



Tonga

# FINANCIAL INSTITUTIONS ACT

**Chapter 38.14**

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## FINANCIAL INSTITUTIONS ACT

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# FINANCIAL INSTITUTIONS ACT

[1](#)

[3rd October 2005]<sup>2</sup>

## PART I — PRELIMINARY

### 1 Short title

This Act may be cited as the Financial Institutions Act.

### 2 Interpretation

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

“**acting in concert**” means acting pursuant to an agreement, arrangement or understanding, whether formal or informal;<sup>3</sup>

“**affiliate**” means a company wherein another company’s shareholding is at least 20 per cent but not more than 50 per cent of the issued shares or where that other company has the power to exercise significant influence over the policies of management of the company;<sup>4</sup>

“**associated person**” means a person in a licensed financial institution who —

- (a) directly or indirectly controls the management;
- (b) owns directly or indirectly 20 per cent or more in nominal value of the equity share capital, as defined in the Companies Act;
- (c) is directly or indirectly controlled by the licensed financial institution;  
or

(d) owns directly or indirectly 20 per cent or more of the equity share capital, as defined in the Companies Act;

“**bank**” is as defined in the National Reserve Bank of Tonga Act;<sup>5</sup>

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

“**Board**” is as defined in the National Reserve Bank of Tonga Act;

“**close relatives**” means any person who is related to a director, officer or employee (“such persons”) of a financial institution-

(a) by marriage, blood or kinship, including adopted children or foster children of such persons; and

(b) the spouse, father, mother, brother or sister of such persons;<sup>6</sup>

“**connected parties**” is as defined in subsection 28(1)(b) of this Act;<sup>7</sup>

“**control**” is deemed to exist over a company if a person –

(i) directly or indirectly, or acting through one or more persons, or acting in concert with such persons, owns, or has the power to exercise the voting power of 10 % or more of the voting shares of the company;

(ii) has the power to elect a majority of the directors of the company;  
or

(iii) exercise a significant influence over the management, operations or policies of the company;<sup>8</sup>

“**disclosures**” means special information required to be included in the financial statements in accordance with internationally accepted accounting standards and applicable Acts and regulations, as determined by the Reserve Bank;<sup>9</sup>

“**document**” is as defined in the Evidence Act;<sup>10</sup>

“**financial activity**” means an activity as defined under section 27 of this Act;<sup>11</sup>

“**financial institution**” means an institution-

(i) carrying out banking business as prescribed by this Act or the National Reserve Bank of Tonga Act;

(ii) carrying out any financial activity listed in section 27 of this Act;<sup>12</sup>

(iii) prescribed by subsection 2(2) of the National Reserve Bank of Tonga Act; or

(iv) approved by the Reserve Bank as prescribed by this Act or any other Acts or Regulations;

“**financial statement**” means the following documents- balance sheet (showing assets, liabilities and equity), income statement, cash flow statement



and equity statement (showing changes in equity), in accordance with internationally accepted accounting standards, as determined by the Reserve Bank;<sup>13</sup>

“**fit and proper**” means a person whose qualifications, background and experience, financial position, or business interests qualify that person in the judgment of the Reserve Bank to be a director, officer, employee, auditor or shareholder of a licensed financial institution, as further prescribed in a prudential statement of the Reserve Bank;<sup>14</sup>

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

- (a) the exposure to those persons constitute a single exposure because of the fact that one of them directly or indirectly exercise control over the others;
- (b) although the persons to whom the financial institution is exposed are different entities, they are so interconnected that if one of them experiences financial difficulties, another one or all of them are likely to experience financial problems;
- (c) the persons are affiliates within the meaning of this Act;or
- (d) those persons have common control.<sup>15</sup>

“**large credit exposure**” means any advance, credit facility, financial guarantee or other risk exposure or liability granted by a licensed financial institution or its subsidiary to any person or company, or a group of interrelated persons that exceeds 20% but is not more than 25% of the licensed financial institution capital as determined by the Reserve Bank;<sup>16</sup>

“**licensed financial institution**” means a financial institution carrying out any banking business, as determined in a license granted by the Bank-

Provided that, for the purposes of this Act, unless otherwise specified, all offices and branches of a licensed financial institution in Tonga shall be deemed to be one entity and regarded by the Reserve Bank as a single licensed financial institution;<sup>17</sup>

“**minimum capital**” means the capital of a licensed financial institution as prescribed under section 12 of this Act;<sup>18</sup>

“**Ministry**” means the Ministry responsible for Finance;<sup>19</sup>

“**person**” means any individual or company, partnership, syndicate, association or body of persons, corporate or unincorporated;<sup>20</sup>

“**prudential statement**” for the purposes of this Act and the National Reserve Bank of Tonga Act, means a statement issued by the Reserve Bank in accordance with section 15 of this Act;<sup>21</sup>

“**public holiday**” means a public holiday as defined in the Public Holidays Act;<sup>22</sup>

“**regulatory capital**” means the amount of capital resulting from the application of the ratio of Total Capital-to-Risk-Weighted Assets or “capital adequacy ratio”, which shall be maintained at all times by a licensed financial institution, individually or on a consolidated basis, as determined by the Reserve Bank;<sup>23</sup>

“**Reserve Bank**” means the National Reserve Bank of Tonga established under the National Reserve Bank of Tonga Act;

“**significant influence**” means having any interest in a person that makes it possible to exercise a direct or indirect power to determine the management or policies of such person;<sup>24</sup>

“**subsidiary**” means any legal person in which another person or group of persons acting in concert-

- (1) holds the equivalent of 50 % or more of the voting shares of such legal person; or
- (2) may exercise a significant influence that permits such other person or group of persons to determine the management or policies of such legal person;<sup>25</sup>

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

- (2) Notwithstanding any provisions of the National Reserve Bank of Tonga Act, a person who —
  - (a) advertises;
  - (b) solicits money;
  - (c) deposits; or
  - (d) offers to sell or place bonds, certificates, notes or other securities,

and uses or intends to use the funds so acquired, either in whole or in part, for advances, or investments or any other operation either authorised by law or by customary banking practice, shall be deemed to be conducting banking business.

## PART II — LICENSING OF FINANCIAL INSTITUTIONS

### 3 Licence for banking business and other financial activities<sup>26</sup>

- (1) No person shall conduct banking business or any of the financial activities referred to in section 27, for which a licence is required, unless he has been issued with a licence under this Act or Regulation or any other Act or Regulation.<sup>27</sup>
- (2) The Reserve Bank may require for examination, from any person, books, accounts and records if it has reason to believe he is in contravention of subsection (1).
- (3) Any person who —
  - (a) contravenes the provision of subsection (1); or
  - (b) refuses, on request, to make available for examination the books, records referred to in subsection (2),shall be liable to a penalty not exceeding \$2,000 and an additional of \$1,000 for each day of contravention.
- (4) A person holding funds which he has obtained in contravention of subsection (1) shall repay such funds as directed by the Reserve Bank. Any person who fails to comply with any such direction is guilty of an offence and is liable on conviction to a fine not exceeding \$25,000.

### 3A Pyramid schemes<sup>28</sup>

Any person, who directly or indirectly, initiates, offers, advertises, conducts, finances, manages, supervises or directs a scheme where profits earned by participants in the scheme largely depend on increases in the number of participants in the scheme or in the size of their contributions to the scheme, commits an offence and such person shall be liable upon conviction to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding 30 years or both.

