

REPUBLIC OF VANUATU
BILL FOR THE
COMMERCIAL GOVERNMENT BUSINESS ENTERPRISE
ACT NO. OF 2016

Explanatory Note

The purpose of this Bill is to provide for the Government to have control of business enterprises. Government Business Enterprises (the “Enterprise) have features of both private and public sector organizations. Like private companies, Enterprises engage in commercial activities with the goal of profit-making and compete with other private sector companies. Like public sector agencies, Enterprises are required to execute government policies, mainly in the form of delivering non-commercial services. This Bill will foster and encourage the entrepreneurial spirit and will open new opportunities for Enterprises to compete and get finance to grow.

This Bill is divided into 6 Parts.

Part 1 deals with the Preliminary Matters.

Clause 1 provides for the interpretation and outlines the definition of terms that are used throughout the Bill. Clause 2 deals with the application of this Bill. Clause 3 provides for the meaning of control of a company. Clause 4 provides for the Government control of a body corporate.

Part 2 deals with the Incorporation of an Enterprise.

Clause 5 provides what is an Enterprise and the purposes of an Enterprise. Clause 6 declares the status of an Enterprise and provides that the subsidiaries of an Enterprise which do not represent and cannot bind the State. Clause 7 provides for the primary objectives of an Enterprise. Clause 8 requires that directors of an Enterprise must develop and adopt a statement of corporate intent. Clause 9 requires directors of an Enterprise to develop and adopt a business plan for each financial year and the 2 financial years after the first financial year. Clause 10 provides that an Enterprise has the legal capacity and powers of an individual and the powers of a body corporate, both in and outside of Vanuatu. Clause 11 provides for activities an Enterprise must not do without the approval of the Minister. Clause 12 provides for a subsidiary of an Enterprise. Clause 13 provides for the services an Enterprise may provide to the Community.

Part 3 deals with the Governance of an Enterprise.

Clause 14 provides that a provision of the constitution of an Enterprise that is inconsistent with any provision of this Act or a Regulation made under this Act is void. Clause 15 provides for the composition of boards of an Enterprise. Clause 16 empowers the Minister by Order, with the approval of the Council of Ministers, to appoint and determine the remuneration and terms and conditions of a director of an Enterprise. Clause 17 provides that the term of office for directors will not exceed 3 years and a director may be re-appointed, and sets out the grounds and processes for the Minister to remove directors. Clause 18 requires the tabling of Orders for appointments and removals of directors of an Enterprise in Parliament. Clause 19 provides for the duties of directors and requiring them to ensure that they comply with such duties. Clause 20 provides for board meetings. Clause 21 provides for the disclosure of interests. Clause 22 provides that an Enterprise or subsidiary of an Enterprise must not exempt or indemnify an officer for liability owed to it, without the written approval of the Minister. Clause 23 provides for the appointment, disqualification, remuneration, allowances, terms and conditions of employment of a Chief Executive Officer of an Enterprise. Clause 24 empowers the Chief Executive Officer of an Enterprise to appoint and determine the terms and condition of other staff of the Enterprise. Clause 25 allows an Enterprise to appoint an expert advisor from time to time on such terms and conditions to assist it in carrying out its functions. Clause 26 outlines matters an Enterprise must have in its code of conduct and that the code of conduct must be reviewed at least once every 3 years.

Part 4 deals with the Finances and Reports by Enterprises.

Clause 27 provides that the Minister may acquire, on behalf of the Government, shares in or other securities of an Enterprise and monies payable by the Government for the acquisition of shares in or other securities are payable out of the funds appropriated for that purpose. Clause 28 provides that the Minister may, with the approval of the Council of Ministers, give a guarantee or other credit support in respect of a liability of an Enterprise. Clause 29 provides for the restrictions on share dealings that only apply to shares and securities of an Enterprise that are owned by the Government. Clause 30 requires each Enterprise and subsidiaries of each Enterprise to keep written financial records. Clause 31 requires the directors of an Enterprise to prepare for each financial year a financial statement and what a financial statement must consist of. Clause 32 provides for the Auditor-General or a qualified person engaged by the Auditor-General to assist him or her to perform all auditing services for each Enterprise and each subsidiary of an Enterprise. Clause 33 provides that an Enterprise is to submit an annual report and other reports to the Minister not less than 2 months after the end of the first half of each financial year.

Part 5 deals with the Shareholding and Supervision.

