



Tuvalu

**PUBLIC ENTERPRISES (PERFORMANCE  
AND ACCOUNTABILITY) ACT 2009**





Tuvalu

## **PUBLIC ENTERPRISES (PERFORMANCE AND ACCOUNTABILITY) ACT 2009**

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Tuvalu

## **PUBLIC ENTERPRISES (PERFORMANCE AND ACCOUNTABILITY) ACT 2009**

**AN ACT TO PROMOTE IMPROVED PERFORMANCE AND  
ACCOUNTABILITY IN RESPECT OF PUBLIC ENTERPRISES BY  
SPECIFYING PRINCIPLES GOVERNING THE OPERATION OF PUBLIC  
ENTERPRISES, SPECIFYING THE PRINCIPLES AND PROCEDURE  
FOR THE APPOINTMENT OF DIRECTORS OF A PUBLIC  
ENTERPRISE, ESTABLISHING REQUIREMENTS CONCERNING  
ACCOUNTABILITY FOR PUBLIC ENTERPRISES AND PROVIDING  
SUPPORT FOR SHAREHOLDING MINISTERS ON MATTERS  
RELATING TO PUBLIC ENTERPRISES.**

ENACTED BY THE PARLIAMENT OF TUVALU  
28<sup>th</sup> May 2010

Commencement [1<sup>st</sup> December 2010]

### **PART I**

#### **PRELIMINARY**

##### **1 Short Title**

This Act may be cited as the Public Enterprises (Performance and Accountability) Act 2009.

## 2 Commencement

This Act shall come into force on such date as the Minister may by notice appoint.

## 3 Interpretation

(1) In this Act, unless the context otherwise requires:

“**Act**” means the Public Enterprises (Accountability and Performance) Act 2009

“**Board**” means –

(a) In relation to a Public Enterprise that is a company, the board of directors of the Public Enterprise;

(b) In relation to a Public Enterprise that is not a company, the persons occupying the positions in or in relation to the Public Enterprise (under governing legislation that are comparable with) those of the board of directors of a company.

“**Governing legislation**” means an Act which provides for the establishment, purposes, functions and governance and purposes of an individual Public Enterprise.

“**Organization**” includes a company, a enterprise corporate, a statutory corporation, a statutory enterprise, a trust, a partnership and a joint venture.

“**Public Enterprise**” means an organization included in Schedule 1 and any subsidiary of a Public enterprise.

“**Public Beneficial Enterprise**” means an organisation listed in Part B of Schedule 1 and any subsidiary of a Public Beneficial Enterprise:

“**Public Trading Enterprise**” means an organisation listed in Part A of Schedule 1 and any subsidiary of a Public Trading Enterprise.

“**Responsible Minister**” in relation to a Public Enterprise means the Minister for the time being responsible for that Public Enterprise.

“**Shares**” means –

- (a) In relation to a company that has issued shares, a share of any class;
- (b) In relation to an organization (other than a company) that has a capital, an interest in or right to the whole or any part of that capital, other than an interest or right as a creditor;
- (c) In relation to a company or other organization that does not have a capital,



- (i) an interest in or right to any part of the assets of the company or organization other than an interest or right as a creditor; or
- (ii) where there are no assets, a direct or contingent obligation to contribute money to or bear losses of the company or organization; and

“**shareholder**” has a corresponding meaning.

“**Shareholding Ministers**” means the Minister of Finance and the Responsible Minister and, where the Minister of Finance is also the Responsible Minister, a Minister who is approved by Cabinet to be a Shareholding Minister for the purpose of this Act.

“**Subsidiary**” has the same meaning as in the Companies Act 1991.

- (2) Part A of Schedule I provides the list of Public Trading Enterprises and Part B of Schedule 1 provides the list of Public Beneficial Enterprises.

#### **4 Purpose**

The purpose of this Act is to enhance the performance and accountability of Public Enterprises in order to provide the best possible service for the people of Tuvalu thereby contributing to Tuvalu’s social, cultural, economic and commercial development.

## **PART II**

### **FORMATION AND OWNERSHIP OF PUBLIC TRADING ENTERPRISES**

#### **5 Transfer to the Companies Act 1991**

Despite the provisions of any law each Public Trading Enterprise shall register as a company under the Companies Act 1991 at a time and in such form of registration as determined by the Minister of Finance.

Every existing Public Trading Enterprise is deemed to have been registered as a company under the Companies Act at the coming into effect of this Act. A Public Trading Enterprise formed after the effective date of this Act must register as a company under the Companies Act 1991 within one month of its formation.

#### **6 Ministerial Shareholding**

- (1) Shares in a Public Trading Enterprise held by Share-holding Ministers are held ex officio on behalf of the people of Tuvalu and must be registered accordingly

- (2) The Minister of Finance and each responsible Minister may subscribe for or otherwise acquire all of the shares in a Public Trading Enterprise.
- (3) Where a Public Trading Enterprise has entered into a joint venture or other legal entity such that the shareholding of the Government is less than 100% this section shall only apply to the shares of such joint venture or other legal entity which are owned by the Government.
- (4) The number of shares in a Public Trading Enterprise held by each shareholding Minister pursuant to subsection (1) shall be the same.
- (5) Any money required to be paid by a shareholding Minister on subscribing or applying for, or being allotted, shares pursuant to subsection (1) shall be paid out of money appropriated by Parliament for the purpose.
- (6) The shareholding Minister is responsible to Parliament for the performance of Public Enterprises under the Act.
- (7) **The Board of a Public Trading Enterprise shall be accountable to the shareholding Minister.**
- (8) The Board of a Public Beneficial Enterprise shall be accountable to the Shareholding Minister.

