



Tonga

TONGA COMMUNICATIONS CORPORATION ACT

Chapter 15.06

2020 Revised Edition



TONGA COMMUNICATIONS CORPORATION ACT

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TONGA COMMUNICATIONS CORPORATION ACT

AN ACT FOR THE ESTABLISHMENT AND REGULATION OF THE TONGA COMMUNICATIONS CORPORATION IN THE KINGDOM OF TONGA¹

Commencement [15th January 2001]²

PART I - PRELIMINARY

1 Short title

This Act may be cited as the Tonga Communications Corporation Act.

2 Interpretation

In this Act, unless the context otherwise requires —

“**Authorised Services**” means the Authorised Services defined in the Franchise Agreement;

“**board**” means the board of directors of the Corporation;

“**Commission**” means the Tonga Telecommunication Commission created and established under the Tonga Telecommunications Commission Act;

“**communications**” means any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or combination of those forms;

“**Corporate plan**” means a corporate plan prepared under section 18;

“**Corporation**” means the company incorporated or to be incorporated under the Companies Act pursuant to section 4 and which shall, on the succession date, be known as the Tonga Communications Corporation;

“**Department**” means the Department of Communications established or to be established under the Communications Act;³

“**financial statements**” mean a balance sheet, profit and loss statement, statement of source and application of funds, cash flow statements and such other statements of accounts as may be specified by the Minister;

“**financial year**” means a period of twelve (12) months ending on 30th June of each calendar year;

“**Franchise Agreement**” means the agreement dated 6 July 1994 between the Government and Cable and Wireless plc for the provision of external telecommunications services;

“**investor**” means an investor participating in the ownership and operation of the Corporation pursuant to the arrangement determined by the Minister of Finance under section 11;

“**liabilities**” means liabilities, debts, charges, duties and obligations of every description (whether present or future, actual or contingent, and whether payable or to be payable or to be observed or performed in Tonga or elsewhere);

“**Minister**” means the Minister responsible for communications;

“**property**” unless otherwise stated includes all property, movable or immovable, and all estates, interests, easements and rights, whether equitable or legal in, to or out of property, choses-in-action, money and goodwill;

“**related companies**” has the meaning prescribed in the Companies Act;

“**rights**” means all rights, powers, privileges and immunities, whether actual, contingent or prospective;

“**scheme**” means the Tongan participation scheme under section 13;

“**succession date**” means the date published in the Gazette by the Minister to be the date on which the properties, rights and liabilities of the Commission are transferred to and vested in the Corporation;⁴

“**shares**” means any shares in the Corporation; and

“vested” in relation to property, includes rights to property which are future or contingent and rights in reversion and remainder.

PART II - OBJECTS

3 Objects

The objects of this Act are to —

- (a) facilitate the continuity of the Authorised Services on the termination of the Franchise Agreement;
- (b) provide for the Corporation to succeed the Commission;
- (c) make provisions for the participation of an investor in the ownership and operation of the Corporation;
- (d) facilitate the participation of Tongans in the ownership of the Corporation; and
- (e) pursue and promote the national policy objectives of Tonga for the communications sector.

PART III - ESTABLISHMENT OF THE CORPORATION

4 The Corporation

- (1) The Minister has caused or shall cause the incorporation of a company under the Companies Act for the purposes of this Act.
- (2) The Minister has caused or shall cause the Corporation to comply with all the requirements of incorporation under the Companies Act, prior to and on the incorporation of the Corporation.

5 The Corporation to purchase the assets of Cable and Wireless

The Corporation has purchased or shall purchase on behalf of the Government such assets and has assumed or shall assume such liabilities of Cable and Wireless plc as are necessary and sufficient to enable it to carry on the operation of the Authorised Services on the termination of the Franchise Agreement.

6 Appropriation of Government funds to the Corporation

The Government has advanced or shall advance by way of appropriation to the Corporation the funds necessary to purchase the assets and assume the liabilities of Cable and Wireless plc in accordance with section 5.