### 4 “Bank” name restriction

- (1) Every licensed bank shall use as part of its name the word “bank” unless the Reserve Bank otherwise permits.
- (2) The word “bank” or its derivative shall be used only by a bank licensed under this Act.
- (3) Notwithstanding subsection (2), the Reserve Bank may approve the use of the word “bank” —
  - (a) in the name of a foreign financial institution authorised by the Reserve Bank to establish a representative office in Tonga; or

- (b) where its use is such that there is no risk of harm to the public from it.
- (4) No bank shall be granted a licence under a name which so closely resembles the name of an existing bank and is likely, in the opinion of the Reserve Bank, to mislead the public.
- (5) No licensed financial institution shall change its name or use a name other than that under which it was licensed, without the prior written consent of the Reserve Bank.<sup>29</sup>

## 5 Existing financial institutions deemed licensed<sup>30</sup>

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

## 6 Application

- (1) Any person may apply for a licence under this Act to operate a banking business or to perform any of the financial activities referred to in section 27, for which a licence is required, as determined by the Reserve Bank.<sup>31</sup>
- (2) An application for a licence under this section shall be —
  - (a) made in writing to the Reserve Bank in the prescribed form; and
  - (b) accompanied by the prescribed application fee.
- (3) Every person who makes an application under subsection (2)(a) shall furnish such information, and documents, as the Reserve Bank may specify.
- (4) Any person who knowingly furnishes false or misleading information or document, in connection with an application under this Act, is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000.

## 7 Consideration of application

The Reserve Bank shall, in considering any application for a licence made under section 6, have regard to —

- (a) the adequacy, structure, sources, and proposed beneficial owners of the applicant's capital;
- (b) the ability of the applicant to carry on the proposed business, the character and experience of its directors and management, and those persons who will own 10 per cent or more of the voting shares of the applicant;

- (c) the effectiveness of accounting, internal controls, audit and risk management systems that the applicant will put in place;
- (d) where the applicant is a financial institution and an overseas company, evidence of —
  - (i) incorporation in home country;
  - (ii) current financial institution licence in home country;
  - (iii) relevant law and regulatory requirements relating to licensing and supervision of financial institution in home country; and
  - (iv) being subject to comprehensive supervision and regulation on a consolidated basis by the appropriate authorities in home country and such authorities have no objection to the applicant carrying on banking business in Tonga; and
- (e) such other matters as the Reserve Bank considers relevant.

## 8 Determination of application

- (1) The Reserve Bank shall, within 3 months of receipt consider the application and inform the applicant of its decision.
- (2) The Reserve Bank shall, where the decision under subsection (1) is in favour of the applicant, issue to the applicant a licence subject to terms and conditions as may be specified in the licence.
- (3) A copy of the licence issued under this section shall be displayed conspicuously in places of business of the licensed financial institution.
- (4) The licence shall remain valid unless revoked under this Act.
- (5) The Reserve Bank may charge and collect a licence fee for each year that a license is in effect and which shall be paid by a licensed financial institution on the anniversary of the date of its licence being granted. <sup>32</sup>

## 9 Requirements and limits on licence

- (1) No person other than a company shall be granted a licence to do banking business under this Act.
- (2) Financial institutions shall be licensed either as banks or as non-bank financial institutions where non-bank financial institutions are required to be licensed as determined by the Reserve Bank in accordance with this Act or Regulations or any other Act or Regulations. <sup>33</sup>
- (3) A licence issued under this Act cannot be assigned or transferred and any purported assignment or transfer shall be null and void.

## 10 Revocation of licence

- (1) The Reserve Bank may revoke a licence if the licensee —
  - (a) requests revocation of the licence;
  - (b) fails to commence business within one year following the issue of the licence;
  - (c) ceases to carry on banking business in Tonga;
  - (d) contravenes the terms and conditions of its licence or the provisions of this Act;
  - (e) is subject to voluntary or involuntary winding up proceedings or has a receiver appointed; or
  - (f) was licensed on the basis of any information or document which is false or misleading in any material particular.

(2)

- (a) The Reserve Bank shall give the licensee —
  - (i) written notice of intention to revoke the licence; and
  - (ii) within 10 working days from the date of the notice, an opportunity to submit reasons why the licence should not be revoked:

Provided that subject to section 37 a licence may be revoked without notice.

- (b) The Reserve Bank may, after consideration of any submission under this subsection, either confirm its intention to revoke or withdraw the notice.

## 11 Reserve Bank to authorise changes to the constitution<sup>34</sup>

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

**11A Reserve Bank to authorise changes<sup>35</sup>**

- (1) A licensed financial institution shall obtain prior authorisation from the Reserve Bank, in the event of an application to the Court under the Companies Act to propose a compromise or arrangement involving that licensed financial institution. A licensed financial institution shall also furnish the Reserve Bank, as the case may be, with
  - (a) a notice of every meeting ordered by the Court; and
  - (b) a statement explaining the effect of the compromise or arrangement under the Companies Act.
- (2) A licensed financial institution incorporated in Tonga may, with the written consent of the Reserve Bank
  - (a) effect a merger;
  - (b) amalgamate;
  - (c) consolidate; or
  - (d) purchase and assume assets of,  
any other licensed financial institution.
- (3) The applicant under subsection (1) shall furnish the Reserve Bank with any information required.
- (4) The Reserve Bank shall consider whether
  - (a) the proposal will result in a substantial lessening of competition, in financial services;
  - (b) the licensed financial institution will comply with this Act as a result of the transaction; and
  - (c) the transaction is consistent with the public interest.
- (5) Any licensed financial institution, its directors or managers, who act in contravention of this section, commits an offence and shall be liable upon conviction to a fine not exceeding \$100,000.

**PART III — CAPITAL AND RESERVES****12 Minimum capital**

- (1) Every financial institution licensed under this Act shall maintain —
  - (a) if incorporated in Tonga, paid up capital and reserves; and
  - (b) if incorporated abroad, assigned capital and reserves in Tonga,in such minimum amount and proportion as the Reserve Bank may specify having regard to internationally accepted capital standards. Such proportion

shall not be less than 8 per cent of the total risk weighted assets for a licensee incorporated in Tonga.

- (2) The minimum amount specified under subsection (1) for the issue of a licence under section 8 shall not be less than \$2,000,000.
- (3) The Reserve Bank may specify minimum capital standards for the consolidated group in the case of a licensed financial institution incorporated in Tonga.

### 13 Restrictions on dividends

- (1) No licensed financial institution shall declare or pay any dividend or make any other transfer or remittance from profits —
  - (a) if this would contravene section 12 or section 28; and
  - (b) where the payments would exceed earnings in the year to which they relate without the prior approval of the Reserve Bank.
- (2) Any licensed financial institution which contravenes subsection (1), is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000.

### 14 Transfer of control

- (1) Subject to subsection (2) and section 14A, a licensed financial institution may, with the prior written approval of the Reserve Bank, implement a transfer of control.<sup>36</sup>
- (2) The Reserve Bank shall determine a transfer of control under subsection (1) by considering the following —
  - (a) any agreed sale, transfer or other disposition of share capital, and issue or allotment of any new share capital;
  - (b) any proposed compromise or arrangement where application has been made to the Court under the Companies Act; and
  - (c) any other event or scheme which directly or indirectly affects transfer of ownership or powers exercisable over the paid up shares.
- (3) Any licensed financial institution which contravenes this section, is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 and any purported transfer or allotment may be declared null and void.

### 14A Acquisition of control, significant ownership or increase in existing ownership<sup>37</sup>

- (1) Any person, acting directly, indirectly by or through related persons, or acting in concert with other persons, or who proposes to acquire a control, significant ownership or increase in existing ownership in a licensed financial



institution in a manner that would reach or exceed a threshold of 10 % of the entity's capital or the voting rights, shall obtain prior approval of the Reserve Bank, by application to the Reserve Bank at least 90 days prior to the proposed acquisition.

- (2) The application under subsection (1) shall include such documents and information as the Reserve Bank may require.
- (3) In determining an application under subsection (1), the Reserve Bank shall –
  - (a) assess the expected effects on the financial soundness of the licensed financial institution; and
  - (b) conduct a background check of the applicants and satisfy itself as to the identity and character of the proposed owners."
- (4) The Reserve Bank shall not approve any application if -
  - (a) it is not satisfied as to any of the matters in subsection (3);
  - (b) anti-competitive effects will be clearly outweighed by the transaction's expected positive effects;
  - (c) the proposed change will result in an environment of unhealthy competition or monopolistic practices; or
  - (d) the transaction will be detrimental to the banking or financial system of the Kingdom.
- (5) A licensed financial institution that –
  - (a) is or becomes aware of a proposed acquisition of control under subsection (1) shall give a notice to the Reserve Bank, as soon as practicable, but no later than 30 consecutive days from the date of its awareness, indicating in such notice the grounds of the respective proposed transaction; or
  - (b) becomes aware of circumstances that indicate that any of the proposed owners or the present owners and, in particular, owners exercising a control over the licensed financial institution, are no longer fit and proper persons, shall notify the Reserve Bank within 10 days of such knowledge.