## 7 Disposal of Shares

- (1) Subject to this section a shareholding Minister shall not:
  - (a) Sell or otherwise dispose of any shares in a Public Trading Enterprise held in the Minister's name; or
  - (b) Permit shares in the Public Trading Enterprise to be allotted or issued to any person other than a shareholding Minister; except in accordance with this Act.
- (2) A share in a Public Trading Enterprise held by a shareholding Minister may only be sold or otherwise disposed with the approval of the Governor General acting on the advice of Cabinet.
- (3) Cabinet may call for investments in any Public Trading Enterprise by way of subscriptions for the purchase and acquisition of shares in the Public Trading Enterprise or by any other scheme of investment it approves.
- (4) Cabinet may:
  - (a) Approve the sale of shares or any other scheme of investment in any Public Trading Enterprise; and
  - (b) As part of any sale of shares or other scheme of investment, approve the sale or transfer of some or all of the shares held by a Shareholding Minister on such terms and conditions as determined by Cabinet.

- (5) Subject to subsection (6) the Minister of Finance shall give the Speaker of Parliament a report on the sale of shares or other scheme of investment for a Public Trading Enterprise approved by Cabinet within 14 days of Cabinet approving the sale of shares or other scheme of investment, and the report must be tabled by the speaker in the parliament session immediately following the submission of the report.
- (6) Where, in the opinion of the Minister of Finance, the tabling of a report under subsection (5) would have the effect of decreasing the value of any Public Trading Enterprise or any shares in a Public Trading Enterprise the Minister shall delay the tabling of such report until he or she is satisfied that the value of the Public Trading Enterprise or shares in the Public Trading Enterprise will not be adversely affected by the tabling of such report and, where such report is ultimately tabled, the Minister of Finance shall provide a written statement with the report explaining the delay.

## PART III

### OBJECTIVE OF PUBLIC TRADING ENTERPRISES

#### 8 **Principal objective to be a successful business**

Subject to the Companies Act 1991, the principal objective of every Public Trading Enterprise shall be:

- (a) to operate as a successful business; and
- (b) be as profitable and efficient as comparable businesses that are not owned by the State; and
- (c) meet any community service obligations established under Part III; and
- (d) be a good employer (as defined in subsection (2)); and
- (e) be an organisation that shows social responsibility by considering the interests of the community in which it operates.

## PART IV

### COMMUNITY SERVICE OBLIGATIONS

#### 9 **Definition of Community Service Obligation**

- (1) For the purposes of this Act a Community Service Obligation means:

- (a) The provision of a good or service by a Public Trading Enterprise to a consumer or user on any terms other than normal commercial terms applying from time to time; or
  - (b) The entering into an agreement by a Public Trading Enterprise on any terms other than normal commercial terms applying from time to time; or
  - (c) The forbearance by a Public Trading Enterprise to exercise a right or entitlement other than on normal commercial terms applying from time to time.
  - (d) The forgiveness or reduction by a Public Trading Enterprise of a debt or an amount of money owed to the Public Trading Enterprise other than on normal commercial terms applying from time to time
- (2) Nothing in this part shall prevent a Public Trading Enterprise from exercising a commercial judgement to make donations to worthy causes or to price goods and services at or below the cost of their production.

## **10 Minister may direct Community Service Obligation**

Subject to this Part the Responsible Minister may direct a Public Trading Enterprise to provide a Community Service Obligation if the performance of the obligation is necessary to ensure:

- (a) that there is universal access to a necessary good or service; or
- (b) the promotion of a policy vital to the national interest as declared by the Governor General acting on the advice of Cabinet; or
- (c) that there is a proper and timely response to a local, regional, national or international emergency; or
- (d) the correction of an injustice as declared by the Ombudsman.

## **11 Minister to follow procedure concerning Community Service Obligation**

- (1) In performing any power or duty under this Part the Responsible Minister shall follow the procedures provided in Schedule 2 concerning the issuing of a direction to a Public Trading Enterprise to provide a Community Service Obligation.
- (2) Any direction by a Responsible Minister under this Part which fails to follow the procedures provided in Schedule 2 shall be invalid.

## **12 Procedure for issuing direction for Community Service Obligation**

- (1) The procedures for issuing of a direction by the Responsible Minister to a Public Trading Enterprise to provide a Community Service Obligation are provided in Schedule 2.
- (2) Schedule 2 may be amended from time to time by regulation made by the Minister of Finance acting on the advice of Cabinet.
- (3) Any regulations made pursuant to this section shall be laid before the Parliament within fourteen days of the making of the regulations or, where the Parliament is not sitting, within seven days of the commencement of the next sitting after the promulgation of the regulations.

## **13 Offence to unlawfully direct Director or Board of Directors**

- (1) Any person who knowingly directs or attempts to direct a Director or the Board of Directors of a Public Trading Enterprise to perform a Community Service Obligation other than in accordance with the provisions of this Act is guilty of an offence and shall be liable to a fine of up to \$10,000.00.
- (2) Any person who, whilst acting in the capacity of a Director of a Public Trading Enterprise, knowingly makes or takes part, or attempts to make or take part, in the making of a decision to perform a Community Service Obligation, other than in accordance with the provisions of this Act is guilty of an offence and shall be liable to a fine of up to \$10,000.00.

# **PART V**

## **OBJECTIVES OF PUBLIC BENEFICIAL ENTERPRISES**

### **14 Principal objective to be a successful beneficial enterprise**

The principal objective of every Public Beneficial Enterprise shall be to provide excellent service to its users and to this end:

- (a) meet the purposes and objectives of its governing legislation; and
- (b) operate in as efficient and effective manner as comparable organisations that are not owned by the State; and
- (c) act as good employer; and
- (d) be an organisation that shows social responsibility by considering the interests of the community in which it operates.