Clause 34 empowers the Minister, subject to this Act, to exercise all powers and rights that shareholders have in relation to an Enterprise. Clause 35 empowers the Minister to provide a written direction to an Enterprise, after consultation with its board and considering matters raised by its board, to disclose to the public or to a person or persons specified information or documents of an Enterprise or subsidiary of an Enterprise. Clause 36 establishes the Enterprise Monitoring Unit. Clause 37 provides the functions of the Enterprise Monitoring Unit. Clause 38 provides for the powers of the Enterprise Monitoring Unit.

Part 6 deals with the Miscellaneous matters.

Clause 39 provides for the process of delegation of powers and functions of a board and Chief Executive Officer. Clause 40 provides for the transitional provision for persons already occupying positions in an Enterprise before the commencement of the Act. Clause 41 empowers the Minister to make Regulations prescribing matters required or permitted to be prescribed or that are necessary or convenient to be prescribed for the better carrying out or giving effect to the provisions of this Act.

Minister of Finance and Economic Management



REPUBLIC OF VANUATU

BILL FOR THE COMMERCIAL GOVERNMENT BUSINESS ENTERPRISE ACT NO. OF 2016

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REPUBLIC OF VANUATU

BILL FOR THE COMMERCIAL GOVERNMENT BUSINESS ENTERPRISE ACT NO. OF 2016

An Act to provide for the establishment, operation and regulation of Commercial Government Business Enterprises and for related matters.

Be it enacted by the President and the Parliament as follows–

PART 1 PRELIMINARY MATTERS

1 Interpretation

In this Act, unless the contrary intention appears:

board means the board of directors of an Enterprise ;

constitution, in the case of an Enterprise that is a company, means the articles and memorandum of the Enterprise;

CSO agreement means a Community Service Obligation agreement referred to under section 13;

CSO proposal means a Community Service Obligation proposal referred to under section 13;

director means a director of an Enterprise;

Enterprise or **Commercial Government Business Enterprise** has the same meaning set out in subsection 5(1);

Enterprise Monitoring Unit means the unit established under section 36;

executive officer means:

- (a) the Chief Executive Officer of the Enterprise; or

(b) any other employee of the Enterprise involved in management;

financial year means a period that is a financial year for accounting purposes for the Enterprise;

Minister means the Minister responsible for Public Finance and Economic Management;

Ministry means the Ministry of Finance and Economic Management;

public servant means a person employed by the Public Service Commission, either on a full-time or a part-time basis;

security interest has the same meaning as set out in section 3 of the Personal Property Securities Act No. 17 of 2008;

share, in relation to an Enterprise that is a company, means a share in the capital of the company;

subsidiary, of an Enterprise, means:

- (a) a company that is controlled by the Enterprise; or
- (b) a joint venture or similar Enterprise (whether incorporated or not) that is controlled by the Enterprise;

weighted average cost of capital means the amount calculated in respect of the Enterprise in accordance with subsection 7(7).

2 Interface of this Act with other Acts

- (1) This Act applies in addition to the Companies Act No 25 of 2012 and any other Act that creates an entity that is an Enterprise.
 - (2) If a provision of this Act is in conflict with the provision of another Act, the provision of this Act prevails.

3 Meaning of control of company

For the purposes of this Act, the Government or an Enterprise controls a company if the Government or the Enterprise:

- (a) holds at least 50% shares of the company; or
- (b) has the power to exercise, or control the exercise, of voting rights attached to at least 50% of the shares of the company; or
- (c) has the power to dispose of, or control the disposition of, at least 50% of the shares of the company.

4 Government control of a body corporate

The Government controls a body corporate with no shares, if:

- (a) the Government or a Minister has power to appoint a person to be a member or director of the body corporate; or
- (b) the consent or approval of the Government or a Minister is required for the appointment of a person to be a member or director of the body corporate; or
- (c) the Government or a Minister determines the outcome of decisions concerning the management or financial and operating policies of the body corporate.

PART 2 INCORPORATION OF AN ENTERPRISE

5 What is an Enterprise for the purposes of this Act

- (1) For the purposes of this Act, an **Enterprise** is an entity, such as a company or other body corporate that is controlled by the Government and is listed in Schedule 1.
- (2) For the avoidance of doubt, the entities that are listed in Schedule 1 on the commencement of this Act are taken to be Enterprises and this Act applies to them as if they had been entered in Schedule 1 by Order under subsection (3).
- (3) After commencement of this Act:
 - (a) the Minister may by Order enter an entity that is controlled by the Government in Schedule 1; and
 - (b) the Minister may by Order remove an entity from Schedule 1; and
 - (c) in either case, Schedule 1 is amended by the entry or removal of the name of the entity, as the case may be, without any further step being required.
- (4) Without limiting the power of the Minister to enter an existing entity in Schedule 1 under paragraph (3)(a), the Minister may, with the approval of the Council of Ministers, incorporate a company under the Companies Act No 25 of 2012 with a view that the company will become an Enterprise.
- (5) The Minister may by Order, with the approval of the Council of Ministers, determine in writing that certain assets and liabilities of the State or of another Enterprise vest in a new Enterprise on a date to be specified in the Order.”

