



Tonga

**COMMUNICATIONS COMMISSION ACT
2015**

Act 12 of 2015



COMMUNICATIONS COMMISSION ACT 2015

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COMMUNICATIONS COMMISSION ACT 2015

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AN ACT TO ESTABLISH THE COMMUNICATIONS COMMISSION

I assent,
TUPOU VI,
18th February 2016.

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

- (1) This Act may be cited as the Communications Commission Act 2015.
- (2) This Act shall come into force on a date proclaimed by Cabinet.

2 Interpretation

In this Act, unless the context otherwise requires -

- “**Appointments Committee**” has the meaning given in section 8;
- “**Audit Office**” has the meaning given in the Public Audit Act 2007;
- “**Chairperson**” means the person appointed as a chairperson under section 8;
- “**commencement date**” means the date that this Act comes into force under section 1(2);

“**Commission**” means the Communications Commission established under this Act;

“**Commissioner**” means a person appointed as a commissioner under section 7;

“**Communications Act**” means the Communications Act 2015;

“**Communications Commission Fund**” means the fund of that name established in accordance with section 23(1)(a);

“**ICT**” means International and Communications Technology

“**ICT Expert**” means a person appointed as an ICT expert under section 10(2);

“**licensee**” has the meaning given in the Communications Act;

“**Member**” means each of the Chairperson, the Commissioner and the ICT Expert;

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

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

“**Public Fund**” has the meaning given in the Public Finance Management Act 2002;

“**Remuneration Authority**” means the authority established under section 4 of the Remuneration Authority Act 2010;

“**respondent**” has the meaning given under section 13(2);

“**Universal Service Fund**” means the fund of that name established in accordance with section 23(1)(b);

“**universal service agreement**” has the meaning given under the Communications Act; and

“**universal service regime**” has the meaning given under the Communications Act.

PART II – THE COMMUNICATIONS COMMISSION

3 The Communications Commission

- (1) The Communications Commission is hereby established.
- (2) The Commission shall be a body corporate with perpetual succession and a common seal.
- (3) The Commission shall be capable of suing and being sued and, in the performance of its functions, exercise of its powers and discharge of its duties under this Act, it may acquire, hold and dispose of real and personal property and do and suffer all such acts and things as bodies corporate may do and suffer.

- (4) Except as expressly provided otherwise in this Act, the Commission shall act independently in performing its functions, exercising its powers and discharging its duties under this Act.

4 Functions

The Commission shall have the functions imposed on the Commission by the Communications Act.

5 Powers

- (1) The Commission shall have the powers granted to the Commission by the Communications Act.
- (2) In addition to powers conferred on the Commission under subsection (1), the Commission shall have power as a statutory corporation to do all things necessary or convenient for or in connection with the performance of its functions or discharge of its duties.
- (3) Nothing in subsection (1) shall impose on the Commission any form of duty or liability enforceable by legal proceedings.

6 Duties

The duties of the Commission include:

- (a) performing its functions and exercising its powers with due care and diligence;
- (b) using best endeavours to avoid conflicts of interests;
- (c) ensuring the funds of the Commission are used efficiently and appropriately with a view to minimising the fees and levies imposed on the communications industry; and
- (d) any duties imposed on the Commission under the Communications Act.

7 Members of the Commission

- (1) The Commission shall consist of 4 members which shall include :
 - (a) a Chairperson;
 - (b) a Deputy – Chairperson; and
 - (c) two members
- (2) One of the members under subsection (1) shall be an ICT expert..
- (3) The Members shall be responsible for:
 - (a) the performance of the functions and discharge of the duties of the Commission;

- (b) the exercise of the powers of the Commission; and
 - (c) the execution of the policies, and the implementation of the decisions, of the Commission.
- (4) The Commissioner shall be:
- (a) responsible for the supervision and day-to-day management of the affairs of the Commission and its staff;
 - (b) the head of the staff of the Commission ; and
 - (c) the Commission Secretary
- (5) No member shall be subject to the Public Service Act.

