power to impose Penalty**

The Reserve Bank may impose penalties under this Act on a bank, which has—

- (a) delayed the submission of reports or returns or publication as required by law, regulation, orders, or other directives;
- (b) refused to permit an examination into the affairs of the institution;
- (c) made a false statement in relation to any application or report required under this Act;
- (d) contravened any prudential banking standards, directive, any act or decision issued by the Reserve Bank in accordance with this Act or any other Act.

## **23 Administrative fines**

The Reserve Bank may—

- (a) impose such administrative fines not exceeding \$5,000 for violation of section 22 as it may determine, and a further fine not exceeding \$1,000 for each day of contravention; and
- (b) direct the bank by notice in writing to take any action specified.

## **24 Objection to penalty**

Where a bank objects to penalties imposed under this Act, it shall—

- (a) within 14 days of the date of the notification of such penalty, submit reasons for its objections to the Reserve Bank; and
- (b) after consideration of such submission the Reserve Bank may confirm, vary or rescind the penalty.

## **25 Confidentiality and exemptions**

- (1) No person who has acquired knowledge in his capacity as director, manager, officer, secretary, employee or agent of any bank or as its auditor, liquidator,

controller or liquidator shall disclose to any person or governmental authority the identity, assets, liabilities, transactions or other information in respect of a depositor or customer of a bank except:

- (a) with the written authorisation of the depositor or customer or of his heirs or legal personal representatives; or
  - (b) when lawfully required to make disclosure by any court within Tonga;
  - (c) for the purposes of the performance of his duties under this Act; or
  - (d) under the provisions of any law of Tonga.
- (2) Except that nothing shall prevent:
- (1) a bank or any individual referred to above, from providing to a person, upon a legitimate business request, a general credit rating, a summary of which will be provided to the depositor or customer upon request; or
  - (2) a bank for which a liquidator or controller has been appointed, or any individual referred to above with respect to that bank, from providing access to confidential information of the bank that is necessary to conduct due diligence in connection with a potential acquisition of part or all of the assets and liabilities for the bank, whether through direct transfer or through a merger or similar corporate transaction.

## 26 Offence

Any person who contravenes section 25 is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a period not exceeding 10 years.

## 27 Disclosure by Reserve Bank

The Reserve Bank may –

- (a) provide international banks, foreign banking supervisors and any other local or foreign authorities responsible for the supervision or regulation of a bank, or for maintaining the integrity of the financial system with such statements, returns, data and information; and
- (b) provide access, to any officer of a foreign authority responsible for the supervision or regulation of a foreign banks in order to assess the safety and soundness of a foreign bank, on a reciprocal basis and subject to an agreement for confidentiality and a Memorandum of Understanding.

## 28 Auditing of information

- (1) A bank shall, with the consent of the Reserve Bank appoint an external auditor for each financial year.

- (2) For the purposes of this section, “financial year” means the financial year of the bank.
- (3) The auditor of a bank shall—
  - (a) not later than three months after the end of each financial year carry out an audit of the financial statements, including disclosures, as applicable in accordance with international accounting and auditing standards;
  - (b) provide the Reserve Bank with an opinion, attached to the financial statements verifying that they are complete and give a true and fair view of the financial condition of the bank;
  - (c) perform such other functions as are required under this Act, or any other Act and Regulations;
  - (d) disclose to the Reserve Bank any information relating to the affairs of the bank, if in the opinion of the auditor the bank is insolvent or is in serious financial difficulties or has breached any provisions of this Act or any other Act; and
  - (e) if requested by the Reserve Bank, discuss the audit directly and provide any additional information required.
- (4) The Reserve Bank may, appoint an external auditor to perform a financial or operational audit on a bank and any expense incurred shall be paid by that bank.
- (5) Where a bank fails to produce an audited report or where an auditor refuses to provide an opinion on the financial condition of the bank under this section, the Reserve Bank may revoke the bank’s licence under section 11 of this Act and that procedures for compulsory liquidation under Part VII shall apply upon revocation of a licence to carry on banking business.
- (6) No civil, criminal or disciplinary proceedings shall lie against any auditor arising from the disclosure of information to the Reserve Bank under this Act.

## **29 Publication of financial statements**

- (1) A bank shall, no later than 4 months after the end of each financial year—
  - (a) forward to the Reserve Bank 30 days prior to publication; and
  - (b) publish in any newspaper circulated in Tonga, once every week, for four consecutive weeks a copy of its audited balance sheet and profit and loss account.
- (2) A bank shall, for the purpose of this section, include the Tongan branch operations of a bank incorporated outside Tonga.
- (3) The Reserve Bank may specify the format for disclosing financial statements of banks on an individual or consolidated basis.
- (4) The Reserve Bank shall impose an administrative penalty not exceeding \$10,000 on every director and every manager of a bank who contravenes the provisions of this section.

### 30 Inspection

- (1) The Reserve Bank may, from time to time, inspect or cause the inspection of the books, accounts and transactions of any bank and any of its affiliate, subsidiaries or associated persons.
- (2) The Reserve Bank may delegate its powers of inspection under this section or request the assistance of technical experts in exercising such powers.
- (3) The Reserve Bank may—
  - (a) conduct the inspection with or without notice;
  - (b) require explanations and the production of books, accounts and documents and such information as may be required to conduct the inspection;
  - (c) make copies of and take any papers or electronically stored data from the bank's premises; and
  - (d) require that copies of documents be certified as “true” copies of the originals retained by the bank.

Provided that, for the purpose of this section, if there is need for entry into premises not under the control of the bank, the Reserve Bank shall obtain a search warrant from the Court for that purpose.

- (4) The Reserve Bank shall carry out inspection under this section if it has reason to believe that a bank is—
  - (a) conducting its business in an unlawful or imprudent manner; or
  - (b) in danger of becoming insolvent or about to suspend payment.
- (5) Every employee of a bank, affiliate, subsidiary or associated person who contravenes the provisions of this section shall be liable to an administrative penalty not exceeding \$1,000 for each day of contravention.

### 31 Barred from management

- (1) No person shall be appointed or elected as a director or to the management of a bank who—
  - (a) has acted in similar positions in a bank in Tonga or elsewhere which has had its licence revoked or which has been wound up by a court or the Reserve Bank or subjected to controllership;
  - (b) has been sentenced by a court in any country for an offence involving dishonesty;
  - (c) is or becomes bankrupt or enters into a scheme of arrangement with his creditors;
  - (d) a certificate of compliance as required by the Reserve Bank in accordance with section 21(1)(d) has not been submitted by the bank;

- (e) has acted in similar positions in a bank and has been removed in accordance with section 39;
  - (f) has been disqualified or suspended from practicing a profession on grounds of personal misconduct;
  - (g) does not possess sufficient financial competence and expertise;
  - (h) is an officer or employee of another bank unless both entities are commonly owned;
  - (i) does not reside in the place where the bank is located except as otherwise authorised by the Reserve Bank; or
  - (j) falls under such other criterion or criteria as may be established by the Reserve Bank in a directive, prudential statement or other acts or decisions.
- (2) Any person who accepts an appointment in contravention of subsection (1) is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or imprisonment for a period not exceeding 10 years.
- (3) Any person appointed or elected as a director or to the management of a bank shall cease to hold such office if he is disqualified under subsection (1).

### 32 Special liability of directors and managers

- (1) In addition to any liability imposed by the provisions of this Act or any other Act, any director or manager of a bank may be held liable by a court of law for any loss or damage sustained by the bank, as a result of gross negligence or wilful misconduct in the performance of his functions or duties as director or manager of that institution, as the case may be -

Provided that a director or manager acting under the direction of the Bank shall not be personally liable for an act or default of the Bank done or omitted to be done in good faith.

- (2) Actions to recover damages shall be commenced by the affected bank, within three years after the discovery of the negligence or misconduct indicated in the previous subsection.

### 33 Restrictions on lending

- (1) For the purposes of this section “**unsecured**” means without security or—
- (a) the value of any advance or other facility granted against collateral, not readily marketable, exceeds 4/5 of the value of such collateral as determined by the Reserve Bank; or
  - (b) the value of any advance or other facility granted against readily marketable collateral, exceeds 4/5 of the market value of such collateral.