## PART IV — SUPERVISION OF LICENSED FINANCIAL INSTITUTIONS

### 15 Reserve Bank to supervise licensed financial institutions<sup>38</sup>

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

### 16 Information to be supplied to Reserve Bank<sup>39</sup>

- (1) The Reserve Bank may require from a licensed financial institution for the purposes of section 15 in the specified form —
  - (a) not later than 15 business days after the last working day to which it relates, or within such other time period as may be prescribed by the Reserve Bank, a monthly statement of assets and liabilities;
  - (b) not later than 15 business days after the last working day to which it relates, or within such other time period as may be prescribed by the Reserve Bank, a monthly statement of profit and loss;
  - (c) not later than 3 months after the end of each financial year of the licensed financial institution, a copy of its audited balance sheet and profit and loss account for that year;
  - (d) a certificate of compliance with section 26(1) and verification that no director or manager (or person specified by the Reserve Bank as employed in a management capacity), holds office contrary to section 26 or any directive, prudential statements, or any act or decision issued by the Reserve Bank on the matter concerned; and
  - (e) such other information as the Reserve Bank may require for the purposes of this Act.
- (2) The Reserve Bank may require a certificate from the external auditor of a licensed financial institution, verifying the accuracy of any information supplied under this Act.

**17 Power to impose penalty<sup>40</sup>**

The Reserve Bank may impose penalties under this Act on a licensed financial institution, which has —

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

**18 Administrative fines**

The Reserve Bank may —

- (a) impose such administrative fines not exceeding \$5,000 for violation of section 17 as it may determine, and a further fine not exceeding \$1,000 for each day of contravention; and
- (b) direct the licensed financial institution by notice in writing to take any action specified.

**19 Objection to penalty**

Where a licensed financial institution objects to penalties imposed under this Act, it shall —

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

**20 Confidentiality and exemptions**

- (1) No person who has acquired knowledge in his capacity as director, manager, officer, employee, auditor or agent of any licensed financial institution, or when exercising any function under this Act, shall disclose to any person any information in respect of a customer of that financial institution except —
  - (a) with the written authorisation of the customer or his legal personal representative;
  - (b) when lawfully required to do so by any court of competent jurisdiction in Tonga or under the provisions of this Act or the Money Laundering and Proceeds of Crime Act;<sup>41</sup>

- (c) for the purpose of the performance of his duties under this Act; or
  - (d) with the written authorisation of the customer or his legal personal representative to provide a person, upon a legitimate business request, a general credit rating a copy of which shall be provided to the customer concerned upon his request.
- (2) No person to whom any information is disclosed pursuant to subsection (1) shall disclose or use such information except according to law.

## 21 Offence

Any person who contravenes section 20 is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a period not exceeding 10 years.

## 22 Disclosure by Reserve Bank

The Reserve Bank may disclose information relating to any licensed financial institution in confidence to a supervisory authority in any other country for the purposes of the exercise of functions similar to those conferred on the Reserve Bank under this Act.

## 23 Auditing of information<sup>42</sup>

- (1) A licensed financial institution shall, with the consent of the Reserve Bank appoint an external auditor for each financial year.
- (2) The auditor of a licensed financial institution shall —
  - (a) carry out each year an audit of the financial statements, including disclosures, as applicable in accordance with international accounting and auditing standards;
  - (b) provide the Reserve Bank with an opinion, attached to the financial statements verifying that they are complete and give a true and fair view of the financial condition of the licensed financial institution;
  - (c) perform such other functions as are required under this Act, or any other Act and Regulations;
  - (d) disclose to the Reserve Bank any information relating to the affairs of the licensed financial institution, if in the opinion of the auditor the licensed financial institution is insolvent or is in serious financial difficulties or has breached any provisions of this Act or any other Act; and
  - (e) if requested by the Reserve Bank, discuss the audit directly and provide any additional information required.

- (3) The Reserve Bank may, appoint an external auditor to perform a financial or operational audit on a licensed financial and any expense incurred shall be paid by that licensed financial institution.
- (4) No civil, criminal or disciplinary proceedings shall lie against any auditor arising from the disclosure of information to the Reserve Bank under this Act.

## 24 Publication of financial statements<sup>43</sup>

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

## 25 Inspection

- (1) The Reserve Bank may, from time to time, inspect or cause the inspection of the books, accounts and transactions of any licensed financial institution and any of its affiliates, subsidiaries or associated persons.
- (2) The Reserve Bank may delegate its powers of inspection under this section or request the assistance of technical experts in exercising such powers.<sup>44</sup>
- (3) The Reserve Bank may —
  - (a) conduct the inspection with or without notice;
  - (b) require explanations and the production of books, accounts and documents and such information as may be required to conduct the inspection;
  - (c) make copies of and take any papers or electronically stored data from the licensed financial institution's premises; and
  - (d) require that copies of documents be certified as “true” copies of the originals retained by the licensed financial institution:

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

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

## 26 Barred from management<sup>45</sup>

- (1) No person shall be appointed or elected as a director or to the management of a licensed financial institution who —
  - (a) has acted in similar positions in a licensed financial institution in Tonga or elsewhere which has had its licence revoked or which has been wound up by a court;
  - (b) has been sentenced by a court in any country for an offence involving dishonesty;
  - (c) is or becomes bankrupt or enters into a scheme of arrangement with his creditors;
  - (d) a certificate of compliance as required by the Reserve Bank in accordance with section 16(1)(d) has not been submitted by the licensed financial institution;
  - (e) has acted in similar positions in a licensed financial institution and has been removed in accordance with section 33;
  - (f) has been disqualified or suspended from practicing a profession on grounds of personal misconduct;
  - (g) does not possess sufficient financial competence and expertise;
  - (h) is an officer or employee of another licensed financial institution unless both entities are commonly owned;
  - (i) does not reside in the place where the licensed financial institution is located except as otherwise authorised by the Reserve Bank; or
  - (j) falls under such other criterion or criteria as may be established by the Reserve Bank in a directive, prudential statement or other acts or decisions.
- (2) Any person who accepts an appointment in contravention of subsection (1) is guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or imprisonment for a period not exceeding 10 years.

- (3) Any person appointed or elected as a director or to the management of a licensed financial institution shall cease to hold such office if he is disqualified under subsection (1).

## **26A Special liability of directors and managers<sup>46</sup>**

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

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

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

## **27 Permitted financial activities<sup>47</sup>**

- (1) Licensed financial institutions may only engage in the following activities —
  - (a) receiving deposits of money or other repayable funds from the public, provided that this activity shall only be performed by banks;
  - (b) including but not limited to extending credits, consumer and mortgage credit and financing of commercial transactions;
  - (c) buying and selling for its own account or customers' account money market instruments and debt securities;
  - (d) providing money transmission services;
  - (e) with the prior approval of the Reserve Bank, buying and selling foreign currencies, including contracts for the future purchase or delivery of foreign currencies;
  - (f) issuing and administering means of payment, such as credit cards, travellers' cheques or bank drafts;
  - (g) safekeeping and administration of valuables, including securities;
  - (h) providing credit reference services; and
  - (i) any other activities approved by the Reserve Bank.
- (2)

- (a) A licensed financial institution shall apply to the Reserve Bank to own subsidiaries that engage in other activities of a financial nature.
- (b) The Reserve Bank in considering an application under paragraph (a) shall consider the following —
  - (i) whether the applicant has the financial and managerial resources to engage in the activities applied for in a manner consistent with the public interest; and
  - (ii) the risks which the activity would pose to the licensed financial institution.
- (3) The Reserve Bank may authorise by directive or prudential statement, any prudential requirements and measures to be applied to licensed financial institutions, individually or on a consolidated basis, such as those relating to internal control policies, liquidity, capital, net worth, operations, exposures, classification of assets, interest rate risk, credit risk, currency risk, investment risk or other risks, as required under this Act and any other Act, or as determined by the Reserve Bank in accordance with international sound practices and standards.

