



Tonga

**PUBLIC ENTERPRISES (AMENDMENT)
ACT 2010**

Act No. 40 of 2010



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PUBLIC ENTERPRISES (AMENDMENT) ACT 2010

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AN ACT TO AMEND THE PUBLIC ENTERPRISES ACT

I assent,
GEORGE TUPOU V,
1st October 2010.

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

1 Short Title

- (1) This Act may be cited as the Public Enterprises (Amendment) Act 2010.
- (2) The Public Enterprises Act 2002, as amended, is in this Act referred to as the Principal Act.

2 Section 2 amended - Interpretation

Section 2 of the Principal Act is amended by:

- (1) Deleting the word and definition of “public enterprise” and substituting it with the following:

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

- (2) Deleting the word and definition of “subsidiary” and substituting it with the following:

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

- (3) Inserting in the appropriate places the following definitions:

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

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

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

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

3 Section 4 amended – Non-commercial activities

Section 4 of the Principal Act is deleted and replaced with the following new sections –

“4 Objective of Public Enterprises

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

4A Government Policy Obligations

- (1) The Cabinet may instruct a public enterprise to provide a Government Policy Obligation.
- (2) Where an instruction is issued under subsection (1), the Government and the public enterprise shall enter into an enforceable agreement which shall:
 - (a) be in writing;
 - (b) comply with any enactment applying to Government contracts and the Government’s budgetary and procurement processes;

- (c) be subject to approval by Cabinet;
 - (d) record the nature and quantity of the goods and or services to be provided; and
 - (e) specify the total price to be paid for the goods or services.
- (3) For the purposes of subsection (2), the total price of a Government Policy Obligation shall be calculated as the total cost of provision of the goods or services by the public enterprise plus a margin to allow the public enterprise to meet its targeted return on equity as set by the Minister.
- (4) In the case where user fees are insufficient to cover the full cost of the goods or services, the balance of the total price shall be paid by the Government to the public enterprise.

4 Section 5 replaced - Additions and deletions of public enterprises from the Schedule

Section 5 of the Principal Act is deleted and replaced with the following:

“5 Public Enterprises

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

5 Section 12 replaced - Directors

Section 12 of the Principal Act is deleted and replaced by the following -

“12 Directors: Number and Remuneration

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

6 Section 13 replaced – Directors roles

Section 13 of the Principal Act is deleted and replaced with the following –

“13 Role of Directors

- (1) A director of a public enterprise and subsidiary shall act in good faith and in the best interests of the public enterprise, and shall –
 - (a) ensure that the public enterprise and subsidiary conducts its business and all decisions made by the board are in accordance with its principal objective;
 - (b) not act, or agree to the public enterprise and subsidiary acting, in a manner that contravenes the law or the constitution of the public enterprise;
 - (c) not agree to, cause or allow the business of the public enterprise and subsidiary to be carried on in a manner likely to create a substantial risk of serious loss to the public enterprise’s creditors; or
 - (d) not agree to the public enterprise and subsidiary incurring an obligation unless the director believes at the time on reasonable grounds that the public enterprise shall be able to perform the obligation when it is required to do so.
- (2) Sections 138 to 144 of the Companies Act (“Transactions Involving Self-Interest”) shall apply to all directors of a public enterprise and subsidiary whether or not the public enterprise is registered under the Companies Act, and a reference in those provisions to a company shall be deemed to be a reference to a public enterprise and subsidiary.”.

7 Section 14 replaced - Appointment and termination of directors to boards of public enterprises

Section 14 of the Principal Act is deleted and replaced with the following -

“14 Appointment and termination of directors to boards of public enterprises

- (1) The Minister, with the consent of Cabinet, shall appoint persons as directors of public enterprises who, in the opinion of the Minister, will assist the public enterprise to achieve its principal objective.
- (2) Subject to this Act, no member of Cabinet or the Legislative Assembly shall be appointed or remain as a director of a public enterprise except in the case where a new public enterprise is established and Government sees the need to appoint Cabinet members for an interim period, not exceeding 12 months from the date the public enterprise is established, to establish the new public enterprise.