6 Status of an Enterprise

- (1) An Enterprise and the subsidiaries of an Enterprise do not represent and cannot bind the State.
- (2) The liability of an Enterprise or of a subsidiary of an Enterprise is not a liability of the State.

- (3) Subsections (1) and (2) do not apply if the Minister, upon the approval of the Council of Ministers, expressly provides that:
- (a) an Enterprise and the subsidiary of an Enterprise represent and binds the State; or
 - (b) a liability of an Enterprise or the subsidiary of an Enterprise is a liability of the State.

7 Primary objectives of an Enterprise

- (1) The primary objectives of an Enterprise are:
- (a) to be at least as profitable and efficient as comparable businesses; and
 - (b) to generate, for each financial year, a net operating profit of at least the percentage of its weighted average cost of capital as determined by the Minister.
- (2) The Enterprise Monitoring Unit must prepare and submit to the Minister, a report on the weighted average cost of capital of an Enterprise.
- (3) An Enterprise must conduct its business and operations with a view to achieving its primary objectives.
- (4) An Enterprise that does not comply with subsection (3) will not affect the validity or enforceability of a contract entered into by the Enterprise or other transactions made by the Enterprise.
- (5) The Minister may make a determination in relation to paragraph (1)(b) that is only applicable within the financial year when the determination was made.
- (6) The Minister must, before making a determination under subsection (5):
- (a) provide to the directors of an Enterprise a draft of the determination and a report on the matter from the Enterprise Monitoring Unit; and
 - (b) provide a reasonable period for the directors to provide comments on the draft; and

- (c) consider any comments made by the directors.
- (7) The Minister is to prescribe the method for calculating the weighted average cost of capital of an Enterprise.

8 Statements of corporate intent

- (1) The directors of an Enterprise must, by the start of each financial year, develop and adopt a statement of corporate intent for:
 - (a) that financial year (the first financial year); and
 - (b) the 2 financial years after the first financial year.
- (2) Directors of an Enterprise must not adopt a statement of corporate intent for the Enterprise unless:
 - (a) the Enterprise has given the Minister a draft of the statement, no later than 2 months before the start of the first financial year; and
 - (b) the Enterprise has considered all comments made by the Minister, in relation to the draft statement.
- (3) A statement of corporate intent must include the following:
 - (a) a description of the principal business of the Enterprise; and
 - (b) a statement of the commercial objectives of the Enterprise, demonstrating how those objectives are consistent with the primary objectives; and
 - (c) a description of the nature and scope of the activities that the Enterprise intends to undertake; and
 - (d) a summary of the strategies that the Enterprise will adopt to achieve its commercial objectives and the primary objectives; and
 - (e) a statement or summary of the targets or benchmarks to be used to measure the Enterprise's performance (including in respect of revenue, net profit after payment of tax and return on equity) against its commercial objectives and the primary objectives; and

- (f) a statement of the applicable percentage that has been determined by the Minister; and
 - (g) a statement of any current and anticipated borrowing by the Enterprise or a subsidiary of the Enterprise; and
 - (h) a statement of the accounting policies to be applied by the Enterprise in its financial records and reports; and
 - (i) a summary indicative balance sheet and profit and loss statement for the group consisting of the Enterprise and its subsidiaries, reflecting the directors' expectations for the financial year; and
 - (j) a statement of the proposed dividend and distribution policy of the Enterprise; and
 - (k) a description of any applicable CSO agreement and the impact of that agreement on the financial outcomes expected to be achieved by the Enterprise during the period to which the statement relates; and
 - (l) subject to subsection (6), any other matter relevant to the operations of the Enterprise that the Minister directs to be included in the statement.
- (4) In addition to subsection (3), a statement of corporate intent must provide indicative financial and operational information in respect of the matters specified in subsection (3) for the 2 financial years after the first financial year.
- (5) Without limiting paragraph (4)(l), a direction may require an Enterprise's statement of corporate intent to include information on:
- (a) compliance with an obligation arising from an International Agreement or an arrangement binding on the State; or
 - (b) the implementation of a policy adopted by the Council of Ministers in relation to international relations.
- (6) Before making a direction under paragraph (4)(l), the Minister must:

- (a) provide the directors of the Enterprise a draft of the direction and a report on the matter from the Enterprise Monitoring Unit; and
 - (b) provide a reasonable period for the directors to provide comments on the draft; and
 - (c) consider any comments made by the directors.
- (7) If the Enterprise has a subsidiary, the statement of corporate intent must include corresponding information about the operations of the subsidiary, and the operations of the group comprising the Enterprise and all its subsidiaries.
- (8) An Enterprise may amend its statement of corporate intent at any time and in order to amend the statement of corporate must
- (a) give the Minister a draft of the amendment at least 2 months before it is adopted; and
 - (b) consider any comments made by the Minister in relation to the proposed amendment.
- (9) An Enterprise must give the Minister a copy of its statement of corporate intent, and of any amendment to its statement of corporate intent, within 14 days after the board adopts the statement.
- (10) The Minister must table in Parliament, a copy of each statement of corporate intent and each amendment to a statement of corporate intent at the next sitting of Parliament after receiving the statement of corporate intent and each amendment.
- (11) Each Enterprise and each subsidiary of an Enterprise must give effect to and act consistently with, its current statement of corporate intent.

9 Business plans

- (1) The directors of an Enterprise must, by the start of each financial year, develop and adopt a business plan for:
- (a) that financial year (the first financial year); and
 - (b) the 2 financial years after the first financial year.

- (2) The directors of an Enterprise must not adopt a business plan unless:
- (a) it has given the Minister a draft of the plan, no later than 3 months before the start of the first financial year; and
 - (b) it has considered any comments made by the Minister in relation to the draft plan.
- (3) A business plan must contain:
- (a) information on the operations; and
 - (b) future strategic directions; and
 - (c) financial projections,
- of the Enterprise sufficient to enable the Minister to form a view that the business plan demonstrates that the Enterprise will achieve the primary objectives in the first financial year and in the 2 financial years after the first financial year.
- (4) If an Enterprise has a subsidiary, the business plan must include information about the operations of the subsidiary, and the operations of the Enterprise and all its subsidiaries.
- (5) The directors of an Enterprise may amend the Enterprise's business plan at any time and in order to amend the business plan must
- (a) give the Minister a draft of the amendment at least 2 months before it is adopted; and
 - (b) consider any comments made by the Minister in relation to the proposed amendment.
- (6) An Enterprise must give the Minister a copy of each business plan and of any amendment to a business plan, within 14 days after it is adopted by the board.

10 Capacity of an Enterprise

Subject to this Act and any other Act, and any provision of the constitution of an Enterprise, an Enterprise has the legal capacity and powers of an individual and the powers of a body corporate, both in and outside of Vanuatu.

11 Certain activities requiring Minister's approval

- (1) An Enterprise, must not do any of the following without the written approval of the Minister:
 - (a) incur a liability (a relevant liability) such that the total value of the Enterprise's liabilities (including the relevant liability) would exceed 50% of the net value of the Enterprise's assets as set out in the Enterprise's most recent audited accounts; or
 - (b) make an investment or more related investments, of an amount that may exceed 50% of the net value of the Enterprise's assets as set out in the Enterprise's most recent audited accounts; or
 - (c) incorporate a subsidiary; or
 - (d) be party to an agreement to form a joint venture; or
 - (e) make an investment of any amount outside Vanuatu.
- (2) A security interest cannot be created in property of an Enterprise unless:
 - (a) it is created in the ordinary course of the Enterprise's ordinary business; or
 - (b) the Minister approves in writing, the creation of the security interest.

12 Subsidiaries

- (1) The constitution of a subsidiary of an Enterprise must not be inconsistent with this Act or the constitution of the Enterprise that controls it.
- (2) Despite any provision in the constitution of a subsidiary of an Enterprise, a director of the subsidiary may be removed from office at any time by the board of an Enterprise.

- (3) A subsidiary of an Enterprise must provide the Enterprise with:
- (a) all information and documents necessary to enable the Enterprise to comply with its obligations in relation to the subsidiary; and
 - (b) any other information that the Enterprise requests in writing.

13 Community service by an Enterprise

- (1) The Minister may, with the approval of the Council of Ministers, provide an Enterprise with a written CSO proposal of the Enterprise to provide or cease to provide, a specified community service or to perform or cease to perform a specified community service.
- (2) The Enterprise must, within 1 month after receiving a CSO proposal, notify the Minister, in writing of:
- (a) its agreement to the proposal; or
 - (b) its agreement to the proposal with modifications as set out in the notification (and setting out the reasons for the modifications); or
 - (c) its decision to decline to the proposal on the ground that it is inconsistent with the primary objectives of the Enterprise.
- (3) If the Enterprise gives the Minister a notice under paragraph (2)(a), the Minister and the Enterprise must record the agreement in writing as a CSO agreement.
- (4) If the Enterprise notifies the Minister under paragraph (2)(b), the Minister and the Enterprise must, in good faith, negotiate the terms of the modification and if approved by both parties, record the agreement in writing as a CSO agreement.
- (5) If the Enterprise notifies the Minister under paragraph (2)(c), the Minister and the Enterprise must, in good faith negotiate an arrangement that will not be inconsistent with the primary objectives of the Enterprise and if approved by both parties, record the agreement in writing as a CSO agreement.