7 The Corporation to succeed the Commission

On the succession date,⁵ all properties, rights and liabilities to which the Commission was entitled or subject immediately before that date shall, by virtue of this section, be transferred and vested in the Corporation and become the properties, rights and liabilities of the Corporation without any further conveyance or transfer.

8 Transfer of the employees of the Commission

- (1) On the succession date, all persons who were employed by the Commission and were discharging any of the functions vested in the Commission immediately prior to the succession date shall be deemed to be transferred to the services of the Corporation on such terms to be determined by the Corporation.
- (2) The terms of employment offered by the Corporation to such persons, referred to in section 8(1), shall not be on less favourable terms than those enjoyed by the said persons prior to the succession date, taking into account their salaries, pecuniary benefits and conditions of service.

PART IV - OWNERSHIP OF THE CORPORATION

DIVISION 1 - GENERAL

9 Preparation of the financial statements of the Commission

The Minister shall cause the audited financial statements of the Commission to be prepared as at the succession date.

10 Ownership of the Corporation

- (1) Subject to sections 11 and 13, the Government shall be the sole owner of all the issued shares in the Corporation.
- (2) The Minister of Finance may, for and on behalf of the Government, exercise all rights and powers of a shareholder of the Corporation.

- (3) The Government shall not dispose of any of its shares unless such disposal is in accordance with an arrangement approved under sections 11 or 13.
- (4) The Government shall at all times retain majority ownership in the shares.

DIVISION 2 - INVESTOR PARTICIPATION

11 Investor participation⁶

Subject to the approval of Cabinet, the Minister of Finance may determine and effect an arrangement with an investor to participate in the ownership and operation of the Corporation.

12 Conditions of investor participation

Any arrangement determined by the Minister of Finance under section 11 shall fulfil the following minimum conditions —

- (a) any shares reserved for the scheme under section 13 shall not be available for offer or sale to the investor;
- (b) the Government shall have and be given the first option to purchase the shares issued to the investor under an arrangement determined under section 11 if the investor wishes to sell or otherwise dispose of its shares; and
- (c) the arrangement under section 11 shall be defined and documented in a binding shareholders' agreement.

DIVISION 3 - TONGAN PARTICIPATION SCHEME

13 Tongan participation⁷

Subject to the approval of Cabinet, the Minister of Finance may determine and effect an arrangement known as the Tongan participation scheme to encourage and enable Tongans to purchase the shares.

14 Conditions of the scheme

The scheme determined by the Minister of Finance under section 13 shall satisfy the following minimum conditions —

- (a) the aggregate number of shares available in the scheme shall not exceed ten per cent (10%) of the issued share capital of the Corporation at any one time;

- (b) the Corporation or its related companies shall be prohibited from participating in the scheme; and
- (c) the capital raised under the scheme shall be used by the Corporation for the development and improvement of communications network infrastructure.

PART V - OPERATIONS OF THE CORPORATION

15 Activities of the Corporation

The Corporation shall carry on the following activities, as its principal business —

- (a) the business of installing, owning, operating and developing the Corporation's infrastructure which is used or to be used to provide communications services to meet the needs of the users in Tonga;
- (b) the provision of the Authorised Services upon the termination of the Franchise Agreement; and
- (c) the business activities of the Commission from the succession date.

16 Business of the Corporation is subject to licence conditions

- (1) The board shall at all times ensure that the business activities undertaken by the Corporation are in compliance with the conditions set out in —
 - (a) the individual licence issued by the Minister to the Corporation; and
 - (b) any applicable class licence issued by the Minister,under the Communications Act and the Radiocommunication Act,⁸ if applicable.
- (2) The Corporation shall comply with the terms and conditions (including any variations or amendments) of the individual licence or class licence, as the case may be, as the Minister may determine from time to time.

17 Compliance with the directions of the Department

The Corporation shall comply with any directions, determinations or declarations given by the Minister or the Department in accordance with the powers given to them under the Communications Act.