- (3) Except as provided in subsection (2) any director who registers as a candidate to the Legislative Assembly shall be deemed to have resigned from the board of the public enterprise upon the date of registration.
- (4) Notwithstanding subsection (2), a person who is -
 - (a) under 18 years of age;
 - (b) an undischarged bankrupt;
 - (c) prohibited from being a director under the Companies Act; or
 - (d) not a natural person;shall be disqualified from being appointed as a director of a public enterprise.
- (5) Each director shall be appointed for a term of up to three years and may be reappointed.
- (6) A director may be removed from office by the Minister for incompetence, incapacity, bankruptcy, neglect of duty, misconduct, or failing to assist the public enterprise to act in accordance with the principal objective.
- (7) Where a public enterprise fails to comply with its obligations under Part IV and Part V, a director, as a member of the board of the enterprise concerned, may be removed from the board by the Minister.”

8 Section 15 amended - Board meetings and quorum

Section 15 of the Principal Act is amended by deleting subsection (2) and replacing it with the following –

- “(2) A board meeting shall have a quorum when at least half of the members are present, and if the Chairman is not present, the directors forming the quorum will elect a chairman for that meeting.”

9 Section 17 replaced - Balance sheet

Section 17 of the Principal Act is deleted and replaced with the following:

“17 Additional Funding

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

- (a) equity;
- (b) interest-bearing debt;

- (c) debt guarantees; or
- (d) payment for the provision of goods or services.”.

10 Section 18 amended - Statement of corporate intent

Section 18 of the Principal Act is amended by:

- (a) deleting the words “statement of corporate intent” and replacing it with “business plan” wherever appearing;
- (b) deleting the figure and word “1 month” from subsection (1) and replacing with “two months”;
- (c) repealing subsection (3);
- (d) deleting subsection (4) and replacing it with:

“(4) Each business plan shall specify, in respect of the next financial year and the two years thereafter –

- (a) a one-page summary of:
 - (i) how the objective of the public enterprise will be achieved;
 - (ii) the strategies to be pursued to achieve the objective; and
 - (iii) key performance targets, which shall include but not be limited to projections of revenues, net profit after tax and return on average equity;
- (b) the nature and scope of the activities to be undertaken;
- (c) the performance targets and other measures by which the performance of the public enterprise may be judged in relation to its objective;
- (d) a forecast statement of the financial performance for each financial year of the plan;
- (e) a forecast statement of financial position for each financial year of the plan;
- (f) a statement of any anticipated borrowing;
- (g) a statement of principles adopted in determining the annual dividend;
- (h) any Government Policy Obligations from which the public enterprise seeks compensation from the Government;
- (i) a statement outlining the governance policies and practices, including accountability standards and key performance indicators relating to the management of all subsidiaries;
- (j) such other matters as are agreed by the Minister and the board; and

- (k) projections of cash flow for the following six years, or such longer term as agreed between the board and Minister, including explanations of the strategies and the key assumptions upon which the projections are based.”

- (e) deleting subsection (5) and replacing it with –
 - “(5) Prior to the board adopting the business plan it shall be submitted to the Minister for review and the Minister shall submit comments to the board for consideration no later than 30 days of receiving the draft business plan.”

- (f) deleting subsection (6) and replacing it with –
 - “(6) A board shall consider any comments made on the draft business plan by the Minister and shall deliver the completed business plan to the Minister on or before the commencement of the financial year or such later date as the Minister may determine.”; and

- (g) deleting subsection (7).

11 Section 19 amended - Half-yearly reports

Section 19 of the Principal Act is amended by deleting subsection (2) and replacing it with –

- “(2) The report required under subsection (1) shall include a comparison of the performance of the public enterprise with the business plan required under this Act.”.