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## PART VI

### APPOINTMENT AND ROLE OF DIRECTORS

#### 15 Selection and Appointment of Directors

- (1) Every Director of a Public Enterprise shall be selected and appointed or reappointed in accordance with the criteria for selection and procedure for appointment of directors in Schedule 3.
- (2) The appointment or reappointment of a director of a Public Enterprise which fails to follow the criteria for selection and procedure for appointment in Schedule 3 shall be invalid.
- (3) The criteria for selection and procedure for appointment of directors of Public Enterprises are set out in Schedule 3.

#### 16 Role of Directors of Public Trading Enterprises

Every director of a Public Trading Enterprise shall ensure that it complies with the Companies Act 1991.

#### 17 Decisions by Directors of Public Trading Enterprises

- (1) Every decision by a director of a Public Trading Enterprise and every decision by a Board of Directors of a Public Trading Enterprise shall be made solely in compliance with provisions of the Companies Act 1991 and section 136 of the Act.
- (2) A person who, whilst acting in the capacity of a director of a Public Trading Enterprise, knowingly makes any decision other than for the purpose of complying with the provisions of the Companies Act 1991 and in accordance with section 136 of the Act is guilty of an offence and shall be liable to a fine of up to \$10,000.00

#### 18 Role of Directors of Public Beneficial Enterprises

Every Director of a Public Beneficial Enterprises shall ensure that the Public Beneficial Enterprise provides excellent service to its users in accordance with section 14 of the Act.

## **19 Decisions by Directors of Public Beneficial Enterprise**

- (1) Every decision by a Director of a Public Beneficial Enterprise and a Board of Directors of a Public Beneficial Enterprise shall be made solely for the purpose of ensuring that the Public Beneficial Enterprise provides service to its users in accordance with section 14.
- (2) Any person who whilst acting in the capacity of a Director of a Public Beneficial Enterprise, knowingly makes any decision other than for the purpose of ensuring that the Public Beneficial Enterprise provides excellent service to its users in accordance with section 14 shall be guilty of an offence and shall be liable to a fine of up to \$10,000.00

## **20 Declaration of Pecuniary Interests and Convictions**

- (1) Every director of a Public Enterprise shall provide the Shareholding Ministers and the Auditor General, the Secretary for Finance and the Attorney General with a Declaration of Pecuniary Interests and Convictions in the form provided in Schedule 4 within 2 months of the commencement of the Act and annually thereafter by the 30th day of June.
- (2) A director of a Public Enterprise who fails to perform his or her duty under subsection (1) shall lose his or her position as a director.
- (3) Each Declaration of Pecuniary Interests and Convictions shall be available for public inspection at the Office of the Attorney General during normal business hours upon payment of a fee set by regulation.
- (4) The Attorney General shall keep a register of Declarations of Pecuniary Interests and Convictions to enable the public to exercise their rights under subsection (3).
- (5) The form and content of the Declaration of Pecuniary Interests and Convictions are set out in Schedule 4.
- (6) Schedule 4 to the Act may be amended by regulation made by the Minister of Finance acting on the advice of Cabinet.
- (7) Any regulations made pursuant to this section shall be laid before the Parliament within fourteen days of the making of the regulations or, where the Parliament is not sitting, within seven days of the commencement of the next sitting after the regulations have been promulgated.

## **21 Decisions by Directors involving a conflict of interest**

- (1) A person who whilst acting in the capacity of a director of a Public Enterprise, knowingly makes or takes part in the making, or attempts to take part in the making of a decision where the person has a pecuniary or other interest which

conflicts with the interests of the Public Enterprise is guilty of an offence and shall be liable to a fine of up to \$10,000.00

- (2) A person convicted under this section shall immediately lose his or her directorship of the particular Public Enterprise and any other Public Enterprise of which the person is a director.
- (3) The contents of Sections 20-21 will be superseded by Sections 29-36 and all other relevant provisions of the Leadership Code Act of 2006 when the latter comes into operation.

## **PART VII**

### **ACCOUNTABILITY**

#### **22 Corporate Plan**

- (1) The Board of Directors of each Public Enterprise shall prepare a Corporate Plan in accordance with Schedule 5 to the Act and shall forward a copy of the Corporate Plan to each shareholding Minister, the Auditor General and the Secretary for Finance before the start of each financial year.
- (2) The Corporate Plan shall include a Statement of Corporate Objectives.
- (3) The form and content of the Corporate Plan are set out in Schedule 5.
- (4) Schedule 5 to the Act may be amended by regulation made by the Minister of Finance acting on the advice of Cabinet.
- (5) Any regulations made pursuant to this section shall be put before the Parliament within fourteen days of the making of the regulations or, where the Parliament is not sitting, within seven days of the commencement of the next sitting after the regulations have been promulgated.
- (6) The Statement of Corporate Objectives referred to in subsection (2) shall be put before the Parliament within fourteen days of the Responsible Minister receiving the Statement of Corporate Objectives from the Public Enterprise or where the Parliament is not sitting, within seven days of the commencement of the next sitting after the Statement of Corporate Objectives has been received by the Responsible Minister.

#### **23 Financial Reports, Accounts and Information**

- (1) In addition to the financial reports, accounts and information required by the Companies Act 1991 or governing legislation, as the case may be, each Public Enterprise shall prepare financial reports, accounts and information in accordance with the requirements of Schedule 6.



- (2) Schedule 6 to the Act may be amended by regulation made by the Minister of Finance acting on the advice of Cabinet.
- (3) Any regulations made pursuant to this Section shall be laid before the Parliament within fourteen days of the making of the regulations or, where the Parliament is not sitting, within seven days of the commencement of the next sitting after the regulations have been promulgated.