- (2) Any bank or its subsidiary shall not grant to any person or company, or a group of interrelated persons, any advance, credit facility, financial guarantee or incur any other risk exposure or liability -
  - (a) which in total exceeds 25 percent of the bank's capital as determined by the Reserve Bank;
  - (b) in the case of unsecured facility, 10 percent of the bank's capital as determined by the Reserve Bank; or
  - (c) if the aggregate outstanding principal amount of all large credit exposures of the bank pursuant to paragraphs (a) and (b) would exceed a percentage of the bank's capital as determined by the Reserve Bank.
- (3) For the purposes of this Act, after taking into consideration the bank's cost of funds, profit margin, borrower's credit risk, administrative costs and other loan related costs, the interest rate of a loan whether secured or unsecured shall be linked to the policy rate set by the Reserve Bank from time to time.
- (4) The maximum annual percentage rate which may be charged by a bank shall be disclosed to the public in the manner prescribed by the Reserve Bank.

### 34 Exemptions

The following transactions shall be exempted from the provisions of subsection 33(2)—

- (a) between banks and their branches;
- (b) between banks and financial institutions incorporated abroad as determined by the Reserve Bank;
- (c) between banks and the Reserve Bank;
- (d) banks and any other financial institutions approved by the Reserve Bank;
- (e) related to purchases of telegraphic transfers;
- (f) related to the purchase of bills of exchange accompanied by documents of title to goods if the holder of those bills is entitled to payment on those bills outside Tonga for exports from Tonga;
- (g) granted to, or guaranteed by, the Government of Tonga;
- (h) related to loans that are fully cash collateralised; or
- (i) guaranteed by the parent bank.

### 35 Restrictions on connected parties

- (1) For the purposes of this section “**connected parties**” includes –
  - (a) affiliates, directors, employees, managers, subsidiaries and any person exercising control as prescribed in the definition of “control”; and

- (b) close relatives of such directors, employees and shareholders including spouses, parents, children, and other persons referred to in the definition of “close relatives”.
- (2) The bank or its subsidiary shall not—
- (a) lend for the purchase of, or against the security of, its own shares;
  - (b) grant to any of its connected parties—
    - (i) any advance, credit facility or guarantee unless granted on substantially the same terms, including interest rates and security, as those prevailing at the time for comparable transactions by the bank with members of the general public; and
    - (ii) where the aggregate of all financial exposures would exceed 50 percent of the regulatory capital of the bank;
  - (c) permit unsecured advances or credit facilities to its employees in excess of one year's salary;
  - (d) engage, whether on its own account or on a commission basis, in the wholesale or retail trade, including import or export trade, or have a direct interest in any non-financial undertaking.

Provided that a bank may acquire such direct interest in course of the satisfaction of debts due to it. All such interests shall be disposed of within a reasonable time as determined by the Reserve Bank.

- (3) For the purposes of calculating capital adequacy, the amount of exposures that are in excess of the limits under subsection (2)(b)(ii) shall be deducted from capital.

### 36 Restrictions on shareholding

- (1) The bank or its subsidiary shall not—
- (a) acquire or hold share capital for its own account in an undertaking that would result in the combined value of all such share capital exceeding 10percent of the bank's capital as determined by the Reserve Bank, unless—
    - (i) it is share capital, approved in writing by the Reserve Bank, in a subsidiary bank or in a subsidiary company formed for the execution of nominee, executor or trustee functions or other functions incidental to banking business;
    - (ii) the share capital is held as trustee or nominee, or is related to the purchase or sale upon the order of and for the account of a customer; or
    - (iii) the share capital is acquired in the course of satisfaction of debts due to it and any such acquisition must be disposed of within such reasonable time as determined by the Reserve Bank;

- (b) acquire, operate or permit a subsidiary company, to carry out business in any capacity, without the prior written approval of the Reserve Bank under this Act.

### **37 Contravention of restrictions**

Any bank which contravenes sections 33, 35 and 36 shall rectify the contravention within six months, or any further period as the Reserve Bank may approve in writing, without prejudice of the application of penalties and remedial actions established under section 39 by the Reserve Bank.

### **38 Operation of a new branch**

- (1) A bank shall not open a new branch in Tonga without obtaining the written approval of the Reserve Bank.
- (2) A bank incorporated in Tonga shall, obtain written approval from the Reserve Bank to operate a branch office or subsidiary outside Tonga.
- (3) The Reserve Bank shall not grant approval under subsection (2) unless it is satisfied that—
  - (a) the Reserve Bank has the ability and resources to adequately supervise the branch or subsidiary situated outside Tonga; and
  - (b) the bank has the administrative and financial capacity to conduct banking business at a branch or subsidiary outside Tonga, without affecting the stability of the financial system and the safety of the interests of depositors both within and outside Tonga.

### **39 Penalties and Remedial Actions**

The Reserve Bank may impose any of the measures in this section where -

- (a) a bank or any of its officers, directors or shareholders contravenes any provision of this Act and any conditions imposed on a licence, or any directive, prudential banking standards, or any act or decision, issued in accordance with this Act or any other relevant Act;
- (b) in the opinion of the Reserve Bank, a bank conducts unsafe or unsound activities including any action, or lack of action, which is contrary to international sound practices and standards of banking operation, the possible consequences of which, if continued, would result in risks to itself, its customer or to the financial system; or
- (c) the Reserve Bank has evidence to believe that the bank or its directors, officers, or significant shareholders has engaged or is engaging in illegal activities in a manner as to jeopardize depositors' interests.

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- (2) Where no specific monetary penalty is prescribed under this Act, the Reserve Bank may impose penalties not exceeding \$1,000 for each day during which the infraction or the unsafe or unsound activities continues.
- (3) In light of the facts relating to the specific contravention, or the unsafe or unsound activities of the bank, the Reserve Bank may-
- (a) issue written warnings;
  - (b) enter into a written agreement with the board of directors of the bank providing for a program of remedial action; and
  - (c) issue written orders to cease and desist such infractions and the actions referred to in the following subsection.
- (4) The Reserve Bank may also take the following actions-
- (a) call a meeting of the shareholders and the board of directors of the bank to discuss and to agree on remedial measures to be taken by such entity;
  - (b) suspend the bank's distribution or payment of dividends or profits in any form;
  - (c) attach any condition to the bank's license to the extent required to remedy any violation;
  - (d) request that the chairman of the board of directors convene the board of directors to review and examine the violations to take the necessary measures to eliminate the violations; in such case, one or more representatives of the Reserve Bank shall attend the board of directors meeting;
  - (e) temporarily suspend or permanently bar from office any manager, officer or employee of the bank, depending on the seriousness of the violation;
  - (f) require a director, manager or connected parties to file returns, financial accounts on their business and any other information the Reserve Bank may prescribe;
  - (g) require that the bank remove the chairman or any of the members of the bank's board of directors;
  - (h) require that one or more persons having a significant ownership to exercise control over the bank to sell or otherwise dispose of such holding within a time period determined by the Reserve Bank;
  - (i) with respect to persons indicated in paragraph (f), to cease and desist communicating with the bank, its board, management, officers or employees;
  - (j) appoint an external auditor at the expense of the bank to perform a financial or operational audit under terms of reference approved by the Reserve Bank;
  - (k) require the bank to submit a capital restoration plan in a form acceptable to the Reserve Bank;
  - (l) facilitate the merger or acquisition of the bank with a solvent bank;

- (m) impose restrictions on the operations of the bank;
  - (n) suspend the bank from participating in a clearing system;
  - (o) restrict the bank from further lending or taking further financial exposures, including off-balance sheet transactions, investments, or capital expenditure;
  - (p) require the bank to sell, liquidate, or otherwise dispose of an affiliate or part of its business;
  - (q) require the bank to deposit capital in cash to be held in an account with the Reserve Bank;
  - (r) prohibit a shareholder from direct or indirect exercise of voting rights attached to shares of the bank;
  - (s) revoke the bank's licence under section 11 of this Act and that procedures for compulsory liquidation under Part VII shall apply upon revocation of a licence to carry on banking business; or
  - (t) take any other action in accordance with internationally accepted sound practices and standards applicable to banks.
- (5) Where a bank is required by the Reserve Bank to submit a capital restoration plan under subsection (4)(j), and it fails, refuses or neglects to comply or to implement the capital restoration plan, the Reserve Bank shall take any of the following measures –
- (a) prohibit the bank from opening new branches or acquiring or establishing new subsidiaries;
  - (b) restrict the bank from engaging in new business;
  - (c) impose restrictions on growth of assets or liabilities of the bank as it shall consider fit;
  - (d) restrict the rate of interest on savings and term deposits payable by the bank to the rates as the Reserve Bank shall determine; or
  - (e) remove officers of the bank responsible for the noncompliance.
- (6) If at any time –
- (a) after the period specified in the approved capital restoration plan, the bank failed to raise its capital to the levels necessary to rectify its under-capitalisation; or
  - (b) before the end of the period specified in the approved capital restoration plan, the financial position of the bank continues to deteriorate, the Reserve Bank may without having to wait for the expiry of that period revoke its licence and initiate liquidation in accordance with Part VII of this Act, except where the shareholders of the bank request for controllership under section 40.