12 Section 20 amended - Annual report and accounts

Section 20(2) of the Principal Act is amended as follows:

- (a) deleting “statement of corporate intent” in paragraph (a) and replacing it with “business plan”;
- (b) deleting the word “and” after paragraph (a);
- (c) deleting the full stop after paragraph (b) and replacing it with “; and”;
- (d) inserting the following as paragraph (c) -

“(c) state the performance achieved against targets and total revenue received during the year by the public enterprise from the Government or other sources of consideration for undertaking an agreement in response to a Government Policy Obligation.”.

13 Section 22 amended - Information to be presented to the Legislative Assembly

Section 22 of the Principal Act is amended by –

(a) deleting subsection (1) and replacing it with –

“(1) The Minister shall table in Cabinet, within one month of receiving them, the annual report of each public enterprise.”

(b) deleting subsection (2) and replacing it with –

“(2) The board of public enterprise shall cause a brief summary of the annual report of the public enterprise and any of its subsidiaries to be published within 2 months in a Tongan newspaper in both the Tongan and English language after the Annual Report is adopted by the board of the public enterprise. Such publication shall include:

- (a) a comparison of revenues, net profit after tax, return on average equity, and non-financial performance targets with those projected in the business plan for the same year;
- (b) projected revenues, net profit after tax, and return on average equity, and non-financial performance targets in the business plan for the next financial year;
- (c) where the copy of the annual report can be obtained or inspected, including the fee prescribed by the Minister.
- (d) a brief statement describing all financial transactions entered into between the public enterprise, its subsidiary and the Government in the preceding year, including:
 - (i) any injection of capital whether in the form of debt or equity, the amount, the rate of interest, if applicable, and any repayment terms;
 - (ii) the total amount of debt guarantees issued by the Government in favour of the public enterprise;
 - (iii) the total amount paid by the Government for the provision of goods or services and, where that amount exceeds 10 percent of the annual revenue of the public enterprise, a brief description of the goods or services purchased; and

- (iv) any other payments made by the Government, and where such payments exceed 10 percent of the capital of the public enterprise, a brief description of the reason for the payment and whether the public enterprise must repay all or any of the payment made.”.

14 Section 24 amended - Audits and the role of the Auditor General

Section 24 of the Principal Act is amended by inserting a new subsection (2) as follows:

- “(2) The Minister may require the Auditor General to conduct an audit of a public enterprise. Upon receipt of such request in writing by the Minister, the Auditor General shall conduct an audit forthwith.”.

15 Section 25 replaced - Protection from disclosure of sensitive information

Section 25 of the Principal Act is repealed and replaced with the following –

“25 Protection from disclosure of sensitive information

- (1) Nothing in this Act shall be construed as requiring any public enterprise or subsidiary of a public enterprise to include in any report, required under this Act and available for public disclosure, any information which in the opinion of the board could damage the commercial interests of the public enterprise or its subsidiary and could, except for the provisions of this Act, be properly withheld.
- (2) If any person seeks to challenge the decision of the board to withhold information under subsection (1) they shall present their arguments to the Minister, whose determination will be final.”.

16 New section 32 inserted – Additional provisions dealing with directors

The Principal Act is amended by inserting a new section 32 as follows:

“32 Additional provisions dealing with directors

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

- (a) no more than one public servant shall be appointed or continue to serve on the board of any public enterprise at the same time, and if more than one public servant is serving on a board at the time

this Act comes into force, the Minister shall determine which public servant may continue to serve and shall immediately notify the public servants and public enterprise of his determination in writing; and

- (b) no public servant may serve as chairman of a public enterprise.”.

17 New section 33 inserted – Management of Public Enterprise Subsidiary

The Principal Act is amended by inserting a new section 33 as follows:

“33 Management of Public Enterprise Subsidiary

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

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

18 First and Second Schedule replaced

The Principal Act is amended by deleting the First Schedule and Second Schedule and replacing them with the following –

“SCHEDULE
(Section 5(1))
Public Enterprise Subsidiaries

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

Passed by the Legislative Assembly this 20th day of September 2010.