## **24 Performance Audit**

- (1) A shareholding Minister or the Secretary for Finance may require the Auditor General to conduct a performance audit of a Public Enterprise.
- (2) Upon being requested in writing by a shareholding Minister or the Secretary for Finance the Auditor General shall conduct a performance audit.
- (3) Of his or her own motion the Auditor General may conduct a performance audit, hiring appropriate technical expertise if necessary.
- (4) For the purposes of the Act a performance audit shall take the form of an enquiry by the Auditor General as to the circumstances and performance of a Public Enterprise and shall include an enquiry as to the performance of any duty or responsibility under the Act, the Companies Act 1991 or any governing legislation by any person, director, board of directors or Public Enterprise.
- (5) Upon completion of a performance audit the Auditor General shall forward a report to each shareholding Minister, the Secretary for Finance and the Speaker of the Parliament.
- (6) Upon receipt of any report provided under subsection (5) the Speaker shall lay the report before the Parliament
- (7) In conducting a performance audit the Auditor General shall have all such powers as are necessary or expedient to enable the Auditor General to carry out his or her functions under this section.
- (8) Without limiting the generality of subsection (7) the Auditor General shall have the power:
  - (a) to inspect and take copies of any document, file, bank statement or record (whether paper, electronic or in any other form);
  - (b) to seize any document, file, record (whether paper, electronic or in any other form), bank statement, or any computer or other electronic device, recording system or database;
  - (c) to enter any premises, if necessary by force, to search for and seize any item the Auditor General believes on reasonable grounds is needed to assist with the conduct of a performance audit; and the Commissioner of Police and the Secretary for Finance shall give any assistance the

Auditor General may request to enable a performance audit to be completed.

- (9) Notwithstanding any law now existing the Auditor General shall have the power to require any bank, financial institution, trust, trustee, accountant, lawyer, any other legal entity, Minister, Member of Parliament, Government Department, Government organization, departmental head, public servant or any other person to answer any question which the Auditor General may require the entity or person to answer.
- (a) The powers of the Auditor General under subsection 9(i) are subject only to the right of any person to refuse to answer a question if the person believes that the answer would incriminate the person.
- (b) Where a person refuses to answer a question on the grounds of self-incrimination the Auditor General shall include details of the refusal in the report of the performance audit.

## **25 Director liable to be dismissed**

If, following a performance audit it is found that a director of a Public Enterprise has failed to perform any duty or function required of the director under this Act, the Companies Act 1991 or any governing legislation, the Responsible Minister may dismiss the director from the Public Enterprise.

## **26 Secretary for Finance to undertake assessment of performance**

- (1) The Secretary for Finance may at any time undertake an assessment as to the performance of a Public Enterprise and its capacity to meet its obligations under the Act, the Companies Act 1991 or any governing legislation.
- (2) The assessment under subsection (1) may take the form of an inquiry in such manner as the Minister of Finance thinks fit.
- (3) In conducting an assessment under (1) the Secretary for Finance shall have all such powers as are necessary or expedient to enable the Secretary for Finance to carry out his or her functions under this section.
- (4) Without limiting the generality of subsection (3) the provisions of subsections (8) and (9) of section 24 of the Act shall apply to any assessment conducted by the Secretary for Finance under this section and where the Auditor General is referred to in subsections (8) and (9) of section 24 of the Act the references shall be read as referring to the Secretary for Finance and the powers of the Secretary for Finance.

## **27 Auditor General to be Auditor of Public Enterprises and Subsidiaries**

- (1) Notwithstanding the provisions of the Companies Act 1991 and any governing legislation the Auditor General shall be the auditor of every Public Enterprise and of every subsidiary of every Public Enterprise, and, for the purposes of the Companies Act 1991 shall have and may exercise the functions, duties, and powers of an auditor appointed under the Act and all such powers in respect of public moneys trust money and public property.
- (2) Every Public Enterprise shall pay to the Auditor General or an external auditor so appointed by the Auditor General for carrying out the duties and functions under this section fees at such rates no greater than those prescribed by the Minister of Finance.
- (3) The Auditor General may after consultation with the Board of a Public Enterprise, appoint a person or firm that is qualified for appointment as an auditor of a company to audit the Public Enterprise. Consistent with his or her constitutional powers, it shall be the responsibility of the Auditor General to certify that a completed audit has been carried out in accordance with internationally recognised best practices of auditing and the opinion expressed therein are supported. In this context best practice includes ensuring adequate experience and skills are possessed by the individuals who are to perform the audit.

## **PART VIII**

### **SUPPORT FOR PUBLIC ENTERPRISES AND DIRECTORS**

## **28 Support by the Public Enterprise Monitoring Unit, Ministry of Finance**

- (1) The Public Enterprise Monitoring Unit, Ministry of Finance shall provide any Shareholding Minister, director and board of directors of a Public Enterprise with:
  - (a) advice and assistance concerning Corporate Plans, Statements of Corporate Objectives and financial reports;
  - (b) analysis, advice and information concerning the performance of any Public Enterprise and compliance with the Act by any Public Enterprise or person;
  - (c) advice to shareholding Ministers on expenditure, advances, credit support, and guarantees to be made, sought or provided in relation to a Public Enterprise;
  - (d) financial, commercial and public policy analysis and advice in relation to Public Enterprises and in relation to corporatization and/or privatization of Public Enterprises;

- (e) advice on the appointment of directors and boards of Public Enterprises and the performance of such directors and boards;
  - (f) information and advice relating to best practice by Public Enterprises so as to encourage and enhance efficiencies and service delivery; and
  - (g) information and advice to shareholding Ministers when requested to do so.
- (2) The Public Enterprise Monitoring Unit, Ministry of Finance shall be responsible for monitoring the performance of Public Enterprises on behalf of the Shareholding Ministers and advising the Shareholding Ministers in respect of the Government's investment in Public Enterprises.