- (7) The powers of the Reserve Bank under this section are in addition to any other provisions authorising or requiring the Reserve Bank to take action or impose penalties under other sections of this Act.
- (8) This section shall not be construed so as to preclude the Reserve Bank from taking actions under any other provision of this Act.
- (9) The action that the Reserve Bank takes pursuant to this section shall be proportionate to the misconduct of the bank or of its directors, managers, officers or employees.
- (10) For the purposes of this Act, misconduct means any contraventions of this Act, conditions imposed on a licence, directive, prudential banking standards, or any act or decision, issued in accordance with this Act or any other relevant Act by any officer, director or shareholder of the bank.

## **PART V – CONTROLLERSHIP**

### **40 Grounds for appointing a controller**

- (1) A bank by resolution of its shareholders may request the appointment of a controller to the Reserve Bank and where the Reserve Bank deems it necessary in order to protect the assets of the bank for the benefit of its depositors and creditors shall appoint a controller subject to section 39 of this Act.
- (2) The board of directors and secretary of the bank shall be suspended from their duties upon appointment of a controller.
- (3) Subject to subsection (4), every director and secretary of the bank shall resume their role as director and secretary following the conclusion of the controllership.
- (4) Subsection (3) does not apply to a director or secretary who has, after conclusion of the controllership, been found by the Reserve Bank to cease to be a fit and proper person, and where compulsory liquidation follows.

### **41 Persons qualified and appointed to be a controller**

- (1) Subject to subsection (4) and (5), the shareholders of the bank shall write to the Reserve Bank to appoint a controller.
- (2) The shareholders of the bank may write to the Reserve Bank and nominate up to 3 controllers, and that the nominated controllers shall declare and submit the fact, nature, character and extent of any conflict of interest to the Reserve Bank.
- (3) Within 5 days of receipt of the nomination, the Reserve Bank, by written notice shall approve or deny the appointment of a controller.

- (4) A controller shall be subject to the fit and proper provisions of this Act and any prudential banking standards issued by the Reserve Bank.
- (5) The controller may be any person or an official of the Reserve Bank who meets the qualifications determined by the Reserve Bank.

#### **42 Notice of appointment of controller**

A bank shall be promptly notified of the appointment of a controller and the notification shall specify the grounds for the appointment.

#### **43 Effective date of appointment**

The appointment of a controller shall be effective from the time specified by the Reserve Bank.

#### **44 Period of appointment**

- (1) A controller may be appointed for a period not exceeding three months.
- (2) A controller may be re-appointed for a further period not exceeding three months if it appears to the Reserve Bank that additional time is required to ensure an orderly restructuring of the bank under this Act.

#### **45 General powers of the controller**

- (1) Upon the appointment of a controller, all powers, functions and responsibilities of the bank's directors, managers and officers shall vest in the controller, except where the controller requests the directors, managers or officers to carry out any activity provided under this Act.
- (2) The controller shall have full and exclusive powers to manage and operate the bank, including taking any action:
  - (a) necessary or appropriate to carry on the business of the bank in accordance with this Act, Regulations made under section 98 of this Act, directives or prudential banking standards issued by the Reserve Bank;
  - (b) to preserve and safeguard its assets and property; or
  - (c) to implement a plan of action with respect to the bank approved by the Reserve Bank.
- (3) The controller may, with the approval of the Reserve Bank, and notwithstanding any other law or the constitution of the bank:
  - (a) remove any directors, managers or officers, and appoint their replacements subject to the criteria of a fit and proper person;
  - (b) issue or sell shares, or rights to acquire shares, in the bank; or

- (c) acquire or redeem shares, as the case may be, in a manner which cancels or reduces the liability of a shareholder to the bank in relation to a share held prior to controllership.
- (4) The controller may recommend to the shareholders and employ, at the expense of the bank in controllership:
  - (a) legal counsel;
  - (b) accountants;
  - (c) valuers;
  - (d) appraisers; and
  - (e) other independent professionals or consultants, to assist the controller with the prior approval of the Reserve Bank.

#### **46 Reserve Bank oversight of controllership**

- (1) In the exercise of his powers under this Part, the controller shall act in accordance with Regulations made pursuant to section 98 of this Act, directions and prudential banking standards issued by the Reserve Bank, at any given time in the course of the controllership, and shall be accountable only to the Reserve Bank for the performance of his duties and the exercise of his powers as controller.
- (2) The controller may delegate any of his powers or duties to other persons, in accordance with the instructions issued by the Reserve Bank.

#### **47 Replacement and removal of controller**

- (1) The controller may at any time be replaced by the Reserve Bank.
- (2) The controller may be removed prior to the end of the period specified.
- (3) The appointment of a controller shall be terminated upon –
  - (a) disability, bankruptcy, neglect of duty or misconduct;
  - (b) the Reserve Bank being satisfied that it is in the interests of effective conduct of the affairs of the bank or maintaining of confidence in the financial system; or
  - (c) request to terminate by the controller.

#### **48 Declaration of conflict of interest**

A declaration by a controller shall declare the fact, nature, character and extent of the conflict to the Reserve Bank, and any decision on the appointment of a controller made by the Reserve Bank shall be notified to the shareholders of the bank.

**49 Transactions to be approved by Reserve Bank**

Any transaction involving the bank in controllership in which the controller has a conflict of interest in the matter may be engaged in only with the prior approval of the Reserve Bank.

**50 Failure of controller to disclose interest**

If a controller fails to disclose an interest or relationship as required, the contract may be set aside and the Reserve Bank shall remove the controller.

**51 Suspension of dividends and payments**

The controller shall immediately suspend the payment of capital distributions in general and payment of any kind owing to directors, officers, and significant shareholders however base compensation may be paid to officers for services rendered in their capacity as officers of the bank.

**52 Moratorium and effect of controllership on proceedings**

- (1) The Reserve Bank may impose a moratorium suspending some or all payments by a bank in controllership, except payments to central clearing counterparties and to payment, settlement and clearing systems. and utilities
- (2) On and during the appointment of a controller, no creditor, shareholder, depositor or any other person shall have any remedy against the bank in respect of any claim until the termination of controllership in relation to the bank or without the prior leave of the court, unless the court directs otherwise.
- (3) Without prejudice to the generality of subsection (2), no creditor, shareholder, depositor or any other person shall:
  - (a) commence or continue any action, execution or other proceedings; or
  - (b) seek to enforce in any way any judgment or order obtained against the bank or its successor or the transferee of the whole or any part of any property, assets or undertaking of the bank for the recovery of any claim or in respect of any other liability,until the termination of controllership in relation to the bank or without the prior leave of the court, unless the court directs otherwise.
- (4) Where controllership has not yet been terminated, the Reserve Bank may, where it is of the opinion that it is no longer necessary to impose a stay, publish in the Gazette and in a national newspaper in circulation a notification to lift the stay imposed under this section.
- (5) Where a stay has been lifted under subsection (4), no person shall take any steps to institute winding up, liquidation, administration or any other related

proceedings in relation to that bank without the prior leave of the court unless the court directs otherwise.

- (6) No creditor, shareholder, depositor or any other person shall:
- (a) commence or continue any claim, action, execution or other proceedings; or
  - (b) seek to enforce in any way any judgment or order obtained against the controller,

in respect of any act, commission, claim, fact or matter connected with or arising out of the acts or omissions of the controller in respect of the bank, until the termination of controllership in relation to the bank without the prior leave of the court unless the court directs otherwise.