## 28 Fixed restrictions<sup>48</sup>

- (1) For the purposes of this section —
  - (a) “**unsecured**” means without security or —
    - (i) the value of any advance or other facility granted against collateral, not readily marketable, exceeds four-fifths of the value of such collateral as determined by the Reserve Bank; or
    - (ii) the value of any advance or other facility granted against readily marketable collateral, exceeds four-fifths of the market value of such collateral; and
  - (b) “**connected parties**” includes —
    - (i) affiliates, directors, employees, shareholders owning or exercising, control or power over 10 per cent of the shares of the licensed financial institution; and
    - (ii) close relatives of such directors, employees and shareholders including spouses, parents, children, and other persons referred to in section 2(1).
- (2) Any licensed financial institution or its subsidiary shall not grant to any person or company, or a group of interrelated persons, any advance, credit facility, financial guarantee or incur any other risk exposure or liability —
  - (a) which in total exceeds 25 % of the licensed financial institution's capital as determined by the Reserve Bank;
  - (b) in the case of unsecured facility, 10 % of the licensed financial institution's capital as determined by the Reserve Bank; or



- (c) if the aggregate outstanding principal amount of all large credit exposures of the licensed financial institution pursuant to paragraphs (a) and (b) would exceed a percentage of the licensed financial institution's capital as determined by the Reserve Bank.

## 29 Exemptions<sup>49</sup>

The following transactions shall be exempted from the provisions of subsection 28(2) —

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

## 30 Further restrictions<sup>50</sup>

The licensed financial institution or its subsidiary shall not —

- (a) lend for the purchase of, or against the security of, its own shares;
- (b) grant to any of its connected parties —
  - (i) any advance, credit facility or guarantee unless granted on substantially the same terms, including interest rates and security, as those prevailing at the time for comparable transactions by the financial institution with members of the general public; and
  - (ii) the total amount of credits extended to all connected parties shall not exceed the amount of the financial institution's regulatory capital as determined by the Reserve Bank;
- (c) permit unsecured advances or credit facilities to its employees in excess of one year's salary;
- (d) engage, whether on its own account or on a commission basis, in the wholesale or retail trade, including import or export trade, or have a direct interest in any non financial undertaking;

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

### **31 Restriction on shareholding<sup>51</sup>**

- (1) The licensed financial institution or its subsidiary shall not —
  - (a) acquire or hold share capital for its own account in an undertaking that would result in the combined value of all such share capital exceeding 10 per cent of the licensed financial institution's capital as determined by the Reserve Bank, unless —
    - (i) it is share capital, approved in writing by the Reserve Bank, in a subsidiary financial institution or in a subsidiary company formed for the execution of nominee, executor or trustee functions or other functions incidental to banking business;
    - (ii) the share capital is held as trustee or nominee, or is related to the purchase or sale upon the order of and for the account of a customer; or
    - (iii) the share capital is acquired in the course of satisfaction of debts due to it and any such acquisition must be disposed of within such reasonable time as determined by the Reserve Bank;
  - (b) acquire, operate or permit a subsidiary company, to carry out business in any capacity, without the prior written approval of the Reserve Bank under this Act.

### **31A Contravention of restrictions<sup>52</sup>**

Any licensed financial institution which contravenes sections 28, 30 and 31 shall rectify the contravention within six months, or any further period as the Reserve Bank may approve in writing, without prejudice of the application of penalties and remedial actions established under section 33 by the Reserve Bank.

### **32 Operation of a new branch**

- (1) A licensed financial institution shall not open a new branch in Tonga without obtaining the written approval of the Reserve Bank.
- (2) A licensed financial institution incorporated in Tonga shall obtain written approval from the Reserve Bank to operate a branch office or subsidiary outside Tonga.
- (3) The Reserve Bank shall not grant approval under subsection (2) unless it is satisfied that —

- (a) the Reserve Bank has the ability and resources to adequately supervise the branch or subsidiary situated outside Tonga; and
- (b) the licensed financial institution has the administrative and financial capacity to conduct banking business at a branch or subsidiary outside Tonga, without affecting the stability of the financial system and the safety of the interests of depositors both within and outside Tonga.

### 33 Penalties and Remedial Actions<sup>53</sup>

- (1) The Reserve Bank may impose any of the measures in this section where –
  - (a) a licensed financial institution or any of its officers, directors or shareholders contravenes any provision of this Act or any directive, prudential statements, or any act or decision, issued in accordance with this Act or any other relevant Act; or
  - (b) in the opinion of the Reserve Bank, a licensed financial institution conducts unsafe or unsound activities including any action, or lack of action, which is contrary to international sound practices and standards of banking operation, the possible consequences of which, if continued, would result in risks to itself, its customer or to the financial system.
- (2) Where no specific monetary penalty is prescribed under this Act, the Reserve Bank may impose penalties not exceeding \$1,000 for each day during which the infraction or the unsafe or unsound activities continues.
- (3) In light of the facts relating to the specific contravention, or the unsafe or unsound activities of the licensed financial institution, the Reserve Bank may-
  - (a) issue written warnings;
  - (b) enter into a written agreement with the board of directors of the licensed financial institution providing for a program of remedial action; and
  - (c) issue written orders to cease and desist such infractions and the actions referred to in the following subsection.
- (4) The Reserve Bank may also take the following actions-
  - (a) call a meeting of the shareholders or other owners and the board of directors of the licensed financial institution to discuss and to agree on remedial measures to be taken by such entity;
  - (b) suspend the licensed financial institution's distribution or payment of dividends or profits in any form;
  - (c) attach any condition to the licensed financial institution's license to the extent required to remedy any violation;
  - (d) request that the chairman of the board of directors convene the board of directors to review and examine the violations to take the necessary measures to eliminate the violations; in such case, one or more

- representatives of the Reserve Bank shall attend the board of directors meeting;
- (e) temporarily suspend or permanently bar from office any manager, officer or employee of the licensed financial institution, depending on the seriousness of the violation;
  - (f) require that the licensed financial institution to remove the chairman or any of the members of the licensed financial institution's board of directors;
  - (g) restrict the powers of any administrator
  - (h) require that one or more persons having a significant ownership to exercise control over the licensed financial institution to sell or otherwise dispose of such holding within a time period determined by the Reserve Bank;
  - (i) with respect to persons indicated in the previous subsection, to cease and desist communicating with the licensed financial institution, its board, management, officers or employees;
  - (j) appoint an external auditor at the expense of the licensed financial institution to perform a financial or operational audit under terms of reference approved by the Reserve Bank;
  - (k) reduce the capital of the licensed financial institution not represented by its assets or impaired by losses;
  - (l) require the licensed financial institution to submit a capital restoration plan in a form acceptable to the Reserve Bank;
  - (m) facilitate the merger or acquisition of the licensed financial institution with a solvent financial institution;
  - (n) impose restrictions on the operations of the licensed financial institution;
  - (o) revoke the licensed financial institution's licence and order it to dissolve under applicable law;
  - (p) revoke the licensed financial institution's licence and appoint a receiver for it under the receivership provisions of this Act; or
  - (q) take any other action in accordance with internationally accepted sound practices and standards applicable to licensed financial institutions.
- (5) The imposition of administrative fines under sections 3(3), 18, 24(4), and 25(5) is without prejudice of the application of provisions stipulated in subsections (2), (3) and (4) of this section.
- (6) Any licensed financial institution to which subsections (1), (2), (3) and (4) apply shall be notified in writing by the Reserve Bank of its decision. The licensed financial institution shall respond in writing to the Reserve Bank within 14 working days.

## PART V — CONTROLLERSHIP AND RECEIVERSHIP

### 34 References to affiliates, subsidiary and associated persons

In this Part of the Act, all references to a licensed financial institution shall also refer to its affiliate, subsidiary or associated person.