## PART IX

### OTHER MATTERS

#### 29 Transfer of employment from the Public Service

- (1) Except as otherwise provided in this Act every Public Enterprise shall consult with the Public Service Commission over the conditions of employment to be included in any agreement to be entered into with any employee transferring from employment in the Public Service, for the purpose of ensuring that such agreement contains terms that are no less favourable than those upon which the employee is employed immediately before the transfer.
- (2) For the avoidance of doubt on the establishment of a Public Enterprise all employees transferring employment from the Public Service to the Public Enterprise shall transfer on terms no less favourable than those applicable to him or her immediately prior to transfer.
- (3) Every employee transferring employment from the Public Service to a Public Enterprise shall be entitled, in accordance with any regulations made under this Act, to the payment of such entitlements as they have accumulated during their employment in the Public Service.

#### 30 Powers

The Governor General, Cabinet, Ministers, Auditor General, Secretary for Finance, Attorney General, Ombudsman, Commissioner of Police, each Public Enterprise and each Director of a Public Enterprise shall have the power to do all lawful things necessary or convenient to be done for or in connection with the performance of their respective powers, functions and duties under the Act.

**31 Delegation by Shareholding Ministers, Auditor General and Secretary for Finance**

- (1) The Shareholding Ministers, the Auditor General and the Secretary for Finance may delegate any of their powers, functions and duties under this Act in writing, except for this power of delegation.
- (2) Where a delegation has occurred in accordance with this section any decision or action taken by the person to whom the power, function or duty is delegated shall be regarded for all purposes as if it were a decision or action of the Shareholding Minister, the Auditor General or the Secretary for Finance, as the case may be.

**32 Regulations**

- (1) The Minister of Finance acting on the advice of Cabinet may make regulations prescribing matters:
  - (a) Required or permitted by this Act to be prescribed including amendment of, or addition to, the Schedules; or
  - (b) Necessary or convenient to be prescribed for carrying out or giving effect to this Act; or
  - (c) To impose penalties for any matter under this Act.
- (2) All regulations made under this section shall be laid before the Parliament by the Minister of Finance within 14 days of the date of the making thereof if the Parliament is then in session, and if not, at the commencement of the next session.

**SCHEDULE****Schedule 1**

(section 3(2))

**PART A -Public Trading Enterprises**

National Bank of Tuvalu (NBT)  
Development Bank of Tuvalu (DBT)  
Telecommunications Corporation (TTC)  
Vaiaku Lagi Hotel (VLH)  
Electricity Corporation (TEC)  
Fishing Corporation (NAFICOT)  
Philatelic Bureau. (TPB)

**PART B -Public Beneficial Enterprises**

Maritime Training Institute (TMTI)

**Schedule 2**

(section 11)

**PROCEDURES CONCERNING COMMUNITY SERVICE OBLIGATION**

2. Procedures for the issuing of a direction applied for by the Board of Directors of a Public Trading Enterprise or a Minister (other than the Responsible Minister), for the performance of a Community Service Obligation (CSO)

- 2.1 Before the Responsible Minister issues a direction the following procedures have to be complied with:
- 2.1.1 The Board of a Public Trading Enterprise under Schedule 1 or a Minister, (other than the Responsible Minister) may apply to the Responsible Minister to issue a direction for the performing of a CSO.
- 2.1.2 An application under sub-clause 2.1.1 for a direction of a CSO shall include:
- (a) the scope of the CSO; and This section shall provide a description of the function to be performed, service provided or concession allowed.
  - (b) the legislative authority under which the CSO is being provided; and This section shall refer to the legislative authority in section 10 of the Act given to a Public Trading Enterprise to perform the CSO.
  - (c) any other Government objective being pursued that is not covered in the Act; and This section shall provide what outcome the Government is achieving from the delivery of this CSO. The implications for this objective of not continuing the CSO should also be examined;
  - (d) the past or intended results of the CSO; and This section shall provide details of the past results or intended results of the CSO activity. It shall state the:
    - (i) beneficiaries and benefits from providing the CSO; and
    - (ii) activity or program of the Public Trading Enterprise that would be affected in the performance of the CSO; and
    - (iii) effect on the Public Trading Enterprise of providing the CSO.
  - (e) the total cost of the delivery of the CSO; and
  - (f) details of any revenue associated with the CSO; and This section shall provide the details of the revenue sources associated with providing the CSO, for instance, Government funding or other funding.
  - (g) The performance measures for delivering the CSO.
- 2.1.3 Every application in sub-clause 2.1.1 containing any estimated funding by Government shall be subject to the performance budgetary process and submitted to Ministry of Finance at a time necessary for the application to be considered in the Estimates but not later than 3 months before the end of the Government financial year.

- 2.1.4 Every application in sub-clause 2.1.1 shall be forwarded to the Responsible Minister and, where applicable, to the Public Trading Enterprise likely to perform the CSO for an assessment report to be provided no later than one month after receiving the application and including their costing of the delivery of the CSO and, at the same time, the Finance secretary for an independent review.
- 2.1.5 Ministry of Finance shall provide a report and advise on the independent review of the application in sub-clause 2.1.1 to the Responsible Minister no later than one month after receiving the application.
- 2.1.6 The Responsible Minister shall forward:
- a) the application for the CSO; and
  - b) the CSO assessment report (if applicable) from the Public Trading Enterprise likely to perform the CSO; and
  - c) Ministry of Finance's report and advice on its independent review of the application in sub clause 2.1.1; and
  - d) Ministry of Finance's advice on the availability of Government funding (if applicable);
- to Cabinet for review and approval.
- 2.1.7 Cabinet may or may not approve the application for the direction of a CSO.
- 2.1.8 In the process of approving the application, Cabinet may select the most appropriate enterprise, organization or business to perform the CSO through a competitive tendering process complying with the normal tendering procedures of Government.
- 2.1.9 If Cabinet approves the application, the Responsible Minister shall issue the direction for the provision of the CSO by the Public Trading Enterprise in accordance with the requirements stated in this Schedule.
- 2.2 Procedures for the issuing of a direction for Community Service Obligations applied for by the Responsible Minister:
- 2.2.1 In the case where a Responsible Minister requires the performance of a CSO by a Public Trading Enterprise, the Minister must:
- a) make an application in accordance with all the requirements in sub-clause 2.1.2; and
  - b) forward the application to Ministry of Finance for an independent review; and