- (7) No provision of a security agreement or lease between the bank and a secured or other creditor that provides, in substance, that on:
- (a) the winding up of the bank or any insolvency restructuring or reorganization proceedings being commenced, continued or ordered in respect of the bank or any related entity; or
  - (b) the default by the bank of an obligation under the security agreement or lease,

the bank ceases to have such rights to use or deal with assets secured or dealt with under the agreement or lease as the bank would otherwise have, or is given lesser rights or priorities in respect of any assets or property as the bank would otherwise have, shall have any force or effect, until the termination of controllership in relation to the bank or without the prior leave of the court, unless the court directs otherwise.

- (8) No provision in any contract or agreement or any other document which gives any party a right to acquire any property or assets of the bank on the grounds of any change of control or on any analogous ground or on the grounds of insolvency shall have any effect, until the termination of controllership in relation to the bank or without the prior leave of the court unless the court directs otherwise.

- (9) For the purposes of this section:
- (a) the rights, property and assets referred to in this provision are taken to be the rights, property and assets where ever located; and
  - (b) the agreement or lease referred to in this provision are taken to be an agreement or lease governed by law.

- (10) A stay pursuant to subsection (2) shall only operate as a temporary stay of a claim against the bank and shall not have or be taken to have the effect of extinguishing such a claim.

- (11) Where a claim is stayed pursuant to this section, for the purposes of the computation of time limits under any applicable law on limitation of actions, the period of time commencing with the date of appointment of the controller

and ending with the date of termination of appointment of the controller shall be excluded.

- (12) For the purposes of this section, “claim” means any claim whatsoever, including claims which are secured or unsecured, present or future, actual, prospective or contingent, or arising out of contract, tort, bailment, restitution, breach of trust or any other cause of action and whether or not made by a creditor, shareholder, depositor or any other person.

### **53 Suspension of contractual early termination rights**

No right or obligation of a third party under any contract to which the bank in controllership is a party, may be terminated, accelerated, or modified solely because of the appointment of the controller or any action taken by the controller.

### **54 Taking control of the bank**

- (1) Immediately upon appointment, the controller shall secure the properties, offices, assets, books and records of the bank, and may take all necessary or appropriate steps aimed at such purpose, including without limitation -
- (a) cancelling authorisations of persons to engage the financial responsibility of the bank and issuing new authorisations, as appropriate, and notifying third parties; and
  - (b) informing correspondent banks, registrars and transfer agents of securities, and external asset managers of the bank’s assets that persons who previously had authorization to give instructions on behalf of the bank with respect to dealing in the bank’s assets or assets held in trust by the bank are no longer so authorised and that only the controller, and persons authorised by the controller have such authority.
- (2) In the course of the controllership, the controller shall have unrestricted access to, and control over, the properties, offices, assets and the books of account and other records of the bank.
- (3) The controller may request the assistance of the police officers, who shall, if necessary, use force to assist the controller to gain access to any premises of the bank, to gain control over and to secure such properties, offices, assets, books and records of the bank.
- (4) The bank, its affiliated institutions and their directors, officers and agents other than its auditors shall give every assistance to the controller including the supply of information or explanation in any form as may be required, the production of books, documents, minutes, cash, securities and vouchers, and generally the provision of all necessary facilities required for the performance of any function of the controller save that in the case of its auditors they shall only be required to supply any information which is in their possession or knowledge other than their internally generated working papers.

- (5) A person who does not comply with subsection (4) or otherwise obstructs the controller in the performance of functions under this section commits an offence and is liable on summary conviction to a fine \$100,000 or imprisonment of a term not exceeding 10 years or both.

## **55 Inventory and plan of action to resolve the bank**

- (1) Not later than 7 days after the appointment, the controller shall prepare and deliver to the Reserve Bank an inventory of the bank's assets and liabilities.
- (2) The controller in his report shall classify the assets in accordance with internationally accepted asset classification criteria.
- (3) Not later than 14 days after the appointment, the controller shall prepare and deliver to the Reserve Bank a report on the financial condition and future prospects of the bank.
- (4) The controller shall include in the report an assessment of the amount of assets likely to be realized in a liquidation of the bank.
- (5) In the report referred to under subsection (3), the controller shall propose a plan of action which, as appropriate, may recommend -
  - (a) returning the bank to compliance with the provisions of this Act by carrying out a plan of corrective actions that may include a capital increase;
  - (b) compulsory liquidation of the bank if there is no reasonable prospect for the return of the bank to financial soundness through reorganization or otherwise; or
  - (c) any other course of action designed to resolve the bank in a manner that minimizes disruption to depositors and preserves the stability of the financial system.
- (6) The controller shall promptly provide any additional report or information requested by the Reserve Bank.
- (7) The Reserve Bank may:
  - (a) approve the report or additional report mentioned in subsection (3) or (6) without modification;
  - (b) approve the report or additional report mentioned in subsection (3) or (6) subject to such conditions as it considers necessary; or
  - (c) refuse to approve the report.
- (8) On the basis of the report and with the approval of the Reserve Bank, the controller shall implement the plan of action.
- (9) The controller shall have no liability to depositors, creditors and shareholders of the bank as a result of actions taken in accordance with this Part, except to the extent of any losses to a depositor or creditor as a result of the completion of the plan was due to gross negligence or serious misconduct, the controller

shall be liable upon conviction to a fine not exceeding \$100,000 or to a term of imprisonment not exceeding 10 years or to both.

## **56 Capital increase by existing shareholders**

On the basis of the report under section 55 of this Act and with the approval of the Reserve Bank the controller may take the following actions to increase the bank's capital through the issuance of new shares -

- (a) determine the extent of losses and prepare the bank's balance sheet covering the amount of such losses through the bank's profits, reserves and, if necessary, capital; and
- (b) notify existing shareholders of the amount of additional capital needed to bring the bank's capital into compliance with all capital requirements and allow the shareholders to subscribe and purchase additional shares, by submitting binding commitments equal to the full amount of additional capital needed within three business days of such notification.

## **57 Recapitalization by new shareholders**

- (1) On the basis of the report produced under section 55 of this Act and with the approval of the Reserve Bank, the controller may take the following actions to increase the bank's capital through the issuance of shares to new shareholders in the following circumstances -
  - (a) in the event that binding commitments are not submitted in an amount equal to the full amount of additional capital needed by existing shareholders; or
  - (b) without offering shares to existing shareholders, where the Reserve Bank determines that -
    - (i) an expedited resolution of the bank to maintain financial stability is necessary;
    - (ii) the existing shareholders are no longer fit and proper to maintain a significant capital position in the bank ; or
    - (iii) there has been a failure to comply with a remedial measure under this Act requiring an increase in the capital of the bank.
- (2) To carry out a recapitalisation by new shareholders, the controller shall -
  - (a) if not already carried out in accordance with section 55, determine the extent of losses and prepare the bank's balance sheet covering the amount of losses through the bank's profits, reserves and, if necessary, capital;
  - (b) determine the amount and type of funding needed to bring the bank into compliance with all capital requirements;

- (c) cause the bank to issue additional shares in the amount necessary and carry out the sale of shares by the bank and purchase of such shares by new investors.
- (3) Any new significant shareholders may acquire interests pursuant to this provision only if the Reserve Bank is satisfied that they are fit and proper.

## **58 Mergers, sales and other restructurings**

- (1) On the basis of the report produced under section 55 of this Act and with the approval of the Reserve Bank, the controller may carry out a merger of the bank or a transfer, in whole or in part, of the bank's assets and liabilities, without obtaining any approval, assignment, or consent with respect to such transfer or assumption.
- (2) The transferee may be required to continue operating at the premises of the transferor for a specified period of time, including safe deposit box and safekeeping activities.
- (3) The transferee of assets of the bank shall have no liability to depositors, creditors, or shareholders of the bank except to the extent liabilities are explicitly assumed.
- (4) On the basis of the report produced under section 55 of this Act, the Reserve Bank may approve a restructuring of the bank's liabilities through arrangements with the creditors, including a reduction, modification, rescheduling and novation of their claims.
- (5) In carrying out a transfer of assets and liabilities, where a depositor whose deposit is to be transferred owes the bank an amount for a matured or past-due loans, that amount may be set-off against the deposit amount in accordance with prudential banking standards issued by the Reserve Bank.