- (6) To avoid doubt, if an Enterprise notifies the Minister under paragraph (2)(c), the Enterprise is not required to give effect to the proposal unless a CSO agreement in respect of the proposal is in effect.
- (7) A CSO agreement:
- (a) include provision for funding or other resources from the Government to the Enterprise; and
 - (b) that provides for the Enterprise to provide goods or services, must specify:
 - (i) the goods or services, including any particular quantities; and
 - (ii) an estimate of the total cost to the Enterprise of providing the goods or services, and an estimate of the revenues to be received by the Enterprise for doing so, each on an annual basis; and
 - (iii) how the performance of the Enterprise in providing the goods or services will be monitored and assessed; and
 - (iv) the funding and other resources to be provided by the Government under the agreement; and
 - (c) include any other provision, as may be agreed between the Minister and the Enterprise, that must not be inconsistent with this Act.

PART 3 GOVERNANCE OF AN ENTERPRISE

14 Constitution of an Enterprise

A provision of the constitution of an Enterprise that is inconsistent with any provision of this Act or a Regulation made under this Act is void.

15 Composition of boards of an Enterprise

The board of each Enterprise consists of at least 3 but not more than 7 directors.

16 Appointment and qualification of directors

- (1) The Enterprise Monitoring Unit must advertise the position of a director of an Enterprise in any newspaper in Vanuatu.
- (2) Subject to subsections (4),(5) and (6), the Minister may, by Order and with the approval of the Council of Ministers, appoint a qualified person to be a director of an Enterprise.
- (3) The Minister is to determine in writing the:
 - (a) remuneration and allowances payable to a director; and
 - (b) terms and conditions of appointment of a director.
- (4) A person is disqualified to be appointed as a director if:
 - (a) there is reason to believe that the person is not a fit and proper person to be a director of the Enterprise; or
 - (b) the person is a Minister, a member of Parliament or a member of a Municipal Council or Provincial Government Council; or
 - (c) he or she has been convicted of an offence punishable by imprisonment of 12 months or more; or
 - (d) he or she has been convicted of an offence involving dishonesty; or
 - (e) he or she has been, in any jurisdiction, disqualified from acting as a director of a body corporate under a law relating to Companies.

- (5) In addition to subsection (4), the Minister must not appoint a public servant as a director of an Enterprise if there are:
- (a) only 3 directors-one public servant has been appointed as a director; or
 - (b) more than 3 directors-2 public servants have been appointed as directors.
- (6) A public servant must not be appointed as a director of an Enterprise if the public servant performs a function that is directly or indirectly related to the policy or operational business of the Enterprise.
- (7) The Minister is to appoint a Chairperson from amongst the members of the board.
- (8) The directors must elect from amongst themselves, a Deputy Chairperson of the board.
- (9) A public servant is disqualified from being appointed as Chairperson or elected as Deputy Chairperson of the board.
- (10) Anything done by or in relation to a person purporting to act under an appointment as director is not invalid if there was a defect or irregularity in connection with the appointment.

17 Term of office for directors

- (1) A director may be appointed for a period not exceeding 3 years and may be reappointed.
- (2) A director may resign by giving a 14 days written notice to the Minister.
- (3) A director ceases to hold office immediately if he or she:
- (a) becomes a Minister, a Member of Parliament or a member of a Municipal Council or Provincial Government Council; or
 - (b) is convicted of an offence punishable by imprisonment of 12 months or more; or
 - (c) is convicted of an offence involving dishonesty; or

- (d) is, in any jurisdiction, disqualified from acting as a director of a body corporate under a law relating to Companies.
- (4) The Minister may, by Order, after consultation with the Council of Ministers, remove a director from office.

18 Tabling of Orders for appointments and removal of directors

In addition to sections 16 and 17, the Minister must table in Parliament, all Orders for the appointment and termination a director of an Enterprise.