### 35 Preservation of assets

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

### 36 Grounds for Reserve Bank to consider

Where —

- (a) a licensed financial institution informs the Reserve Bank that it is insolvent or likely to become so, or is likely to suspend payment;
- (b) a licensed financial institution becomes unable to meet its obligations or suspends payment;
- (c) the Reserve Bank is of the opinion, either as a result of an inspection carried out pursuant to section 25 or otherwise, that a licensed financial institution —
  - (i) is following unsound or unsafe practices in the conduct of its business such that it is likely to jeopardise its obligations to its depositors or other creditors, or adversely affect the operation or stability of the financial system;
  - (ii) is insolvent or is likely to become unable to meet its obligations or is about to suspend payment; or
  - (iii) has contravened or failed to comply with the terms and conditions of its licence or the provisions of this Act;
- (d) the Reserve Bank has reasonable grounds to believe that any affiliate, subsidiary or associated person of a licensed financial institution is —
  - (i) likely to become unable to meet its obligations;
  - (ii) insolvent or about to suspend payment; or

- (iii) subject to conditions described in paragraphs (a), (b) or (c) of this subsection; or
  - (e) the Reserve Bank considers it necessary in the interests of the soundness of the financial system or to minimise detriment to the interests of depositors or creditors of the licensed financial institution,
- the Reserve Bank shall exercise one or more of the powers specified in section 37.

### 37 Powers of the Reserve Bank

- (1) The Reserve Bank shall have the power —
  - (a) to require the licensed financial institution forthwith to take whatever action in relation to its business as the Reserve Bank may specify;
  - (b) to appoint a person to advise the licensed financial institution on the proper conduct of its business, and to fix the remuneration to be paid by the licensed financial institution to any person so appointed;
  - (c) to issue a directive to the licensed financial institution to cease such practice, contravention or non-compliance; and take such action as may be specified in the directive to correct the conditions resulting from such practice, contravention or non-compliance;
  - (d) in cases of breach of any provisions or directives under this Act —
    - (i) to assume control of, or appoint a person to assume control of, the business of the licensed financial institution, or in the case of a subsidiary, it has been incorporated or acquired by the licensed financial institution prior to or subsequently to the assumption of control of the parent company; and
    - (ii) to fix the remuneration to be paid by the licensed financial institution;
  - (e) to present a petition to the Supreme Court for the winding up of the licensed financial institution; and
  - (f) revoke the licensed financial institution's licence.
- (2) Where the Reserve Bank or person appointed has assumed control of the business of a licensed financial institution or branch thereof in Tonga under this section, the Reserve Bank or that person shall carry on the business of the licensed financial institution and may exercise all such powers, rights, and authorities as may be necessary to carry on that business.

### 38 Power to publish

The Reserve Bank shall publish in the Gazette, the Tonga Chronicle or any other newspaper published and circulated in Tonga for 4 consecutive weeks a notification of the assumption of control of the relevant licensed financial institution.

**39 Further powers of Reserve Bank**

- (1) Subject to section 35, the Reserve Bank or the appointed person shall, for the purposes of carrying on the business of the licensed financial institution, have the power to —
  - (a) pay, in whole or in part, any creditor or class of creditors of the licensed financial institution;
  - (b) make any compromise or arrangement with any creditor, or person claiming to be a creditor, of the licensed financial institution;
  - (c) compromise all calls, debts and claims subsisting between the licensed financial institution and any other person and deal with all questions relating to the assets of the licensed financial institution, and give a complete or partial discharge.
- (2) The Reserve Bank or the appointed person shall have all such powers, rights, and authorities as may be necessary for the purposes of control but not limited to —
  - (a) all the powers, rights, and privileges that the licensed financial institution has under any contract or otherwise; or
  - (b) in the case of a company in Tonga, all the powers of the members in general meeting and the Board of Directors of that company.

**40 Management of licensed financial institution**

- (1) Where a licensed financial institution is declared to be subject to the control of the Reserve Bank or the appointed person, the management of the licensed financial institution shall vest in the Reserve Bank or appointed person on the date specified in the order.
- (2) Where a licensed financial institution is declared to be subject to the control of the Reserve Bank or the appointed person it shall not be lawful or competent for any director, manager, or other person to be engaged in the management or conduct of the business of the licensed financial institution, except with the permission of the Reserve Bank or the appointed person.
- (3) Where a licensed financial institution is under a controller, its financial resources shall be available, subject to section 35, to discharge their debts and obligations.

**41 Expenses of controller**

- (1) All remuneration and expenses incurred by the controller in the exercise of its functions and powers shall be payable out of the property of the licensed financial institution and shall have priority over all other claims.

- (2) The controller shall disclose to creditors the amount of all remuneration and expenses as are payable under subsection (1). The form and method of disclosure is subject to the Reserve Bank's approval.

#### **42 Advances for expenses**

- (1) The Reserve Bank may advance such amounts for remuneration and expenses due to, or incurred by the controller.
- (2) All money so advanced to the controller shall be refunded to the Reserve Bank, out of the property of the licensed financial institution.

#### **43 Duty to deliver books and property to controller**

- (1) Every person who is in possession of any documents or other property belonging to any licensed financial institution under controllership shall forthwith deliver those documents or other property to the controller.
- (2) Any person who fails to comply with the provisions of subsection (1) within 7 days, shall pay an administrative fine not exceeding \$5,000 and an additional \$1,000 for each day of non-compliance.
- (3) It shall not be a defence to any proceedings under this section that the person in possession of such documents or other property is, or was, a trustee of the documents or other property for the licensed financial institution, or entitled to a lien or other charge over the property, or was a receiver or manager of the property.

#### **44 Offence to destroy, alter, conceal or send documents**

Every person who—

- (a) destroys, alters, conceals or sends out of Tonga any document or other property relating to, a licensed financial institution under controllership;  
or
- (b) fails to answer or wilfully gives a false answer to any question asked by the controller in relation to any such document or other property,

is guilty of an offence and shall be liable upon conviction to a fine not exceeding \$30,000.

#### **45 Termination of controllership**

- (1) The Reserve Bank may order that any licensed financial institution under a controller shall cease to be subject to controllership.



- (2) The controller may apply to the Reserve Bank to make an order terminating the controllership if a winding up order is made in respect of any licensed financial institution.
- (3) Any person aggrieved by the placing into controllership of a licensed financial institution may request the Reserve Bank to make an order under subsection (1).
- (4) Where an order is made, under subsection (1), or a winding up order is made in respect of a licensed financial institution —
  - (a) the controllership shall cease on the date specified in the order; and
  - (b) the appointment of any controller shall terminate on the date specified in the order.

#### **46 Appointment and termination of appointment of controller**

- (1) The Reserve Bank may appoint a controller to assume control of any licensed financial institution.
- (2) The appointment of a controller shall be terminated upon —
  - (a) disability, bankruptcy, neglect of duty or misconduct;
  - (b) the Reserve Bank being satisfied that it is in the interests of effective conduct of the affairs of the licensed financial institution or maintaining of confidence in the financial system;
  - (c) resignation; or
  - (d) death.

#### **47 Notice of termination**

The Reserve Bank shall publish in the Gazette, the Tonga Chronicle or any other newspaper published and circulated in Tonga for 4 consecutive weeks a notification of cessation of controllership and termination of appointment of the controller.

#### **48 Indemnity**

A controller shall not incur any personal liability as a result of anything done in the exercise of his powers and duties under this Act.

#### **49 Controller to comply with directions of Reserve Bank**

Every controller shall comply with any directions given in writing by the Reserve Bank relating to the exercise of his powers under this Act.

**50 Considerations affecting exercise of powers by Controller**

- (1) A controller of a licensed financial institution shall in exercise of its powers have regard to —
  - (a) maintaining public confidence in the operation and soundness of the financial system; and minimise detriment to the depositors;
  - (b) avoiding significant damage to the financial system;
  - (c) resolving the difficulties of that institution within 30 working days; and
  - (d) preserving the position of depositors and maintaining the ranking of claims of depositors.
- (2) Every controller shall —
  - (a) consult with the Reserve Bank, as to the exercise of his powers; and
  - (b) provide such reports which the Reserve Bank may require relating to the licensed financial institution.