## **59 Mandatory restructuring of liabilities**

- (1) On the basis of the report produced under section 55 of this Act and with the approval of the Reserve Bank, the controller may restructure the liabilities of the bank in accordance with this section without the approval of depositors, creditors or shareholders.
- (2) The Reserve Bank may approve mandatory restructuring of liabilities if the Reserve Bank determines that the restructuring, either alone or combined with recapitalisation or other resolution measures, will restore the bank to viability.
- (3) The controller shall not apply mandatory restructuring to secured debt.
- (4) In the exercise of his powers under this section the controller shall act in accordance with Regulations made pursuant to section 98 of this Act and prudential banking standards issued by the Reserve Bank.

**60 Misconduct by shareholders, directors, officers or others**

If the controller has evidence to believe that shareholders, directors, officers, lawyers, accountants or other professionals have engaged or are engaging in illegal or in fraudulent activities, it shall immediately notify-

- (a) the Reserve Bank and shall pursue civil actions seeking damages and restitution; and
- (b) the police and any other authority responsible for investigating and prosecuting the activities.

**61 Prohibition against removal of assets**

- (1) No person shall transfer or remove from the bank's premises or any other location any property or assets of any bank under controllership, except with the consent of the controller.
- (2) Every person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction –
  - (a) in the case of an individual, to imprisonment for a term not exceeding 10 years or to a fine not exceeding \$100,000 or to both; or
  - (b) in the case of a company, to a fine not exceeding \$500,000.

**62 Expenses of the controllership**

- (1) The controller shall receive a remuneration determined by the Reserve Bank.
- (2) All costs and expenses incurred on account of the controllership shall be borne by and charged to the bank subject to any proceedings.

**63 Termination of controllership**

- (1) The controllership shall terminate at the expiry of the term specified in the decision appointing the controller specified under section 40 (2) of the Act or any extension of the term of appointment by the Reserve Bank.
- (2) A controllership may be terminated prior to the expiry of the term identified in subsection (1) if the Reserve Bank determines that-
  - (a) controllership is no longer necessary because the grounds for appointment of the controller have been remedied; or
  - (b) it appears the grounds for a plan of action under section 55 cannot be remedied and the Reserve Bank issues a decision to revoke the bank's license under section 11 and to commence liquidation proceedings under Part VII.
- (3) In the case of a termination of controllership that does not involve a closure of the bank the controller shall carry out the duties of the bank's directors and

officers, until nomination or election of new directors and appointment of officers, at which time all powers of control over the affairs of the bank and its properties, offices, assets, books and records that were vested in the controller shall vest in the bank.

- (4) The decision of the Reserve Bank to terminate a controllership shall be accompanied by a recommendation by the controller and a detailed report prepared by the controller supporting the recommendation.
- (5) Within 14 days of the termination of the appointment, the controller shall prepare and submit to the Reserve Bank a final report and accounting of the controllership.

## **PART VI - VOLUNTARY LIQUIDATION**

### **64 Voluntary liquidation**

- (1) A voluntary liquidation of a bank shall be subject to authorisation by the Reserve Bank when:
  - (a) the bank is solvent and has sufficient liquid assets to repay its depositors and other creditors within three days; and
  - (b) the liquidation has been properly approved by the members or shareholders of the bank.
- (2) The bank's licence shall be revoked subject to authorization by the Reserve Bank under subsection (1).

### **65 Cessation of banking business operations**

When it has received the authorisation of the Reserve Bank the bank shall:

- (a) immediately cease to carry on banking business, retaining only the powers necessary to effect an orderly liquidation;
- (b) repay its depositors and other creditors; and
- (c) wind up all operations undertaken prior to the receipt of the authorisation.

### **66 Notice to depositors of voluntary liquidation**

- (1) Within thirty days from the receipt of authorisation referred to in section 65 a notice of voluntary liquidation, setting out any information as the Reserve Bank may determine, the bank shall notify all depositors, other creditors and persons otherwise entitled to the funds or property held by the bank as a trustee, lessor of a safe deposit box or bailee.
- (2) The notice shall be posted conspicuously on the premises of each office and branch of the bank and shall be published as the Reserve Bank, shall direct.

**67 Rights of depositors and creditors in voluntary liquidation**

- (1) The authorisation to go into voluntary liquidation shall not prejudice the rights of a depositor or other creditor to payment in full of his claim nor the right of an owner of funds or other property held by the bank.
- (2) All deposits shall be paid within three days, all other lawful claims shall be paid promptly, and all funds and other property held by the bank shall be returned to their owners within such maximum period as the Reserve Bank shall determine.

**68 Distribution of assets**

- (1) When the Reserve Bank, is satisfied that the bank has discharged all the obligations referred to in section 66 of this Act, it shall be removed from the Schedule and the remainder of its assets shall be distributed among its shareholders in proportion to their respective rights, but no such distribution shall be made before-
  - (a) all claims of depositors and other creditors have been paid or, in the case of a disputed claim, before the bank has turned over to the Reserve Bank sufficient funds to meet any liability that may be determined by a court;
  - (b) any funds payable to a depositor or other creditor who has not claimed them have been turned over to the Reserve Bank; and
  - (c) any other funds and property held by the bank that could not be returned to the owners in accordance with the provisions of section 87 of this Act have been transferred to the Reserve Bank, together with the inventories.
- (2) Any funds or property not claimed within a period of 12 years following a transfer to the Reserve Bank shall be kept in a reserve account and may be appropriated as the Reserve Bank deems necessary.

**69 Termination of voluntary liquidation**

The voluntary liquidation shall terminate at the expiry of 3 months from the authorization of a voluntary liquidation, or any extension of a further 3 months with the prior approval of the Reserve Bank. The Reserve Bank shall revoke the licence at the termination of the voluntary liquidation.

**70 Audited accounts, and conclusion of liquidation**

- (1) When all assets have been distributed in accordance with the provisions of this Act, the bank shall render an audited account to the Reserve Bank within 3 months.
- (2) Upon approval of this account the bank shall notify the Registrar of Companies which shall proceed to remove from the registry the word “bank” from the name of the company.

## PART VII - COMPULSORY LIQUIDATION

### 71 Grounds for liquidation

- (1) The Reserve Bank may appoint a liquidator for a bank where:
  - (a) it is insolvent;
  - (b) it fails to meet the capital requirement and fails to be recapitalized or its condition is otherwise unsound;
  - (c) it has experienced substantial dissipation of assets or earnings due to any of the grounds for action by the Reserve Bank under subsection (1) of section 39 of this Act;
  - (d) it or its directors, officers, employees, or significant shareholders wilfully violate or fail to comply with an order or direction of the Reserve Bank under sections 39 of this Act;
  - (e) its business is being conducted in an unlawful or imprudent manner;
  - (f) the continuation of its activities is detrimental to the interests of its depositors;
  - (g) it conceals or refuses to submit any of its records or its operations for examination as provided for in section 30 of this Act, or has otherwise obstructed such examination;
  - (h) its licence has been revoked in accordance with section 11 or section 39 of this Act;
  - (i) controllership is terminated pursuant to paragraph (b) of subsection (2) of section 63 of this Act; or
  - (j) it is carrying on banking business without a licence.
- (2) A liquidator appointed under this Part shall liquidate the bank for which it has been appointed liquidator and wind up its affairs in an orderly manner that minimizes any risk to financial stability, minimizes disruption to depositors, and, consistent with the preceding goals, maximizes the value of the assets of the bank.
- (3) For purposes of this section, “insolvent” means the bank is not paying or is unable to pay its obligations as they fall due or the value of its liabilities exceeds the value of its assets;
- (4) The value of a bank’s assets, liabilities and capital shall be determined in accordance with valuation standards and procedures issued by the Reserve Bank.

### 72 Qualifications and compensation for liquidator

- (1) A liquidator may be:

- (a) any person other than a controller appointed under Part V who meets the qualifications determined by the Reserve Bank; or
  - (b) any institution whose mandate includes that of liquidation;
- (2) A liquidator shall be subject to the fit and proper provisions of this Act and any prudential banking standards issued by the Reserve Bank.
- (3) The Reserve Bank may dismiss a liquidator and replace the liquidator with another qualified person.
- (4) The terms of the liquidator's compensation shall be set by the Reserve Bank.