19 Duties of directors

- (1) A director in performing his or her duties must:
- (a) act honestly; and
 - (b) act in good faith; and
 - (c) act with care and diligence; and
 - (d) comply with the Enterprise's code of conduct under section 26.
- (2) A director must ensure that:
- (a) the Enterprise complies with subsection 7(3); and
 - (b) the Enterprise and each subsidiary of the Enterprise, complies with any applicable law and their constitutions.
- (3) In addition to paragraph (1)(c), a director does not act with care and diligence, if the Enterprise incurs a debt:
- (a) the Enterprise is not able to pay all its debts as and when they become due; or
 - (b) incurring the debt creates or is likely to create a substantial risk that the Enterprise will not be able to pay all its debts as and when they become due.

- (4) If a director breaches subsection (3), the director is jointly and severally liable with the Enterprise, for the payment of the debt unless he or she establishes that:
- (a) the debt was incurred without his or her express or implied consent; or
 - (b) at the time when the debt was incurred, the director, after due inquiry, did not have reasonable cause to suspect that the enterprise had incurred a debt.
- (5) A director or employee of an Enterprise must not use his or her position and any information of the Enterprise for his or her personal gain and cause a detriment to the Enterprise's ability to conduct its business.
- (6) Subsection (5) applies even after the person ceases to be a director or employee of an Enterprise.
- (7) If a person contravenes subsection (5), the Enterprise is entitled to recover compensation.
- (8) To avoid doubt, this section also applies to a subsidiary of an Enterprise.

20 Board meetings

- (1) The board must meet at least once every 2 months at a place and time to be determined by the board, and may hold such other meetings as are necessary for the efficient conduct of the Enterprise business.
- (2) The quorum for a meeting is the majority of members of the board present at the meeting.
- (3) Subject to the provisions of the constitution of the Enterprise, the Chairperson is to preside at all meetings of the board, and if the Chairperson is absent, the Deputy Chairperson is to preside at that meeting.
- (4) If the Chairperson and Deputy Chairperson are both absent, the directors present at the meeting must elect a director who is present at the meeting to preside at that meeting.

- (5) All decisions of the board are to be made by a majority of the votes of the directors present.
- (6) If the voting at the meeting is equal, the Chairperson at the meeting has a casting vote.
- (7) A resolution of the board of an Enterprise is taken to have been passed at a meeting of the board on the date on which the last director indicated his or her agreement if:
- (a) a majority of the directors of the board agree that a resolution may be passed by a method other than a board meeting; and
 - (b) by either:
 - (i) all the directors had been given reasonable notice of the resolution (including its terms); or
 - (ii) reasonable effort had been made to give that notice.
- (8) Paragraph (7)(b) does not apply in relation to a director who would have been prevented by subsection 21(3) from deliberating on the resolution if the resolution had been put to a meeting of the board.
- (9) Subject to this Act, the board may determine and regulate its own procedures for meetings.
- (10) The board must keep and maintain proper written minutes of all meetings of the board and all meetings of the committees of the board.

21 Disclosure of interests

- (1) For the purposes of this section:

interest means interest acquired directly or indirectly, pecuniary or non-pecuniary regardless of when the interest was acquired;

related party (of a director) means any of the following:

- (a) a spouse, child or parent of the director; or

- (b) a company (other than the Enterprise) of which the director is a director or executive officer, and a subsidiary of such a company; or
 - (c) a company of which a spouse, child or parent of the director is a director or executive officer; or
 - (d) any company if the director, or spouse, child or parent of the director, owns, or controls the exercise of votes attached to, more than the percentage prescribed by the regulations of shares of the company; or
 - (e) if the director and another person are parties to a contract, arrangement or understanding, whether formal or informal, written or not and whether or not enforceable:
 - (i) to acquire, hold, sell or otherwise deal in shares or other securities in concert; or
 - (ii) to exercise voting rights in a specified body corporate in concert.
- (2) A director of an Enterprise must disclose in writing to each other director of the Enterprise all interests that director has that could conflict with the proper performance of the functions of his or her office.
- (3) In addition to subsection (2), the disclosure must be given as soon as practicable after the director becomes aware of the interest.
- (4) A director who discloses an interest under subsection (2), must not be involved or if he or she is involved, ceases to be involved in that matter.
- (5) Despite subsection (4), a director may continue to perform his or her duties in that matter if the other directors provide their consent.
- (6) For the purposes of this section, if:
- (a) a related party of a director has an interest; and
 - (b) such interest could conflict with the proper performance of the functions of his or her office,

the director is taken to have interest.

- (7) An Enterprise must take reasonable steps to ensure that its employees make proper and adequate disclosure of their interests.
- (8) An Enterprise must record and maintain a register of all disclosures.
- (9) To avoid doubt, this section also applies to a subsidiary of an Enterprise.