- c) comply with the performance budgetary process, if such application contains any estimated funding, and submit the application to Ministry of Finance within the time limit set for the application to be considered in the Estimates but not later than 3 months before the end of the Government financial year; and
- d) where applicable, forward the application to the Public Trading Enterprise likely to perform the CSO for an assessment report to be provided no later than 1 month after receiving the application; and
- e) forward the application for the CSO, together with the advice provided by Ministry of Finance in sub-clause 2.2.1 (b) above and a CSO assessment report from the Public Trading Enterprise likely to perform the CSO, if applicable, to Cabinet for review and approval.

2.2.2 Cabinet may or may not approve the application for the direction of a CSO.

2.2.3 In the process of approving the application, Cabinet may select the most appropriate enterprise, organization or business to perform the CSO through a competitive tendering process, complying with normal tendering procedures of Government.

2.2.4 If Cabinet approves the application, the Responsible Minister shall issue the direction for the provision of the CSO by the Public Trading Enterprise in accordance with the requirements stated in this Schedule.

2.3 Requirements to be included in the issuing of a CSO by the Responsible Minister

2.3.1 Any direction to be issued under this Schedule by the Responsible Minister for the provision of a CSO must state:

- (a) the scope of the CSO; and This section shall provide a description of the function performed, service provided or concession allowed.
- (b) the legislative authority under which the CSO is being provided; and This section shall refer to the legislative authority in section 10 of the Public Enterprises (Performance and Accountability) Act 2001 given to a Public Trading Enterprise to perform the CSO
- (c) the date or time within which the CSO is to be performed; and
- (d) the performance measures for delivering the CSO; and
- (e) the standards to be achieved in delivering the CSO; and

- (f) that the annual cost of the provision of every CSO shall be published in the Public Trading Enterprise's audited accounts; and
- (g) that upon signing the Agreement for the provision of the CSO, the signed Agreement shall be tabled in Parliament within 14 days if the Legislative Assembly is then in session, and if not, within 7 days of the next ensuing session.

2.4 Transitional arrangements for Public Trading Enterprises which are currently performing non-commercial services to turn them into CSOs

2.4.1 The Public Trading Enterprises providing existing non-commercial services shall apply to the Responsible Minister to have the future delivery of these services embodied within the CSO framework. A deadline of 12 months from the date of this Schedule coming into force shall be set for the Public Trading Enterprises to either include these services within the CSO framework or have these services delivered under an alternative arrangement.

### **Schedule 3**

(section 15)

## **CRITERIA FOR THE SELECTION AND PROCEDURES FOR THE APPOINTMENT, RE-APPOINTMENT, VACATING AND REMOVAL OF DIRECTORS OF PUBLIC ENTERPRISES**

### **Part A Public Trading Enterprises**

3.1 Criteria for the selection and re-appointment of Directors of Public Trading Enterprises:

3.1.1 Directors of Public Trading Enterprises shall be selected and re-appointed in accordance with the following criteria:

- (a) A person whom in the opinion of the Committee appointed in clause 3.2.1 below can assist in achieving the Public Trading Enterprise's objectives; and
- (b) A person who is disqualified under the following shall not be appointed as a director;
  - i. under 21 years of age; or
  - ii. an undischarged bankrupt; or
  - iii. adjudged to be mentally defective under the Mental Health Ordinance 1961; or
  - iv. disqualified from being a Director under sections 202, 203 or 204 of the Companies Act 1991; or
  - v. is convicted in Tuvalu or elsewhere of an offence punishable by death or by imprisonment for a term of 2 years or more; and
- (c) A person who has attended a Directors' training course before appointment and for re-appointments a refresher training; and
- (d) No director shall be appointed or re-appointed as a director where that person was a director or manager of a company at the time the company has been placed in receivership or liquidation, whether such receivership or liquidation occurred in Tuvalu or elsewhere; and
- (e) No person shall be appointed or re appointed as a director if that person has or had a history of failing to repay on time any money legally owed by the person to any Public Trading Enterprise; and
- (f) No person shall be appointed or re appointed as a director if such person is an employee, director or shareholder in another enterprise or institution whose business is similar to or potentially in conflict with that of the Public Trading Enterprise; and
- (g) No Member of Parliament, Public Servant or a Constitutional Officer shall be a director or be re-appointed as a director unless Cabinet has certified that such appointment or re-appointment, as the case may be, is necessary; and
  - i. in the national interest; and
  - ii. that the Member of Parliament, Public Servant or Constitutional Officer, as the case may be, has particular qualifications or business experience which the Public Trading Enterprise requires on its Board of Directors and such qualifications or business experience cannot be found elsewhere. Where a Member of Parliament, Public Servant or Constitutional Officer is appointed or reappointed under

this sub-clause the person shall not receive remuneration or other benefits from the Public Trading Enterprise for services as a director; and

- (h) Any other additional criteria drafted by the Committee established under sub-clause 3.2.1 in consultation with Ministry of Finance and the existing Board of the Public Trading Enterprise concerned and in accordance with international best practice, which is necessary for scrutinizing a particular appointment or re-appointment of a director of a Public Trading Enterprise.