**51 Moratorium**

No person shall, where a licensed financial institution is declared to be under controllership —

- (a) bring any action or other proceedings, including proceedings by way of counterclaim in respect of any contract entered into by, that licensed financial institution before the controllership commenced;
- (b) issue any execution, attach any debt, or otherwise enforce any judgment or order obtained against that licensed financial institution;
- (c) petition or resolve to wind up that licensed financial institution;
- (d) foreclose, enter into possession, sell, or appoint a receiver of the property of that licensed financial institution or property in which the licensed financial institution has an equity or redemption;
- (e) claim or exercise any power or rights under, any mortgage, charge, debenture, instrument, or other security over the property of that licensed financial institution;
- (f) exercise any power or rights under any lease, against that licensed financial institution; or
- (g) exercise any right of set-off acquired prior to controllership against that licensed financial institution.

**52 Exemption to moratorium**

- (1) Notwithstanding section 51, an action with the leave of the controller or the Supreme Court may be commenced or continued against a licensed financial institution.

- (2) A controller may waive the application of section 51 in whole or in part except section 51(c) to any claim made by a depositor or class of depositors.
- (3) Section 51 shall not affect the existence of any security over the property of any licensed financial institution or its priority over other debts.
- (4) Notwithstanding section 51(b) a person may commence an action to issue any execution or attachment order or enforce any judgment or in respect of any contract or obligation incurred by the licensed financial institution after the date the controllership commenced.

### **53 Controller may incorporate company under Companies Act**

- (1) Where a licensed financial institution which is a branch of a company incorporated outside Tonga is declared under controllership, the controller may —
  - (a) form and register a company under the Companies Act;
  - (b) subscribe as trustee for that company for all or any shares of the company; and
  - (c) allot all or any of the shares in that company as fully or partly paid up to the value, after deducting the value of any liabilities vested, of any property, rights, and assets vested in that company under subsection (2).
- (2) The Reserve Bank may order that the whole or any part of any property, rights, assets, and liabilities of any such branch shall vest in that company on a date specified in the order.
- (3) Nothing in subsection (2) shall reduce, extinguish, or affect any obligation or liability of a company incorporated outside Tonga.
- (4) Every company formed and registered under subsection (1) shall, for the purposes of this Act, be deemed to be a licensed financial institution under controllership and the controller shall be the controller of that company.

### **54 Vesting of property subject to security**

- (1) The Reserve Bank may make an order under section 53(2) notwithstanding the existence, or the terms and conditions, of any security over that property, or those rights or assets in favour of any other person.
- (2) Subject to section 35, any property, rights or assets which are the subject of an order made under section 53(2) which are subject to a security in favour of any other person, shall continue to be subject to that security.

**55 Proof of vesting**

- (1) No registrar, or any other person charged with the keeping of any books or registers, shall be obliged solely by reason of section 53 to change the name of any company referred to in that section.
- (2) The presentation by the company to any registrar or any other person charged with the keeping of any books or registers of instruments, whether or not comprising an instrument of transfer —
  - (a) executed or purporting to be executed by the company;
  - (b) relating to any property held before controllership by that company; and
  - (c) containing a recital that the property has become vested in the company, by virtue of controllership,shall, in the absence of evidence to the contrary, be sufficient proof that the property is vested in the company.

**56 Prohibition against removal of assets**

- (1) No person shall transfer or remove from Tonga any property or assets of any licensed financial institution under controllership, except with the consent of the controller.
- (2) Every person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction —
  - (a) in the case of an individual, to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$50,000 or to both; or
  - (b) in the case of a company, to a fine not exceeding \$250,000.
- (3) Nothing in subsection (2) shall prevent the issue of an injunction order to prevent any property or assets being removed from Tonga.

**57 Controller may suspend payment**

Notwithstanding the terms of any contract, the controller of a licensed financial institution may suspend in whole or in part the —

- (a) repayment of any deposit;
- (b) payment of any debt; or
- (c) discharge of any obligation to any person.

**58 Sale of financial institution**

- (1) Subject to this Part, the controller of a licensed financial institution may, with the written consent of the Reserve Bank, sell the whole or any part of the

business of the licensed financial institution to such person and upon such terms and conditions as the controller deems fit.

- (2) Without limiting any other powers of the controller for the purposes of subsection (1), the controller shall have power to —
  - (a) form and register a company under the Companies Act;
  - (b) subscribe for all or any of the shares of that company;
  - (c) transfer to that company the whole or any part of the business of the licensed financial institution; and
  - (d) allot all or any of the shares in that company to any person, credited as fully or partly paid, up to the value of the business transferred to that company.
- (3) The controller shall not sell —
  - (a) the whole or any substantial part of the business of a licensed financial institution pursuant to subsection (1);
  - (b) any of the shares of any body corporate formed and registered pursuant to subsection (2)(a); and
  - (c) the whole or any substantial part of the business of any body corporate formed and registered pursuant to subsection (2)(a),unless the Reserve Bank has given approval in writing.

## 59 Consent not required under other Acts

The provisions of any enactment or agreement requiring any consent, licence, permission, clearance or other authority shall not have any application in respect of the sale or disposition of —

- (a) the whole or any part of the business of a licensed financial institution under to section 58;
- (b) any of the shares of any body corporate formed and registered under section 58; and
- (c) the whole or any part of the business of that body corporate, being a sale or disposition to which the Reserve Bank has given its approval under section 58:

Provided that this section shall not apply to any consent, permission, clearance, or other authority required under the provisions of the Land Act.<sup>54</sup>

## 60 Sale of property or assets subject to security

- (1) Pursuant to section 58, the controller may dispose of —
  - (a) any property or assets of a licensed financial institution;

- (b) property or assets of a licensed financial institution to any company formed and registered under section 58; or
- (c) any shares, or property or assets of a company formed and registered under section 58,

notwithstanding the existence, or the terms and conditions, of any security over the property or those assets in favour of any other person.

- (2) Subject to section 35, where the controller of a licensed financial institution disposes of any —
  - (a) property or assets subject to a fixed charge, the person entitled to the charge shall be paid out of the proceeds of disposition in priority to all other claims other than the costs of the controller in disposing of the property or assets;
  - (b) property or assets to any company formed and registered under section 58, the property or assets, which are subject to security in favour of any person shall still continue to be subject to that security;
  - (c) shares in a company formed and registered under section 58, the shares which are subject to a fixed charge in favour of any person, the person entitled to the charge shall be paid out of the proceeds of disposition in priority to all other claims other than the costs of the controller in disposing of the shares; and
  - (d) property or assets of a company formed and registered under section 58, the property or assets subject to a fixed charge in favour of any person, the person entitled to the charge shall be paid out of the proceeds of disposition in priority to all other claims other than the costs of the controller in disposing of the property or assets.

## 61 Proof of transactions

- (1) The presentation to any registrar, or any other person charged with the keeping of any books or registers, of any instrument transferring or otherwise disposing of any property or assets of a licensed financial institution or any shares in, or property or assets of any company incorporated under section 58 —
  - (a) executed or purporting to be executed by or on behalf of the licensed financial institution or company; and
  - (b) containing a recital that the transfer or other disposition of the property or assets of the licensed financial institution, or the shares in, or property or assets of, the company, is made under section 58,

shall, in the absence of evidence to the contrary, be sufficient proof that the transfer or other disposition is made under the authority of that section.

- (2) The presentation to any registrar, or any other person charged with the keeping of any books or registers of a certificate signed by the controller that

the amount secured by a charge over any property or assets of a licensed financial institution or any company formed and registered under section 58 has been paid or otherwise dealt with in terms of this Act shall, in the absence of evidence to the contrary, be sufficient proof that the amount secured by the charge has been appropriately dealt with.