### **73 Commencement and notice of liquidation**

- (1) The Reserve Bank shall provide immediate notice regarding the appointment of a liquidator and revocation of licence to the shareholders or the chairman of the board of directors of a bank as the case may be.
- (2) The appointment of a liquidator of a bank shall be effective from the date of issuance of the notice, unless the notice states otherwise.
- (3) The liquidator shall immediately post in each office of the bank and publish in the Gazette and at least one local newspaper a notice announcing the revocation of the licence and appointment by the Reserve Bank, specifying the effective date and time and the procedures and time frame for depositors and other creditors and stakeholders to present their claims against the bank to the liquidator.
- (4) The notice shall also specify that:
  - (a) authorisations of persons to engage the financial responsibility of the bank have been cancelled;
  - (b) persons who previously had authorisation to give instructions on behalf of the bank with respect to payment or transfer of the bank's assets are no longer so authorised; and
- (5) The liquidator shall publish in a local newspaper consecutively for four weeks to notify depositors and creditors of the liquidation of the bank.
- (6) A liquidator may be appointed for a period not exceeding twelve months.
- (7) A liquidator may be re-appointed for a further period not exceeding twelve months if it appears to the Reserve Bank that additional time is required to ensure an orderly liquidation of the bank under this Act.

### **74 Reserve Bank oversight of liquidator**

- (1) The liquidator shall act in accordance with Regulations made pursuant to section 98 of this Act, directions, and prudential banking standards issued by the Reserve Bank at any time in the course of the liquidation, and shall be

accountable only to the Reserve Bank for the performance of its duties and the exercise of its powers as liquidator.

- (2) The liquidator shall report to the Reserve Bank at least weekly, or more frequently if the Reserve Bank so requires, on the progress of the liquidation in a form determined by the Reserve Bank and provide any other information upon the request of the Reserve Bank.

## **75 General powers of liquidator**

- (1) Upon appointment the liquidator shall become the sole legal representative of the bank, and shall succeed to all the rights, titles, powers and privileges of the bank and its shareholders, directors and officers.
- (2) Notwithstanding subsection (1), shareholders, directors and officers may be instructed by the liquidator to exercise specified functions for the bank.
- (3) The liquidator may -
  - (a) hold title to the books, records, and assets of the bank;
  - (b) manage, operate and represent the bank with all of the powers of the shareholders, directors and officers;
  - (c) merge, consolidate or sell the bank or any part of its operation with any other bank;
  - (d) marshal assets and claims;
  - (e) transfer or dispose of assets and liabilities;
  - (f) take any other action necessary for the efficient liquidation of the bank;
  - (g) continue or discontinue any operation of the bank;
  - (h) administer the bank's accounts;
  - (i) collect the debts due to the bank and recover goods owed by the third parties;
  - (j) execute any instrument in the name of the bank; or
  - (k) initiate, defend and conduct in its name any action or proceeding to which the bank may be party.
- (4) A bank under liquidation shall not take any deposits and shall make no loans except to extend funds for the protection of collateral assets where necessary.
- (5) The liquidator may, in its sole discretion, make partial or complete payment on proven claims at any time, and no liability shall attach to the liquidator, by reason of any payment or for failure to pay dividends to a claimant whose claim is not proved at the time of any payment.
- (6) The liquidator shall have no liability to depositors, creditors and shareholders of the bank as a result of actions taken in accordance with this Part, except to the extent of any losses as a result of the completion of the liquidation was due to negligence or serious misconduct, the liquidator shall be liable upon

conviction to a fine not exceeding \$100,000 or to a term of imprisonment not exceeding 10 years or to both.

## **76 Transfer of assets and liabilities**

- (1) The liquidator may transfer any asset or liability of the bank without obtaining any approval, assignment, or consent from the bank.
- (2) The liquidator may, upon the prior written approval of the Reserve Bank and according to its directions, dispose of part or all of a bank's assets and liabilities through a purchase and assumption transaction with an acquiring bank;
- (3) The arrangements for a transfer of assets and liabilities shall provide for the removal of any director, secretary, manager, officer or employee responsible for the circumstances which led to the appointment of a liquidator for the bank.

## **77 Effects of liquidation**

Upon and after appointment of a liquidator -

- (a) any term, statutory, contractual or otherwise, on the expiration of which a claim or right of the bank would expire or be extinguished shall be extended by 6 months;
- (b) the calculation of interests and penalties against the bank's obligations shall be suspended and no other charge or liability shall accrue on the obligations of the bank;
- (c) all legal proceedings against the bank are stayed and a third party shall not exercise any right against the bank's assets without the prior leave of the court unless the court directs otherwise;
- (d) no depositor or other creditor may sell or take possession of any assets of the bank as a means of enforcing a claim or initiate or continue any legal proceeding to recover the debt or perfect security interests in the bank's assets;
- (e) no attachment or lien, except a lien created by the liquidator in the application of the provisions of this Part, shall attach to any of the property or assets of the bank; and
- (f) No execution shall be returned against the assets of a bank for which a liquidator has been appointed, except an execution effected pursuant to a judgment rendered prior to the date of the appointment of the liquidator for an amount not exceeding \$1,000.

## **78 Taking control of the bank**

- (1) The liquidator shall have unrestricted access to and control over the offices, books of account and other records, and assets of the bank and its subsidiaries.

- (2) The liquidator may request the assistance of police officers to gain access to the premises of the bank or control over the records of the bank.
- (3) The liquidator shall secure the property, offices, books, records, and assets of the bank to seek to prevent their dissipation by theft or other improper action.
- (4) Any person who wilfully interferes with a liquidator's access to or control over the offices, books of account and other records, and other assets of a bank commits an offence and is liable on summary conviction to a fine not exceeding \$100,000 or imprisonment for a period not exceeding 10 years.

## 79 Repudiation of contracts

- (1) Within 90 days from the date of appointment, the liquidator may repudiate any contract to the extent that the fulfilment of the contract is determined to be burdensome for the bank and the repudiation would promote the orderly liquidation of the bank's affairs and protect depositors' interest.
- (2) Any liability arising from the repudiation shall be determined as of the date of repudiation and shall be limited to actual direct damages incurred and shall not include any damage for lost profits or opportunity or non-monetary damages.
- (3) In case of repudiation of a lease agreement of immovable and movable property, the liquidator shall give the owner 30 days' notice.
- (4) This section shall not apply to contracts entered into by a controller appointed in accordance with Part V of this Act, except with the prior approval of the Reserve Bank.

## 80 Avoidance of pre-liquidation transfers

- (1) The liquidator may set aside the following transactions affecting the assets of the bank and recover the assets from the transferee or other beneficiary of the transaction -
  - (a) gratuitous transfers to directors, officers, and significant shareholders of the bank or their relatives made within 1 year prior to the effective date of the liquidation;
  - (b) transactions with related parties conducted within 3 years prior to the effective date of the liquidation, if detrimental to the interest of depositors and other creditors;
  - (c) gratuitous transfers to third parties made within one year prior to the effective date of the liquidation;
  - (d) transactions in which the consideration given by the bank considerably exceeded the received consideration, made within one year prior to the effective date of the liquidation;
  - (e) a transaction based on a forged or fraudulent document that the bank has executed to the detriment of depositors and creditors;

- (f) any act done with the intention of all parties involved to withhold assets from a bank's depositor and creditors, or otherwise impair their rights, within one year prior to the effective date of the liquidation; and
- (2) Any action to set aside a transfer under this section shall be taken by the liquidator within 3 months following the effective date of the liquidation.
  - (3) Notwithstanding subsections (1) and (2), the liquidator may not set aside a payment or transfer by the bank if it was made in the ordinary course of business, or if it was part of a contemporaneous exchange for reasonably equivalent value, or to the extent that following the transfer the recipient extended new unsecured credit to the bank which had not been satisfied by the bank as of the effective date of the liquidation.
  - (4) The liquidator may recover the property transferred or its value from the initial transferee or any subsequent transferee only if the initial transferee or subsequent transferee did not give fair value for the property and knew or reasonably should have known that a transfer could be set aside under the provisions of this Act.
  - (5) The liquidator may order that notice of an action to set aside a transfer be recorded with the Ministry of Lands and Natural Resources for real estate ownership and any other rights in property and a person taking title to or acquiring any security interest or other interest in the property after the filing of a notice takes his title or interest subject to the rights of the liquidator to recover the property.
  - (6) This section shall not apply to transfers to an asset management company or transfers by the controller.