### 3.2 Procedures for the selection of Directors of Public Trading Enterprises

- 3.2.1 An Independent Selection Committee (“the Committee”) of at least 3 members, shall be appointed by Cabinet for a term determined by Cabinet to select persons to fill vacancies on a board. The Committee shall carry out responsibilities required by Cabinet in its terms of reference additional to the Committee’s responsibilities listed below in these procedures.
- 3.2.2 The Committee in consultation with MoFEP and the existing board of the public trading body concerned, shall draft any additional criteria to the standard criteria in clause 3.1 if necessary for any particular appointment.
- 3.2.3 The Committee shall advertise all public trading bodies boards’ vacancies and required criteria as widely as possible both locally and overseas if required and can use television, radio, internet and newspaper, inviting applications from interested persons.
- 3.3.4 Those wishing to be considered for appointment to the Board must provide a statutory declaration addressing the selection criteria and provide at least 2 references. This statutory declaration and application are to be forwarded to the Committee.
- 3.2.5 The Committee shall receive and review applications for the purpose of short-listing the best candidates for the appointment.
- 3.2.6 The Committee shall advise Cabinet of the applicants short-listed and the reasons for their decision.
- 3.2.7 Cabinet shall approve the appointment of candidates recommended by the Committee.

- 3.3 Terms and conditions under which a Director's position becomes vacant or a Director may be removed from office
- 3.3.1 The position of a Director of a Public Trading Enterprise becomes vacant and a Director may be removed from office if the director:
- (a) fails to attend 3 consecutive Board meetings of a Public Trading Enterprise without an apology being received and accepted by the Chairman of the Board, and in the case of the Chairman an apology being received and accepted by the Board of Directors; or
  - (b) attains the age of 70 years and is not recommended by the Committee for reappointment;
  - (c) becomes bankrupt; or
  - (d) is convicted in Tuvalu or elsewhere of an offence punishable by death or by imprisonment for a term of 2 years or upwards; or
  - (e) is convicted of an offence relating to his or her duties as a director; or
  - (f) fails to comply with Schedule 4 of the Act.
- 3.3.2 Cabinet may remove a Director, or all Directors, from a Public Trading Enterprise if the Public Trading Enterprise fails to file its annual reports, quarterly reports or other documents or information relating to a Public Trading Enterprise as required under the Act or the Schedules to the Act.
- 3.4 The application of the above procedures for appointment and reappointment of Board members shall apply:
- 3.4.1 when each Board member of a Public Trading Enterprise's current term of appointment ends: and
- 3.4.2 when a Board member of a Public Trading Enterprise dies, resigns or is removed from office: and
- 3.4.3 when an ex-officio Board member's position on a Board becomes vacant as decided by Cabinet on the advice of Ministry of Finance. The replacement of all ex-officio Board members shall be made within 5 years from the coming into force of this Schedule.

### Part B Public Beneficial Enterprises

The above procedures relating to the selection, re-appointment, vacating and removal of a Director's position in a Public Trading Enterprise shall also apply to Public Beneficial Enterprises.

**Schedule 4**

(section (20))

**DECLARATION OF PECUNIARY INTERESTS AND CONVICTIONS**

The form and content of the Declaration of Pecuniary Interests and Convictions under this Schedule shall be as follows:

- I, (Name of Director) of (Address) being a Director of (name of public enterprise) do solemnly and sincerely declare that:
  - 1. I consent to my appointment as a Director of (name of public enterprise)
  - 2. My personal details are as follows:
    - 2.1 Full name: .....
    - 2.2 Residential Address: .....
    - 2.3 Business Address: .....
    - 2.4 Date of Birth .....
    - 2.5 Place of Birth including country .....
    - 2.6 Business occupation (if any) .....
  - 3. My directorships and other interests are as follows:
    - 3.1 Particulars of any directorships or other offices which I hold in other companies or Public Enterprises are set out in Part 1 of this Declaration.
    - 3.2 Particulars of any membership of partnerships and interests in trusts, joint ventures or other arrangements for the sharing of profits, are set out in Part 2 of this Declaration.
    - 3.3 Except as set out in Part 2 to this Declaration, I:
      - 3.3.1 do not have a beneficial interest in any shares; and
      - 3.3.2 do not have a beneficial interest in any securities (howsoever described).

4. Except as set out in Part 3 of this Declaration, I am not directly or indirectly interested in any contract or proposed contract with a Public Enterprise or any of its subsidiaries.
5. Except as set out in Part 4 of this Declaration, I do not have a beneficial interest in any property or office.
6. Except as set out in Part 5 of this Declaration, I have no conviction in Tuvalu or elsewhere for any offence.
7. Other than the matters detailed in this Declaration, I have no direct or indirect interest which conflicts or which could conflict with my duty as a director of a Public Enterprise.
8. I request that this Declaration be brought up and read at the next meeting of Directors of (name of public enterprise)
9. I declare that if any of the matters referred to in this Declaration change I will execute a further declaration immediately and file it with the Secretary for Justice.