## **62 Bases for initiation of receivership**

- (1) Where the Reserve Bank determines that a licensed financial institution is insolvent, it may petition the Supreme Court for an order to —
  - (a) revoke the licence of the financial institution; and
  - (b) take immediate possession and control of the financial institution through a receiver appointed by the Reserve Bank.
- (2) For the purposes of this Act —
  - (a) a licensed financial institution shall be deemed to be insolvent if —
    - (i) the licensed financial institution is not paying its obligations in full as they fall due;
    - (ii) the value of the liabilities of the licensed financial institution exceeds the value of the assets of the financial institution; or
    - (iii) the licensed financial institution has regulatory capital less than one-quarter of the required minimum regulatory capital; and
  - (b) the value of a licensed financial institution's assets, liabilities and regulatory capital shall be determined in accordance with valuation standards and procedures approved by the Reserve Bank.

## **63 Appointment of receiver**

The Reserve Bank shall appoint a person to be receiver for the purposes of section 62(1)(b).

## **64 Expenses owed to receiver and experts**

- (1) A licensed financial institution shall pay from its assets expenses of the receiver, any experts engaged by the controller and the Reserve Bank in execution of this Part of the Act.
- (2) Payments to the receiver shall be made on a current basis if there are sufficient liquid assets:

Provided that the receiver shall not receive in any calendar month a pro rata share in payment of their claims for fees and expenses that exceeds the payments made under section 77(1)(a).

- (3) Any moneys owing to the receiver at the end of the term of receivership shall be paid from proceeds of sales of the licensed financial institution's assets in accordance with section 77.

## 65 Notice and registration of receivership

Where a receiver is appointed, the receiver shall within 2 days of such appointment

- 
- (a) post in each office of the licensed financial institution a notice of his appointment, the effective date and time of possession by the receiver and specifying that —
    - (i) authorisation of the directors, officers and employees of the licensed financial institution to commit the financial responsibility of the licensed financial institution in transactions with customers has been cancelled; and
    - (ii) authorisation of persons to give instructions on behalf of the licensed financial institution with respect to payment or transfer of assets have been cancelled; and
  - (b) publish the notice in any newspaper published and circulated in Tonga for 4 consecutive weeks.<sup>55</sup>

## 66 Powers of receiver

- (1) Subject to subsection (2) a receiver shall have all the powers of the officers, directors and shareholders of the licensed financial institution.
- (2) A receiver may —
  - (a) operate the licensed financial institution in its own name;
  - (b) sell the licensed financial institution or its assets to satisfy its liabilities to depositors within one year; provided that the Reserve Bank may extend such period;
  - (c) continue any operation except the taking of deposits and extending of credit to customers other than existing customers in relation to outstanding assets;
  - (d) discontinue any operations;
  - (e) borrow money on an unsecured basis or secured;
  - (f) limit the payment of any obligation;
  - (g) employ or dismiss any officer or professional advisor;
  - (h) execute any instrument, initiate or defend and conduct any action or legal proceeding; and
  - (i) exercise lawful rights of set-off and reduce the amounts owing to depositors and other creditors of the licensed financial institution.



**67 Receiver's access to records**

- (1) The receiver shall have unrestricted access to and control over the offices, books of accounts, other records and other assets of the licensed financial institution and its subsidiaries.
- (2) Any person who wilfully interferes with a receiver's power under this section is guilty of an offence and shall be liable upon conviction to imprisonment for a period not exceeding 3 years or a fine not exceeding \$15,000 or both, and \$1,000 for each day during which the offence continues.

**68 Merger**

Any proposal from the receiver for a merger of the licensed financial institution with another licensed financial institution, or sale of substantially all the licensed financial institution's assets to any one licensed financial institution, shall be subject to section 11(3).

**69 Duties of receiver**

The receiver shall upon his appointment secure the assets of the licensed financial institution by taking actions including, but not limited to the following —

- (a) changing the locks and limiting access to the licensed financial institution's offices;
- (b) changing or establishing access codes to the licensed financial institution's computers; and
- (c) suspending the payment of capital distributions in general and payment of any kind to directors, officers and principal shareholders; provided that base compensation may be paid to directors and officers for services rendered.

**70 New balance sheets**

- (1) The receiver shall, upon his appointment, establish a new balance sheet for the licensed financial institution, based on his determination of liquidation values of assets with corresponding reduction in the value of the licensed financial institution's liabilities in the reverse order of priority under section 77.
- (2) Liabilities under subsection (1) shall be deemed due and payable and interest shall cease to accrue as of the date of the appointment of the receiver.
- (3) Unmatured liabilities shall be discounted to present value at the discount rate determined by the Reserve Bank.

## 71 Inventory of assets and property

The receiver shall, within one month of taking possession of a financial institution, make an inventory of the assets and property of the licensed financial institution and submit a copy to the Reserve Bank.

## 72 Withdrawal and payments

- (1) The receiver may, after one month from the date of his appointment, make available for withdrawal by depositors such amount as in his opinion is appropriate.
- (2) Creditors other than those under section 77(1)(a) and (b) shall receive no more than 50 per cent of the amount of their allowed claims, before a general distribution of payments to creditors or the assumption of liabilities by another licensed financial institution.

## 73 Shareholder's rights

When a receiver has taken possession of a licensed financial institution —

- (a) shareholders' rights shall be extinguished except for the right to receive dividends under section 77(4) and shall be subject to the licensed financial institution having positive net worth at the time of sale the right to receive any net payment from the sale of assets; and
- (b) the receiver may issue new shares, sell assets or arrange for the assumption of liabilities of the licensed financial institution.

## 74 Procedure for claims

The Reserve Bank shall prescribe the procedures for determining the validity, priority of claims, liquidation of assets and return of customers' property.

## 75 Unsold assets

Any assets of the financial institution that have not been sold at the end of the term of the receivership may be abandoned by the receiver or given to a charitable institution and there shall be no claim against any such assets.

## 76 Receiver's monthly report

The receiver shall submit a monthly report to the Reserve Bank including —

- (a) the most recent financial statements;
- (b) statements of sources and uses of funds;

- (c) information relating to the prospects of the sale of the licensed financial institution and its assets;
- (d) projections of payment of liabilities; and
- (e) any other relevant documents requested by the Reserve Bank.

## **77 Priorities in payment of claims**

- (1) Where a licensed financial institution is under liquidation, deposit liabilities in Tonga shall be paid in priority to all other claims apart from expenses incurred by the receiver and the Reserve Bank and where assets in Tonga are not sufficient to meet all deposit claims the available balance shall be distributed as follows —
  - (a) deposits up to an amount not exceeding \$2,000 per depositor;
  - (b) the amount not paid on deposits under paragraph (a); and
  - (c) other claims of creditors against the licensed financial institution.
- (2) If the amount available for payment for any class of claims listed under subsection (1) is insufficient to provide payment in full, such claims shall abate in equal proportions.
- (3) After payment of all claims duly filed, any remaining allowable late claims may be paid.
- (4) Any proceeds remaining after all claims by depositors and creditors have been paid shall be distributed among the shareholders of the licensed financial institution in accordance with their rights and interests.

## **78 Appeals from receiver's decisions on claims**

- (1) An appeal from a decision of the receiver with regard to a receivership or property claim may be made to the Reserve Bank within 30 days after the date on which the decision becomes final.
- (2) The Reserve Bank shall review the decision made by the receiver and may affirm, modify or reverse the receiver's decision within 30 days of receipt of the appeal.
- (3) The decision of the Reserve Bank under this section shall be final.

## **79 Final reporting to the Reserve Bank**

Once the proceeds for the sale of assets of a licensed financial institution have been distributed under section 77, the receiver shall submit a report to the Reserve Bank, including statement of income and expenses, and statement of sources and uses of funds.

## PART VI — MISCELLANEOUS

### 80 Retention of records, cheques, and other documents for 7 years<sup>56</sup>

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

### 81 Notice of unclaimed moneys

- (1) Every licensed financial institution shall, within 60 days after the end of each financial year, publish in at least one local newspaper published weekly and circulated in Tonga for four consecutive weeks a statement showing all accounts payable by the licensed financial institution where no transaction has taken place and no statement of account has been requested by the creditor during the last 7 or more years.<sup>57</sup>
- (2) Every statement published under subsection (1) shall require the person to whom the account is payable, or his legal personal representative to submit a claim to the licensed financial institution within 3 months from the date of publication

### 82 Unclaimed moneys paid to Reserve Bank<sup>58</sup>

- (1) Unclaimed moneys included in the statement published under section 81 that remains unclaimed for a period of 3 months after publication, shall be paid to

the Reserve Bank and credited to the Government's general revenue account with the Reserve Bank, after deduction of the costs of publication.