22 Officers' indemnities

- (1) An Enterprise must not:
 - (a) exempt an officer of the Enterprise from a liability owed to it as such an officer; or
 - (b) indemnify an officer of the Enterprise or of a subsidiary of the Enterprise in respect of a liability owed to the Enterprise or to a subsidiary of the Enterprise; or
 - (c) except as permitted by subsection (3), indemnify an officer of the Enterprise or of a subsidiary of the Enterprise in respect of a liability owed to a person other than the Enterprise or a subsidiary of the Enterprise.
- (2) A subsidiary of an Enterprise must not:
 - (a) exempt an officer of the subsidiary from a liability owed to it as such an officer; or
 - (b) indemnify an officer of the subsidiary in respect of a liability owed to it, to another subsidiary of the Enterprise or to the Enterprise; or
 - (c) indemnify an officer of the Enterprise, or of another subsidiary of the Enterprise, in respect of a liability owed to it, to another subsidiary of the Enterprise or to the Enterprise, as such a director; or
 - (d) except as permitted under subsection (3), indemnify an officer in respect of a liability owed to a person other than the Enterprise or a subsidiary of the Enterprise.

- (3) An Enterprise or a subsidiary of an Enterprise may, with the written approval of the Minister, indemnify an officer of the Enterprise or subsidiary of the Enterprise in respect of the officer's liability to a person other than the Enterprise or a subsidiary of the Enterprise if the:
- (a) liability arose out of an act or omission of the officer acting in that capacity; and
 - (b) act or omission was done in good faith and due care.
- (4) To avoid doubt, this section also applies to an executive officer of an Enterprise.

23 Chief Executive Officer

- (1) The board must, after consultation with the Minister, appoint a qualified person to be its Chief Executive Officer.
- (2) The board is to enter into a contract of employment with the Chief Executive Officer and is to determine, after consultation with the Minister, the remuneration, allowances, terms and conditions of employment of the Chief Executive Officer.
- (3) Subject to subsections (6) and (7), the Chief Executive Officer is to hold office for a period of 5 years and is eligible for re-appointment for one term only.
- (4) The board is to determine the criteria for the appointment of the Chief Executive Officer.
- (5) The appointment of the Chief Executive Officer must follow a fair and transparent selection process and must be based on merit.
- (6) A person is disqualified from being appointed as the Chief Executive Officer if he or she:
- (a) is or becomes a member of Parliament, of a Provincial Government Council or a member of a Municipal Council; or
 - (b) is bankrupt or has made an arrangement in the nature of composition or assignment with his or her creditors; or

- (c) has been convicted of an offence and sentenced to a term of imprisonment of 12 months or more, whether or not it is a suspended sentence; or
 - (d) is a director of an Enterprise.
- (7) A person ceases to hold office as Chief Executive Officer if:
- (a) he or she is disqualified for appointment under subsection (6); or
 - (b) he or she becomes permanently incapable of performing his or her functions ; or
 - (c) he or she resigns from his or her office by giving notice in writing to the board; or
 - (d) his or her appointment is terminated by the Enterprise for a serious misconduct.

24 Other Staff of the Enterprise

- (1) The Chief Executive Officer of the Enterprise may, after consultation with the board, employ other staff of the Enterprise as it considers necessary for the proper and efficient performance of the functions of the Enterprise.
- (2) The Chief Executive Officer is to determine the terms and conditions of employment of other staff of the Enterprise.
- (3) The process for the appointment of other staff of the Enterprise must follow a fair and transparent selection process and must be based on merit.
- (4) The Chief Executive Officer, after consultation with the board, may make arrangements with the Public Service Commission for the services of Public Service Commission's employees.

25 Appointment of an Expert Advisor

The Enterprise may appoint an expert advisor from time to time on such terms and conditions to assist it in carrying out its functions under this Act.

26 Code of conduct

- (1) The board must formulate a code of conduct for the Enterprise, and must review the code and its operation once every 3 years.

- (2) A code of conduct must:
 - (a) be consistent with this Act and other written laws; and

 - (b) provide for all of the following matters:
 - (i) standards for conduct of directors and employees; and

 - (ii) actively promoting ethical behaviour and encouraging reporting of unlawful or unethical behaviour; and

 - (iii) the circumstances in which directors and employees may accept gifts and other benefits, including reporting and recording them; and

 - (iv) the use by directors and employees of the Enterprise's resources, including phones, cars and other property; and

 - (v) business travel, including its relationship to personal travel; and

 - (vi) conflicts of interests, including procedures for identifying, reporting and resolving them; and

 - (vii) managing breaches of the code, including monitoring compliance and reporting breaches; and

 - (viii) the use and disclosure of information by directors and employees; and

 - (ix) reducing or eliminating improper influence on directors and employees in carrying out their functions as directors and employees of the Enterprise; and

 - (x) trading in and ownership of securities or other financial instruments by directors and employees.