8 Appointments Committee

- (1) An Appointments Committee is established to appoint the members of the Commission and the Commissioner, and such appointments shall be published by the Minister in the Gazette.
- (2) The members of the Committee shall consist of:
- (a) The Minister;
 - (b) ICT Expert; ; and
 - (c) A representative of the industry consumers.
- (3) The members of the Committee appointed under subsection (2)(b) and (c) shall be appointed by the Minister with the recommendation of the Chief Executive Officer.
- (4) The representative of the industry consumers shall be entitled to reasonable fees and expenses as determined by Cabinet, upon the recommendation of the Minister, for performing his functions , exercising his powers and discharging his duties under this Act.

9 Commission appointment process

- (1) The Appointments Committee shall recommend four people to be appointed as Members under section 7 as soon as practicable after the commencement date.
- (2) The Appointments Committee shall seek to minimise the period of vacancy of the position of each Member and in any event shall make a recommendation for the position of each Member within 6 months of the end of the Member's fixed term.
- (3) Before recommending a person for appointment as a Member under subsection (1), the Appointments Committee shall:
- (a) undertake an open, competitive and transparent selection process that seeks to identify well-qualified candidates, including publishing

- advertisements for applications nationally and internationally, reviewing any available references and holding interviews; and
- (b) invite proposals for candidates from the public and invite comments from licensees, including any bodies representing participants in the communications sector, about candidates under consideration and take into account such comments.
- (4) The appointment of the members of the Commission shall be approved by the Minister with the consent of Cabinet.

10 Appointment criteria

- (1) The Appointments Committee shall not appoint a person as the Chairperson or as the Commissioner unless a majority of the members of the Appointments Committee are satisfied that the person:
 - (a) is a person of integrity, independence of mind and good reputation;
 - (b) is a graduate of a recognized tertiary institute;
 - (c) is qualified for appointment, having regard to the functions, powers and duties of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law or accountancy;
 - (d) possesses sound knowledge of the communications sector; and
 - (e) is not disqualified from appointment under section 13;
- (2) The Appointments Committee shall not recommend a person for appointment as the ICT Expert unless a majority of the members of the Appointments Committee are satisfied that the person:
 - (a) is a person of integrity, independence of mind and good reputation;
 - (b) is a graduate of a recognized tertiary institute ;
 - (c) possesses at least 10 years' experience in one or more of the fields of management, law, economics, engineering or commerce;
 - (d) has expertise and experience in the operation and administration of a communications regulatory regime; and
 - (e) is not disqualified for appointment under section 13.

11 Terms of Appointment

- (1) Appointments made under section 8 shall be on the following terms:
 - (a) Each member shall be appointed for a term of up to 3 years, and may be renewed for only one more term of 3 years , and may be eligible for re-appointment after 3 years from the expiry of his last term;
 - (b) The Commissioner shall be the secretary of the Commission;
 - (c) The Commissioner shall be appointed on a full- time basis;

- (d) The Chairperson and the members of the Commission shall be appointed on a part-time basis; and
 - (e) A Member may resign from office on giving 90 days' written notice to the Minister.
- (2) The Appointments Committee should ensure that no more than two Member's fixed term of appointment shall expire within the same 3 month period.
 - (3) The remuneration of each Member shall be determined by the Remuneration Authority taking into account the criteria set out in section 14 of the Remuneration Authority Act 2010.

12 External consultants

The Commissioner may acquire services from external consultants from time to time, on such terms and conditions as the Commissioner may reasonably determine, to assist the Commission with the efficient performance of its functions under this Act.

13 Eligibility and removal of members

- (1) A person shall not be eligible to be appointed, or remain, as a Member if that person:
 - (a) has committed a serious breach of the terms and conditions of their appointment;
 - (b) materially fails to perform their functions or discharge their duties under this Act;
 - (c) takes a direct or indirect equity or other financial interest in a licensee, or receives remuneration from a licensee other than through a fund over which the person has no control or influence;
 - (d) is determined by at least 2 medical practitioners to be unable due to any physical or mental incapacity to perform the functions, discharge the duties or exercise the powers of their position;
 - (e) becomes or has been declared bankrupt or insolvent, whether in Tonga elsewhere;
 - (f) has a conviction for or is convicted of any offence in the Kingdom or elsewhere under a law involving dishonesty or corruption or where the penalty prescribed for such offence includes imprisonment for 1 year or longer;
 - (g) is a staff member or officer of a Department or Ministry of the Government of Tonga; and
 - (h) holds an elected office in Tonga.
- (2) If the Minister has reason to believe that a Member (**respondent**) is not eligible to continue in office in accordance with subsection (1), the Minister shall:

- (a) call for and arrange a meeting of the Appointments Committee; and
 - (b) inform the Appointments Committee and the respondent by written notice that the Minister is considering removing the respondent and of the grounds under section 13(1) for the proposed removal.
- (3) The respondent shall be given an opportunity to make representations in response to the Minister's notice and the Appointments Committee shall give the respondent an opportunity to be heard, including being represented by a legal practitioner.
- (4) The respondent shall not be removed from office on the grounds in section 13(1)(a) or (b) unless:
 - (a) the respondent's alleged conduct is enquired into by an independent and impartial person appointed as soon as practicable by the Appointments Committee;
 - (b) the respondent is given an opportunity to make representations in such enquiry, including being represented by a legal practitioner; and
 - (c) the Appointments Committee advises, based on the result of its enquiry, that the Minister remove the respondent.
- (5) If the Minister, acting on the advice of the Appointments Committee, is satisfied that the respondent is ineligible under section 13(1) to continue in office, the Minister may remove the respondent from office with no less than 28 days' notice in writing and shall provide the detailed grounds under section 13(1) for such removal.
- (6) In advising the Minister under this section, the Appointments Committee shall consider any relevant advice that is necessary to determine whether the removal from office is reasonably justified in the circumstances.

14 Meetings and decisions of the Commission

- (1) The Commission may set its own procedures, subject to this Act.
- (2) The Commission shall meet at least once in every 2 months.
- (3) Any Member may convene a meeting of the Commission by written notice provided to every other Member.
- (4) Subject to subsections (2) and (7), the Chairperson shall determine the place and time for each meeting of the Commission, having regard to the availability of the members.
- (5) At meetings of the Commission:
 - (a) the Chairperson shall preside. If the Chairperson is unable to preside, the Deputy- Chairperson shall preside;
 - (b) a quorum shall be three Members;
 - (c) all Members present are entitled to vote;

- (d) a decision of a majority of the Members present at any meeting shall be the decision of the Commission; and
 - (e) in the event of an equality of votes, the presiding Member shall have a casting vote.
- (6) The Commission shall keep written minutes of all of its meetings.
- (7) Meetings of the Commission may be held by teleconference or videoconference or any other means that permit all Members in the meeting to communicate with every other Member in the meeting simultaneously and instantaneously.

15 Determinations

A determination in writing signed, or assented to in writing, by all the Members of the Commission necessary to constitute a quorum shall be as valid and effectual as if it had been made at a meeting of the Commission duly called and constituted by those members.

16 Conflicts of interest

- (1) If a Member of the Commission is taking part, or is to take part, in the consideration or determination by the Commission of a matter that relates to or affect a business or body corporate in which that Member has an interest, that, in accordance with the rules of natural justice, disqualifies or would disqualify the Member from taking part in the consideration or determination of that matter:
- (a) the Member shall disclose that interest to the other Members of the Commission as soon as possible after the relevant facts have come to the Member's attention;
 - (b) the disclosure shall be noted in the minutes of the meeting;
 - (c) the Member shall not continue to take part in the consideration of the matter; and
 - (d) the Member shall not be counted for the purposes of constituting a quorum for the Commission on any such deliberation or decision.
- (2) If the operation of subsection (1) means that Commission cannot proceed with deliberation or decision on a matter, the Members of the Commission other than the Member mentioned in subsection (1) may, by unanimous agreement, decide that the Member mentioned in subsection (1) may take part in consideration and decision on the matter.
- (3) A decision under subsection (2) must be made by at least two Members. If this is not possible, consideration of the matter mentioned in subsection (1) must be postponed until such time as two non-conflicted Members are able to consider the issue.