## **81 Obligations of lessors of bank premises and utility providers**

A lessor of a bank's premises or a utility company or other provider of utility services including, without limitation, a company that supplies electricity, water or telecommunication services (including internet), may not alter, refuse or discontinue the services to a bank because of its liquidation or because the bank has failed to pay for the services prior to its liquidation.

## **82 Determination of claims**

- (1) The procedures for determination of the validity and priority of claims and for liquidation of assets and return of the bank customers' property shall be determined by the Reserve Bank.
- (2) Any sale of the bank assets shall be accomplished in a transparent and reasonable manner.
- (3) Any right of a creditor other than a depositor to set off a debt owed by the creditor to the bank against a claim of a creditor may be asserted if it would be enforceable under applicable non-insolvency law, except to the extent that the

claim of the creditor is disallowed or the set off is based on a transaction that has been avoided under section 80.

- (4) If a depositor owes the bank an amount for a matured or past-due loan, that amount shall be set off against the deposit amount owed by the bank.
- (5) If a depositor owes the bank an amount for a loan and the loan is not matured or past-due, then, at the sole option of the depositor, the amount owed may be set-off against the deposit amount owed by the bank.

### **83 Authority to disallow claims**

- (1) The liquidator may disallow any claim or portion of a claim against the bank, including a claim based on a security interest, preference, setoff, or priority which is not proved to the satisfaction of the liquidator.
- (2) In the case of a claim that is secured by any property or other asset of the bank, the portion of the claim which exceeds the fair market value of the property or assets shall be treated as an unsecured claim.

### **84 Claims relating to eligible financial contracts**

- (1) For the purposes of this section:-
  - (a) “eligible financial contracts” includes securities contracts, commodities contracts, swaps, repurchase agreements, and similar financial contracts, determined by the Reserve Bank, and may include a master agreement covering more than one type of contract; and
  - (b) “net termination value” means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.
- (2) In determining the rights and obligations between the bank and its contractual counterparties, effect shall be given to the termination provisions of eligible financial contracts between them, except during the period of any temporary stay on the exercise of the right that the Reserve Bank may determine.
- (3) The temporary stay of termination provisions shall be subject to any safeguard standards as the Reserve Bank shall issue to facilitate liquidation of the bank while at the same time minimizing disruption to the markets for eligible financial contracts.
- (4) The net termination value determined in accordance with an eligible financial contract between them shall be a claim of the bank on the counterparty or shall be admitted after its validation as a claim of the counterparty on the bank.

**85 Priorities in payment of claims**

- (1) In any liquidation of a bank's assets, allowed secured claims shall be paid to the extent of the realization of the security or the security shall be delivered to the secured creditor.
- (2) Other allowed claims shall be paid in relation to all other debts, in the order described below:
  - (a) necessary and reasonable expenses of controllership and the liquidation;
  - (b) the net amount due to any depositor of the bank up to \$200,000, except to a depositor identified in paragraph (h);
  - (c) the net amount due to any depositor of the bank in excess of the amount due under paragraph (c), if any, except to a depositor identified in paragraph (h);
  - (d) taxes, fees and deposits, owed to government authorities concerned;
  - (e) unsecured credits extended to the bank prior to the appointment of the liquidator;
  - (f) unsecured creditors;
  - (g) wages and salaries of employees of the bank in liquidation for the 3 month period preceding the appointment of the liquidator;
  - (h) the net amount of deposits due to directors, managers, officers and shareholders of the bank provided that the directors, managers, officers and shareholders are free and clear of any encumbrances from creditor claims;
  - (i) provident or retirement contributions for officers and employees due but not paid; and
  - (j) other liabilities;
- (3) After payment of claims under subsection (1) and subsection (2), the liquidator shall apply the assets of the bank in satisfaction of all other claims unless the assets are insufficient to meet them, in which case payment shall be made in pro rata among all claims.
- (4) Any proceeds remaining after all claims of depositors and other creditors have been paid shall be distributed among the shareholders of the bank in accordance with their rights.
- (5) Notwithstanding subsection (2), the Reserve Bank may take actions that would treat similarly situated creditors differently, but only if the Reserve Bank determines that-
  - (a) the category of claims that are benefitted by the action are of strategic importance to the economy or the action is necessary to contain potential systemic impact or to maximise the value for the benefit of all creditors as a whole; and

- (b) no creditor will receive less in the liquidation than it would have without the disparate treatment.
- (6) For the purpose of determining the net amount due to any depositor under subsections (2) (b), (c) and (h), the Reserve Bank shall aggregate the amounts of all deposits in the bank which are maintained by a depositor in the same capacity.

## **86 Unclaimed funds**

Unclaimed funds remaining after the final distribution made by the liquidator which are not subject to other provisions of this Act shall be deposited by the liquidator in the Reserve Bank for 12 months, unless claimed by the owner before the expiration of that period, and on the expiration of that period the funds remaining unclaimed shall be paid to the Reserve Bank. After 5 years such funds are not claimed, the funds shall be paid to the Government and shall irrevocably become Government's property.

## **87 Safe deposits and unclaimed property**

- (1) Any safe deposit box, the contents of which have not been withdrawn before a date specified by the liquidator, shall be opened by the liquidator and their contents inventoried and the contents and the inventory shall be deposited by the liquidator in the Reserve Bank.
- (2) Any unclaimed property held by the bank as bailee, together with inventories, shall be deposited by the liquidator in the Reserve Bank.
- (3) Any contents of a safe deposit box or unclaimed property deposited not claimed within a period of five years following its deposit in the Reserve Bank shall be paid to the Government and shall be irrevocably become Government's property.

## **88 Liquidator to notify Reserve Bank of fraudulent activities**

If the liquidator has reasonable cause to believe that a bank or its shareholders, directors, officers, attorneys, accountants or other professionals have engaged or are engaging in fraudulent activities or other criminal activities, the liquidator shall immediately notify:

- (a) the Reserve Bank and shall pursue civil actions seeking damages and restitution; and
- (b) the police and any other authority responsible for investigating and prosecuting the activities.

**89 Termination of liquidation and final reporting to the Reserve Bank**

- (1) Once the proceeds for the sale of assets of a bank have been distributed, the liquidator shall provide a report to the Reserve Bank within 3 months that includes a statement of income and expense and sources and uses of funds during the period of liquidation.
- (2) Upon approval by the Reserve Bank of the report, the liquidation shall be terminated and the Reserve Bank shall notify the Registrar of Companies which shall proceed to terminate the legal existence of the bank as a company and the Reserve Bank and the liquidator shall be relieved of any further responsibility in connection with the liquidation of the bank.
- (3) A liquidation shall be terminated within 12 months of its initiation and may be extended for a further period not exceeding 12 months at the request of the liquidator to the Reserve Bank.

**PART VIII – COMPLETION OF CONTROLLERSHIP OR LIQUIDATION****90 Review of bank resolutions under Parts V and VII**

- (1) After completion of a controllership under Part V or a liquidation under Part VII (a resolution action), the Reserve Bank shall conduct a review to ascertain why the bank's problems required a resolution action under either of those Parts.
- (2) The Reserve Bank shall prepare a written report that describes in detail the circumstances leading to the resolution action, the actions taken by the Reserve Bank prior to action under Part V or Part VII to address any problems, the reasons why those actions did not succeed in preventing the need for resolution.
- (3) The Reserve Bank shall submit a copy of the report to the Board within 6 months.

**91 Non-application of Companies Act**

The provisions of the Companies Act or any law on or relating to company bankruptcy, reorganization, insolvency or liquidation shall not apply to the controllership or liquidation of a bank under this Act.