- (2) Subject to this section, a licensed financial institution is, upon payment to the Reserve Bank of any sums due under this section, discharged from further liability in respect of that amount.
- (3) The Reserve Bank shall, within 60 days after the end of each financial year, publish in at least one local newspaper published weekly and circulated in Tonga for four consecutive weeks a statement on all unclaimed moneys paid to the Reserve Bank under subsection (1), until the expiration of the time period specified in subsection (4).
- (4) Where unclaimed moneys have been paid to the Reserve Bank under this section, a person may lodge a claim with the licensed financial institution for the return of the unclaimed money that has been paid to the government within a period no longer than five years from the date of such payment. Any claim made under this subsection shall be subject to the approval of the Minister of Finance.
- (5) Once the period indicated in the previous subsection has expired without a claim having been submitted, the money paid to the Government under this section shall irrevocably become the Government's property.
- (6) Unclaimed moneys included in the statement published by the Reserve Bank remaining unclaimed for a period of three months after publication, shall be forfeited to the Government, after the expiration of the period specified in subsection (4) and after deduction of the costs of publication.
- (7) Subject to this section, the Reserve Bank, upon forfeiting to the Government of any sums due under this section, is discharged from further liability in respect of that amount.

### **83 Collection of penalties**

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

### **84 Winding up of licensed financial institution**

Notwithstanding the provisions of any other law, a licensed financial institution may not be wound up voluntarily without the prior written approval of the Reserve Bank.

**85 Prevailing application of the National Reserve Bank of Tonga Act and the Financial Institutions Act<sup>59</sup>**

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

**86 Indemnity of Reserve Bank<sup>60</sup>**

A director, employee, officer, agent, Governor or Deputy Governor of the Reserve Bank, and a person appointed by the Reserve Bank to carry out functions on its behalf, or a technical assistance expert who assists the Bank with conducting supervisory work under section 25, including a person previously holding such positions, shall not be held liable for damages, acts or omissions performed in the course of his duties under this Act, under the same conditions, including indemnification, as established in section 20 of the National Reserve Bank of Tonga Act.

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

**87 Operation of Companies Act**

Nothing in this Act shall exempt a licensed financial institution from the provisions of the Companies Act, save that where there is any conflict the provisions of this Act shall prevail.

**88 Regulations<sup>61</sup>**

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

**88A Close of business for holidays or emergency situations<sup>62</sup>**

- (1) All licensed financial institutions shall open their doors for business with the public on all days and during all office hours, excluding public holidays.
- (2) In exceptional circumstances, a licensed financial institution may apply to the Reserve Bank with at least 10 working days notice to close its doors for a specified purpose, which may only be done with the written approval of the Reserve Bank

- (3) In the event that an emergency situation requires the suspension of licensed financial institutions operations, the Reserve Bank may order one or more licensed financial institutions to close their doors temporarily, cease their operations, and resume them only by order of the Reserve Bank.
- (4) Provisions under the previous subsection shall not preclude the right of an affected licensed financial institution to close its business if it is forced by an emergency situation, subject to notification to, and confirmation by, the Reserve Bank, within the next 24 hours from the closing or as soon as practicable in light of the circumstances.
- (5) For the purpose of this section, an emergency situation is one due to natural disasters, public services interruption, internal or external conflicts, war, events of force majeure, or other extreme circumstances as determined by the Reserve Bank.

## PART VII — REPEAL

### 89 Repeal and transition

- (1) The Financial Institutions Act 1991 is hereby repealed.
- (2) The Reserve Bank may within 6 months of the commencement of this Act add further conditions to any licence deemed to be issued under this Act.
- (3) Regulations made under the Financial Institutions Act 1991, shall remain in full force and effect after enactment of this Act unless and until the same shall be modified or repealed.

**Schedule<sup>63</sup>**

*(Section 5(1))*

Westpac Bank of Tonga established under the Westpac Bank of Tonga Act

Tonga Development Bank established under the Tonga Development Bank Act 2014

Australia New Zealand Banking Group Limited

MBF Bank Limited

Pacific International Commercial Bank



## ENDNOTES

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### <sup>1</sup> Act 17 of 2004

Amending Acts	Commencement
Act 42 of 2010	24 November 2010
Act 22 of 2014	27 October 2014

### <sup>2</sup> GS 7/2005

<sup>3</sup> Inserted by Act 22 of 2014

<sup>4</sup> Amended by Act 22 of 2014

<sup>5</sup> Cap. 38.20

<sup>6</sup> Inserted by Act 22 of 2014

<sup>7</sup> Inserted by Act 22 of 2014

<sup>8</sup> Inserted by Act 22 of 2014

<sup>9</sup> Inserted by Act 22 of 2014

<sup>10</sup> Cap. 7.21

<sup>11</sup> Inserted by Act 22 of 2014

<sup>12</sup> Replaced by Act 22 of 2014

<sup>13</sup> Inserted by Act 22 of 2014

<sup>14</sup> Inserted by Act 22 of 2014

<sup>15</sup> Inserted by Act 22 of 2014

<sup>16</sup> Inserted by Act 22 of 2014

<sup>17</sup> Replaced by Act 22 of 2014

<sup>18</sup> Inserted by Act 22 of 2014

<sup>19</sup> Replaced by Act 22 of 2014

<sup>20</sup> Inserted by Act 22 of 2014

<sup>21</sup> Inserted by Act 22 of 2014

<sup>22</sup> Inserted by Act 22 of 2014

<sup>23</sup> Inserted by Act 22 of 2014

<sup>24</sup> Inserted by Act 22 of 2014

<sup>25</sup> Amended by Act 22 of 2014

<sup>26</sup> Amended by Act 22 of 2014

<sup>27</sup> Replaced by Act 22 of 2014

<sup>28</sup> Inserted by Act 22 of 2014

<sup>29</sup> Amended by Act 22 of 2014

<sup>30</sup> Replaced by Act 22 of 2014

<sup>31</sup> Replaced by Act 22 of 2014

<sup>32</sup> Inserted by Act 22 of 2014

<sup>33</sup> Replaced by Act 22 of 2014

<sup>34</sup> Replaced by Act 22 of 2014

<sup>35</sup> Inserted by Act 22 of 2014

<sup>36</sup> Amended by Act 22 of 2014

<sup>37</sup> Replaced by Act 22 of 2014

<sup>38</sup> Amended by Act 22 of 2014

<sup>39</sup> Amended by Act 22 of 2014

<sup>40</sup> Amended by Act 22 of 2014

<sup>41</sup> Cap. 10.18

<sup>42</sup> Amended by Act 22 of 2014

<sup>43</sup> Amended by Act 22 of 2014

<sup>44</sup> Amended by Act 22 of 2014

<sup>45</sup> Amended by Act 22 of 2014

<sup>46</sup> Inserted by Act 22 of 2014

<sup>47</sup> Amended by Act 22 of 2014

<sup>48</sup> Amended by Act 22 of 2014

<sup>49</sup> Amended by Act 22 of 2014

<sup>50</sup> Amended by Act 22 of 2014

<sup>51</sup> Amended by Act 22 of 2014

<sup>52</sup> Inserted by Act 22 of 2014

<sup>53</sup> Replaced by Act 22 of 2014

<sup>54</sup> Cap. 46.02

<sup>55</sup> Reference to now defunct Tonga Chronicle paper deleted by the Law Revision Commissioner in exercise of law revision powers

<sup>56</sup> Amended by Act 22 of 2014

<sup>57</sup> Amended by Act 22 of 2014

<sup>58</sup> Amended by Act 22 of 2014

<sup>59</sup> Replaced by Act 22 of 2014

<sup>60</sup> Replaced by Act 22 of 2014

<sup>61</sup> Amended by Act 42 of 2010 and Replaced by Act 22 of 2014

<sup>62</sup> Inserted by Act 22 of 2014

[63](#) Replaced by Act 22 of 2014