- (4) This section does not apply to the extent that the interest of a Member is only as a result of the supply of goods and services that are available to the public on the same terms and conditions.

17 Other employees of the Commission

- (1) The Commission may appoint such employees as may be necessary to enable the Commission to perform its functions and discharge its duties.
- (2) The Commission shall take reasonable measures to ensure that no conflict of interest exists in relation to its officers, employees, agents or consultants in relation to any licensee.

18 Delegation

- (1) The Commission may, by unanimous decision of all Members, and subject to any regulations made for the purposes of this section, delegate any of its functions, powers or duties other than this power of delegation, to:
 - (a) any Member; or
 - (b) any employees under section 17.
- (2) A delegation under subsection (1):
 - (a) shall be in writing;
 - (b) shall be subject to such conditions and restrictions as are specified in the instrument of delegation;
 - (c) may be specified to be restricted to a class of matters;
 - (d) is revocable at will by resolution in writing of the Commission; and
 - (e) does not affect or prevent the performance of a function, the exercise of a power or discharge of a duty by the Commission.
- (3) A delegate under subsection (1) is subject to the same duties and responsibilities as a Member under this Act.

19 International representation and advice to the Minister

- (1) The Commission shall:
 - (a) on its own motion or at the Minister's request, make recommendations to and advise the Minister on policies for the communications sector;
 - (b) at the Minister's request, represent Tonga in regional and international organisations relating to communications; and
 - (c) at the Minister's request, represent Tonga and negotiate and make recommendations to the Minister for the adoption of regional and international treaties, commitments, recommendations or standards.

- (2) The Minister shall submit any recommendations made by the Commission under subsection (1)(c) to Cabinet for its approval.
- (3) The Commission shall not subject to subsection (1)(c), enter into any regional or international treaty or convention obligations on behalf of Tonga; or
- (4) The Commission shall pay Tonga's membership fee or other charges to any regional or international telecommunications body.

20 Validity of conduct

Subject to this Act, any act, decision or proceeding of the Commission is not invalid by reason of:

- (a) a defect or irregularity in, or in connection with, the appointment or removal of a Member;
- (b) a vacancy in, or absence from, the office of a Member;
- (c) a failure by a Member to comply with section 16; or
- (d) want of form, or any informality or error of form.

21 Members not personally liable

No Member of the Commission shall be personally liable for any act done or default made by the Commission in good faith in pursuance or intended pursuance of the powers, duties and functions of the Commission under this Act.

PART III – FINANCES, REPORTING AND ACCOUNTABILITY

22 Funding

The funds of the Commission shall comprise the following:

- (a) fees described in section 18 of the Communications Act;
- (b) penalties under Division 2 of Part X of the Communications Act;
- (c) loans raised by the Commission;
- (d) grants, donations or other contributions, including contributions from international organisations or from a government, government department, government instrumentality or a statutory entity of a country other than the Kingdom of Tonga, if any, made to or for the benefit of the Communications Commission; and
- (e) moneys appropriated, if any, from the Public Fund by Legislative Assembly.

23 Administration of funds

- (1) Within 1 month of the commencement date, the Commission shall establish:
 - (a) a special fund for the Commission, called the Communications Commission Fund; and
 - (b) a special fund for the universal service regime, called the Universal Service Fund.
- (2) Subject to subsections (3) and (4), all moneys received by or for the benefit of the Commission shall be:
 - (a) paid into the Communications Commission Fund; and
 - (b) at the sole disposal of the Commission for the sole purpose of funding activities in exercises of its powers, performance of its functions or discharge of its duties under this Act.
- (3) All moneys received under Division 4 of Part VI or Division 2 of Part X of the Communications Act, or otherwise received for the purpose of funding the universal service regime, shall be:
 - (a) paid into the Universal Service Fund; and
 - (b) at the sole disposal of the Commission for the sole purpose of funding the universal service regime.
- (4) To the extent that the Commission receives revenue in any financial year that exceeds its expenditure, then the Commission:
 - (a) may retain all or part of that surplus up to the greater of:
 - (i) an amount equivalent to 25% of the amount received as revenue in that financial year;
 - (ii) an amount notified in writing by the Minister to the Commission; and
 - (b) must pay any remaining surplus into the Universal Service Fund.
- (5) For the avoidance of doubt, fees collected under this Act do not constitute public money for the purposes of the Public Finance Management Act 2002.
- (6) The Commission must levy and collect fees and pay them into the relevant fund under subsections (2) to (4) as soon as practicable after they become payable.
- (7) Fees levied by the Commission Act shall constitute a debt due to the Commission and may be recovered in court.
- (8) In any proceeding to recover such debt the certificate referred to in subsection (6) shall be *prima facie* evidence of the existence and amount of such debt.