## PART IX — MISCELLANEOUS

### 92 Retention of records, cheques and other documents for 7 years

- (1) All cheques and bank drafts in the possession of the bank on which they are drawn and all bills of exchange or promissory notes in the possession of a bank, made payable at that institution, including accounting records and management information system (MIS) information, and other related records, shall be retained by that institution until the expiration of the period of 7 years from the date in the case of documents payable on demand or from the due date thereof in the case of all other documents.
- (2) Subsection (1) shall apply to cheques, drafts, bills and notes received by a bank either before or after the commencement of this Act.
- (3) No documents referred to in subsection (1) shall be destroyed at any time after a demand for the delivery of the document has been made to the bank by the person entitled thereto.
- (4) It shall be sufficient compliance with the duty to retain under subsection (1) if a copy of the document has been made by the bank on microfilm, microfiche, tape, disc, or electronic or photographic storage media.
- (5) Notwithstanding subsection (4), no document shall be destroyed at any time within 2 years after its date in the case of documents payable on demand or from its due date in the case of all other documents.

### 93 Notice of unclaimed funds and properties

- (1) Every bank shall, within 60 days after the end of each financial year, send by mail, at the address shown on the bank's books, to all depositors, other creditors, safe deposit box lessees, and the bailors of property held by the bank, and shall publish in at least one local newspaper published weekly and circulated in Tonga for four consecutive weeks a statement showing all accounts payable by the bank where no transaction has taken place and no statement of account has been requested by the creditor during the last 7 or more years.
- (2) Every statement published under subsection (1) shall require the person to whom the funds or properties is payable, or his legal personal representative to submit a claim to the bank within three months from the date of publication.

### 94 Unclaimed funds and properties paid to Reserve Bank

- (1) Unclaimed funds and properties included in the statement published under section 93 that remains unclaimed for a period of three months after publication, shall be paid to the Reserve Bank and funds credited to a reserve account with the Reserve Bank, after deduction of the costs of publication.

- (2) Subject to this section, a bank is, upon payment to the Reserve Bank of any sums due under this section, discharged from further liability in respect of that amount.
- (3) The Reserve Bank shall, within 60 days after the end of each financial year, publish in at least one local newspaper published weekly and circulated in Tonga for four consecutive weeks a statement on all unclaimed funds and properties paid to the Reserve Bank under subsection (1), until the expiration of the time period specified in subsection (4).
- (4) Where unclaimed funds and properties have been transferred to the Reserve Bank under this section, a person may lodge a claim with the bank for the return of the unclaimed funds and properties that have been transferred to the Reserve Bank within a period no longer than five years from the date of such payment. Any claim made under this subsection shall be subject to the approval of the Reserve Bank.
- (5) Once the period indicated in the previous subsection has expired without a claim having been submitted, the funds and properties transferred to the Reserve Bank shall be presumed to be abandoned funds or properties and shall be dealt with as determined by the Reserve Bank.
- (6) Unclaimed funds and properties included in the statement published by the Reserve Bank remaining unclaimed for a period of three months after publication, shall be presumed to be abandoned funds or properties and shall be dealt with as determined by the Reserve Bank.
- (7) Subject to this section, the Reserve Bank is discharged from further liability in respect of abandoned funds or properties.
- (8) Any claim on abandoned funds or properties shall be addressed directly to the Minister of Finance and is subject to the approval of the Minister of Finance.

## **95 Collection of penalties**

- (1) The Reserve Bank may levy and collect any administrative fine imposed under this Act.
- (2) In the event of any administrative fine not being paid, the Reserve Bank may take civil action against the bank to recover the amount due as a debt owed.

## **96 Prevailing application of the National Reserve Bank of Tonga Act and the Banking Act**

Unless specified otherwise in another Act, in the event that the provisions of this Act or the National Reserve Bank of Tonga Act conflict with such provisions of other Acts applicable to any financial institution, then the provisions of this Act and the National Reserve Bank of Tonga Act shall prevail.

## **97 Indemnity of Reserve Bank**

A director, employee, officer, agent, Governor or Deputy Governor of the Reserve Bank, and a person appointed by the Reserve Bank to carry out functions on its behalf, or a technical assistance expert who assists the Bank with conducting supervisory work under section 30, including a person previously holding such positions, shall not be held liable for damages, acts or omissions performed in the course of his duties under this Act, under the same conditions, including indemnification, as established in section 25 of the National Reserve Bank of Tonga Act.

Provided that, this section shall not apply to any of the specified persons, where he has performed his functions and duties with gross negligence or wilful misconduct.

## **98 Regulations**

The Minister, on the advice of the Board and with the consent of Cabinet, shall make Regulations necessary for giving effect to and carrying out the purposes of this Act.

## **99 Prudential banking standards**

The Reserve Bank may issue such prudential banking standards as may be required from time to time for giving effect to the provisions of this Act, including but not limited to prudential banking standards respecting:

- (a) Asset Quality;
- (b) Credit Risk Grading System;
- (c) Administrative Penalties;
- (d) Disclosure of Interest rates and fees and charges by banks;
- (e) Liquidity;
- (f) Capital Adequacy Requirements;
- (g) Audit Arrangements;
- (h) Fit and Proper Requirements;
- (i) Governance;
- (j) Lending Limits;
- (k) Foreign Exchange Risk Management;
- (l) Bank Licensing Requirements; and
- (m) any other standards as determined from time to time by the Reserve Bank.

## **100 Court's powers in legal claims against Reserve Bank**

- (1) In any court proceedings under this Act, the Court shall take into consideration the public interest.

- (2) In considering the public interest, the Court shall have regard to:
  - (a) the critical importance of financial stability to the public interest;
  - (b) the importance of permitting the Reserve Bank to discharge its functions in an expeditious and efficient manner in the interest of maintaining financial stability.
- (3) Where the Court is satisfied in any proceedings under this Act that:
  - (a) a remedy in damages is available to the person who seeks relief; and
  - (b) it would be just in all the circumstances, having regard to the public interest, to limit relief to an award of damages, the Court shall limit relief in such proceedings to an award of damages.

### **101 Close of business for holidays or emergency situations**

- (1) All banks shall open their doors for business with the public on all working days and during all office hours.
- (2) A bank shall not open their doors for business with the public on a non-working day without prior written approval of the Reserve Bank.
- (3) In exceptional circumstances, a bank may apply to the Reserve Bank with at least two working days' notice to close its doors for a specified purpose, which may only be done with the written approval of the Reserve Bank.
- (4) In the event that an emergency situation requires the suspension of banks operations, the Reserve Bank may –
  - (a) order one or more bank to –
    - (i) close their doors temporarily;
    - (ii) cease their operations; and
    - (iii) resume operations only by order of the Reserve Bank;
  - (b) confirm a bank to close its business if it is forced by an emergency situation, subject to notification within the next 24 hours from the closing or as soon as practicable;
- (5) For the purpose of subsection (4), an emergency situation is one due to –
  - (a) natural disasters;
  - (b) public services interruption;
  - (c) internal or external conflicts;
  - (d) war;
  - (e) events of force majeure; or
  - (f) other extreme circumstances as determined by the Reserve Bank.
- (6) For the purposes of this section, working days means any day from and including Monday to Friday and non-working days mean Saturdays, Sundays and public holidays..

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## PART X —REPEAL

### 102 Repeal and savings

- (1) The Financial Institutions Act 2004 is hereby repealed.
- (2) The Financial Institutions Regulations 1997 is hereby repealed.
- (3) Notwithstanding subsection (1):
  - (a) any Rule, Notice or other subsidiary legislation or guideline made pursuant to the Financial Institutions Act 2004, shall, if in force at the commencement of this Act, continue in force until replaced by any Regulation, Rule, Order, Notice or other subsidiary legislation made under this Act; and
  - (b) any act, decision or other matter carried out pursuant to the Financial Institutions Act 2004 shall be deemed to have been carried out under this Act.

### 103 Transitional provision

Any written law or document referring to the repealed Financial Institutions Act 2004 or any provision thereof shall, as far as may be necessary for preserving its effect, be construed as referring or as including a reference to this Act or the corresponding provision in this Act, as the case may be.

Passed by the Legislative Assembly this **10<sup>th</sup>** day of **December** 2020.

**SCHEDULE**

(Section 6 (1))

1. Tonga Development Bank established under the Tonga Development Bank Act 2014;
2. Australia New Zealand Banking Group Limited;
3. MBF Bank Limited;
4. Bank South Pacific (Tonga) Limited.