PART VI - GOVERNANCE OF THE CORPORATION

18 Corporate plan for the Corporation

- (1) The board shall prepare and review a corporate plan at least once a year.
- (2) The corporate plan shall be for a period of not less than 3 years but not more than a period of 5 years, commencing on a date to be determined by the board.
- (3) Each subsequent corporate plan shall commence immediately after the expiry of the previous corporate plan.

19 Matters to be included in the corporate plan

The corporate plan shall include, but not be limited to, the following matters —

- (a) the objectives and strategies;
- (b) the quality of service performance indicators and targets, whether financial or operational; and
- (c) the infrastructure development plans and strategies,

of the Corporation.

20 Accounting procedures

- (1) The board shall ensure that proper accounts and records in relation to the business of the Corporation are kept in accordance with generally accepted accounting principles.
- (2) The board shall, within 90 days of the end of each financial year of the Corporation, prepare the financial statements and such other statements of accounts as are necessary to disclose fully the financial position of the Corporation and the financial performance of the operations of the Corporation during that financial year.

21 Audit procedures

- (1) The financial statements of the Corporation shall be audited annually by a duly qualified independent auditor appointed by the share-holders.
- (2) The auditor's report shall state whether, in the opinion of the auditor, the financial statements of the Corporation are true and accurate and, shall set out any matters falling within the normal duties of an auditor.

22 Annual report

The board shall, in respect of each financial year, prepare an annual report in English and Tongan containing —

- (a) a report on the business activities of the Corporation during the financial year;
- (b) the financial statements and other statements of accounts prepared under section 20(2) for the financial year and the auditor's report for the financial year;
- (c) a report on the scheme; and
- (d) any other matters as may be required by the shareholders,

and shall forward a copy of such report to the shareholders.

23 Place of domicile of the Corporation

The board shall at all times ensure that the management and control of the Corporation shall be ordinarily exercised at a place in Tonga.

PART VII - BOARD STRUCTURE OF THE CORPORATION

24 Board of the Corporation

The board shall at any one time consist of not more than 7 directors and not less than 4 directors.

25 Appointment of Directors

Notwithstanding section 152 of the Companies Act —

- (a) on the date of incorporation of the Corporation, and at any time thereafter, but prior to the participation of an investor under section 11, all directors of the Corporation shall be nominated and appointed by the Minister of Finance with the consent of Cabinet;
- (b) upon the participation of the investor under section 11, and at any time thereafter, the Minister of Finance with the consent of Cabinet and the investor shall nominate and appoint such number of directors of the Corporation, as agreed between the Minister of Finance and the investor. The nomination and appointment of each director may either be made individually or jointly subject to the terms to be agreed between the Minister of Finance and the investor; and

- (c) immediately upon participation of the investor under section 11, the Minister of Finance, if necessary, shall cause such number of directors, as agreed between the investor and the Minister of Finance, to resign as soon as practicable to give effect to subsection (b).

26 Term of appointment

Subject to sections 24 and 25 the term of appointment of a director of the Corporation shall be for a period of not less than 3 years but not more than 5 years.

27 Appointment of a chairman

The directors of the Corporation shall appoint one of the directors of the Corporation to be the chairman.

28 Inconsistencies

- (1) Any matters not provided for in this Act shall be determined in accordance with and regulated by the Constitution of the Corporation.
- (2) Where there is any conflict or inconsistency between the provisions of the Act and the provisions of the Constitution of the Corporation, the provisions of this Act shall prevail.
- (3) Where there is any conflict or inconsistency between the provisions of this Act and the shareholders' agreement under section 12, the provisions of this Act shall prevail.

ENDNOTES

¹ Act 21 of 2000

² GS 12/2000

³ Refer to Volume 1 for New Chapter Number

⁴ By GS 12/2000 the 5th February 2001 was so appointed

⁵ 5th February 2001

⁶ Amended by Act 42 of 2010

⁷ Amended by Act 42 of 2010

⁸ Refer to Volume 1 for new Chapter number