24 Budget

The Commission shall, by no later than 3 months before the end of each financial year prepare, and submit to the Ministry, a budget comprising:

- (a) estimates of all funding proposed to be raised or received in the next financial year, itemised to an appropriate level; and
- (b) estimates of proposed expenditure by the Commission for the next financial year, itemised to an appropriate level.

25 Expenditure forecasts

- (1) Within the budget prepared under section 24, the Commission shall categorise its proposed revenue and expenditure in a manner that:
 - (a) provides a high degree of transparency in relation to the Commission's proposed expenditure within that financial year in performing its functions;
 - (b) identifies significant items of revenue and expenditure in separate line items with an explanation for that revenue or expenditure;
 - (c) explains any instances of significant non-recurring expenditure for large capital items and the manner in which the Commission proposes to allocate such expenditure within its accounts;
 - (d) explains the reason for any forecast material increases in expenditure relative to the Commission's actual expenditure in previous financial years; and
 - (e) identifies the sources of funding and the anticipated level and allocation of any surplus.
- (2) The Commission shall ensure that its expenditure forecasts are reasonable and reflect the Commission's estimate of the actual expenditure likely to be incurred by the Commission in the next financial year and its relevant attribution.
- (3) The Commission shall have regard to the Commission's historical expenditure, and the attribution of that historical expenditure, when preparing its expenditure forecasts.

26 Accounts and audit

- (1) The Commission shall keep full and correct accounts of all its financial transactions, assets, liabilities and funds.
- (2) The financial year of the Commission shall end on the 30th day of June.
- (3) At the end of each financial year, the Commission shall prepare an income and expenditure account showing its financial transactions for that year, together with a balance sheet as at the last day of the financial year.
- (4) The Commission shall, no later than 4 months after the end of each financial year, submit its income and expenditure account and balance sheet to the Audit Office for audit.

- (5) The Commission shall, no later than 6 months after the end of the financial year, lay a copy of the audited accounts of the Commission, together with the corresponding report of the Audit Office, before the Legislative Assembly.
- (6) The Commission may incorporate a copy of the audited accounts of the Commission, together with the corresponding report of the Audit Office, in the annual report of the Commission.

27 Annual report

- (1) The Commission shall, no later than 6 months after the end of each financial year, furnish to the Minister an annual report that includes:
 - (a) a summary of its operations during that year;
 - (b) the results of its monitoring of the performance and efficiency of the telecommunications sector;
 - (c) all financial statements and auditor's reports as are required by this Act or any other applicable law;
 - (d) a list of network operators under the Communications Act;
 - (e) a list of service providers under the Communications Act;
 - (f) a list of requests for arbitration under section 133 of the Communications Act;
 - (g) a list of agreements filed with the Regulator under sections 134 and 138 of the Communications Act;
 - (h) details of any universal services agreements entered into by the Commission and any expenditure made from the Universal Services Fund;
 - (i) a list of consultants and advisors retained by the Commission and a description of the matters in relation to which they have consulted or advised; and
 - (j) a summary of material litigation involving the Commission and any other material matters under Division 2B (Review mechanisms) of Part X of the Communications Act.
- (2) The Minister shall ensure a copy of the annual report is laid before the Legislative Assembly.

28 Borrowing Powers

The Commission may borrow up to such an amount as may be notified by the Minister in writing from time to time and on such terms as may be required by it for:

- (a) meeting any capital expenditure; and
- (b) performing of its functions under this Act.

Passed by the Legislative Assembly this 6th day of October 2015.