#### PART 1 OTHER DIRECTORSHIPS OR OFFICES HELD

[Details]

#### PART 2 RELEVANT INTERESTS IN PARTNERSHIPS, TRUSTS, JOINT VENTURES, OTHER ARRANGEMENTS FOR SHARING PROFITS, SHARES AND SECURITIES

[Details]

#### PART 3 INTERESTS IN CONTRACTS WITH ANY PUBLIC ENTERPRISE OR THEIR SUBSIDIARIES

[Details]

#### PART 4 OTHER PROPERTY AND OFFICES HELD

[Details]

#### PART 5 CONVICTIONS

[Details]

Declared at .....this .....day  
of

.....200.....before me

(Signature)

(Solicitor of the Supreme Court of Tuvalu)

(or other person authorised to take a statutory declaration)



## Schedule 5

(section 22(3))

### Part A – Public Trading Enterprises

- 5.1 Every Board of Director of each Public Trading Enterprise shall prepare a Corporate Plan every year:
  - (a) to cover the next year and the following two years; and
  - (b) which includes a Statement of Corporate Objectives; and
  - (c) which shall be subject to clause 5.4.5.
- 5.2 The Board of Directors of each Public Trading Enterprise shall forward a draft of its Corporate Plan under clause 5.1 above to each Shareholding Minister, the Government Auditor and the Financial Secretary 3 months before each financial year.
- 5.3 The Board of Directors of each Public Trading Enterprise shall prepare a Corporate Plan, including a Statement of Corporate Objectives, in accordance with the guidelines on format and content issued by Ministry of Finance by way of Instructions from time to time.
- 5.4 Approval of the draft Corporate Plan
  - 5.4.1 When the Financial Secretary receives a Public Trading Enterprise's draft Corporate Plan in clause 5.2 above, the Financial Secretary shall review and advise the Shareholding Ministers on the draft Corporate Plan. The Shareholding Ministers and the Board of the concerned Public Trading Enterprise, after considering the Financial Secretary's review and advice, shall, at their earliest, attempt to reach an Agreement on the Corporate Plan.
  - 5.4.2 If an Agreement cannot be reached between the Shareholding Ministers and the Board of Directors under sub-clause 5.4.1, the Shareholding Ministers shall advise Cabinet on matters relating to the draft Corporate Plan that could not be resolved between them and the concerned Public Trading Enterprise.
  - 5.4.3 Cabinet may, by written notice, direct the concerned Board of the Public Trading Enterprise to make modifications to the draft Corporate Plan.

5.4.4 The Board of a Public Trading Enterprise shall immediately comply with a direction issued by Cabinet under sub-clause 5.4.3.

5.4.5 Every Public Trading Enterprise's Corporate Plan under clause 5.1 shall only be effective:

- (a) if there has been an Agreement between the Shareholding Ministers and the concerned Public Trading Board on the draft Corporate Plan under sub-clause 5.4.1; or
- (b) in the case where Cabinet has issued any direction under sub-clause 5.4.3, the Public Trading Enterprise has complied with Cabinet's direction.

5.4.6 Every Public Trading Enterprise shall comply with its Corporate Plan once it is effective under subclause 5.4.5.

5.4.7 The Board of Directors of each Public Trading Enterprise shall ensure that its Corporate Plan is approved at least 14 days before the commencement of the financial year for which the Plan relates.

#### 5.5 Statement of Corporate Objectives (SCO)

The Chairperson of the Board of a Public Trading Enterprise shall advise the Shareholding Ministers by notice in writing upon becoming aware of any information which may materially affect the achievement of the Public Trading Enterprise's Statement of Corporate Objectives.

### **PART B – Public Beneficial Enterprises**

The above provisions shall apply to Public Beneficial Enterprises.

## Schedule 6

(section 23 (2))

### FINANCIAL REPORTS, ACCOUNTS and INFORMATION

For the purpose of this Schedule and, in accordance with the Act, Public Enterprise means every Public Trading Enterprise in Part A of Schedule 1 and every Public Beneficial Enterprise in Part B of Schedule 1.

6. Every Public Enterprise shall submit:
  - 6.1 Quarterly reports to Ministry of Finance no later than 1 month after the end of every quarter.
    - 6.1.1 Quarterly reports shall include:
      - a) accounts prepared for the quarter for management purposes; and
      - b) a statement in respect of each member of the Board as to all appointments, offices held or other matters which do or might give rise to a conflict of interest between any member of the board and the Public Enterprise and other interests arising from such appointments, offices and other matters; and
      - c) comparison between actuals and performance targets set out in the SCO and forecast or budget performance.
  - 6.2 An annual report and audited accounts to Ministry of Finance no later than 4 months after the end of the Public Enterprise's financial year.
    - 6.2.1 Annual reports shall include:
      - a) audited financial statements prepared in accordance with IFRS standards; and
      - b) an auditor's report on the financial statements in sub clause 6.2.1 (a); and
      - c) a statement in respect of each member of the Board of a Public Enterprise as to all appointments, offices held or other matters which do or might give rise to a conflict of interest between the member and the Public Enterprise and

other interests arising from such appointments, offices and other matters; and

- d) the dividend payable by the Public Enterprise to the State for the financial year to which the report relates.

6.3 Ministry of Finance may require a Public Enterprise to submit to Ministry of Finance additional information necessary to assist Ministry of Finance with its reporting responsibilities.

6.4 Every Public Enterprise shall submit to Ministry of Finance any information required by Ministry of Finance under clause 6.3.

6.5 Every Public Enterprise shall keep Ministry of Finance informed of any matters that may adversely affect the achievement of its objectives in the Corporate Plan or SCO.

- 6.6 All Public Enterprises shall prepare their accounts using accounting policy guidelines issued by Ministry of Finance from time to time.
- 6.7 Audited Accounts to be laid before Parliament
- 6.7.1 Within 12 sitting days of receiving the annual report and audited financial statement of the Public Enterprise, the Responsible Minister for the Public Enterprise shall lay the documents before Parliament:
- 6.7.2 Where the annual report and the audited accounts required by subclause 6.7.1 to be laid before Parliament have not been so laid within 5 weeks of the Responsible Minister receiving them, the Minister shall cause for these to be published not later than 5 weeks after that day.

Ministry of Finance shall develop a format to be used by Public Enterprises for quarterly and annual accounts.

## **Schedule 7**

### **Delegation of Powers**