- (3) A director and employee of an Enterprise must comply with the code of conduct.

PART 4 FINANCES AND REPORTS BY ENTERPRISES

27 Acquisition of shares in or securities of an Enterprise

- (1) The Minister may acquire, on behalf of the Government, shares in or other securities of an Enterprise.
- (2) Monies payable by the Government for the acquisition of shares in or other securities of an Enterprise (whether in connection with its incorporation or otherwise) is payable out of the funds appropriated for that purpose.

28 Government credit support for Enterprises

The Minister may give a guarantee or other credit support in respect of a liability of an Enterprise in accordance to sections 59 and 60 of the Public Finance and Economic Management Act [CAP 244].

29 Restrictions on share dealings

- (1) A security interest cannot be created in a share in, or other security of, an Enterprise.
- (2) A share in, or other security of, an Enterprise must not be subject to a trust unless the Minister provides his or her approval.
- (3) This section applies only to shares and securities of an Enterprise that are owned by the Government.

30 Financial records

- (1) Each Enterprise, and each subsidiary of an Enterprise, must keep written financial records that:
 - (a) correctly record and explain its transactions and financial position and performance; and
 - (b) will enable true and fair financial reports to be prepared and audited on the Enterprise and the subsidiary of an Enterprise.
- (2) The Enterprise must keep the financial records for at least 7 years after the date of the transactions to which they relate.

- (3) The financial records are to be kept in English, and at the Enterprise's principal place of business.
- (4) The Enterprise may keep financial records electronically and be able to provide hard copies when necessary.

31 Financial statements

- (1) The directors of an Enterprise must prepare, for each financial year, a financial statement for the group consisting of the Enterprise and each of its subsidiaries.
- (2) A financial statement must consist of:
 - (a) balance sheets, profit and loss accounts and other financial statements for the year, as required by and consistent with, applicable accounting standards; and
 - (b) notes to the financial statements, as required by applicable accounting standards; and
 - (c) a declaration by the directors whether, in their opinion:
 - (i) there are reasonable grounds to believe that the Enterprise and its subsidiaries will be able to pay their debts as and when they become due and payable; and
 - (ii) the financial statement and notes are in accordance with this Act.
- (3) The financial statements and the notes together must include all information necessary to ensure that the financial report gives a true and fair view of the financial position and performance of the Enterprise and the group consisting of the Enterprise and its subsidiaries.
- (4) For the purpose of this section, **subsidiary** does not include a joint venture.

32 Audits of Enterprises

- (1) The Auditor-General is to perform all auditing services, for each Enterprise and each subsidiary of an Enterprise.

- (2) The Auditor-General may engage a qualified person to assist him or her in auditing an Enterprise or a subsidiary of an Enterprise.
- (3) The Auditor-General or a person assisting him or her, is to have the right of access, at all reasonable times, to the books and financial records of an Enterprise and of any subsidiary of an Enterprise.
- (4) A director or staff of an Enterprise or a subsidiary of an Enterprise must provide to the Auditor-General or a person assisting him or her, in the course of auditing an Enterprise or a subsidiary of an Enterprise, any information or document as may be requested by the Auditor-General or the person assisting him or her.
- (5) A director or staff member who contravenes subsection (4), commits an offence and is liable, on conviction, to a fine of not more than VT500,000.
- (6) For the purpose of this section, **subsidiary** does not include a joint venture.

33 Annual reports and other reports by an Enterprise

- (1) An Enterprise is to submit to the Minister, not less than 2 months after the end of the first half of each financial year, a report of the operations of the Enterprise during that half year.
- (2) A report under subsection (1) is to include:
 - (a) a report of the extent to which the Enterprise and its subsidiaries have achieved the outcomes specified in the applicable statement of corporate intent; and
 - (b) any other matter that the Minister has directed the Enterprise to include in the report.
- (3) An Enterprise is to submit to the Minister, not less than 3 months after the end of a financial year, a report of the operations of the Enterprise and its subsidiaries during that financial year.
- (4) The report under subsection (3), must include audited financial statements required by this Act for the financial year, together with an audit report as required by applicable auditing and accounting standards.

- (5) A report under subsection (3) must contain such information as is necessary to enable an informed assessment of the operations of the Enterprise and its subsidiaries during the financial year to which it relates.
- (6) In addition to subsection (5), a report must include the following:
- (a) a review of the operations of the entity in a year that is being reported on and the results of those operations; and
 - (b) a report of the extent to which the Enterprise and its subsidiaries have achieved the outcomes specified in the applicable statement of corporate intent; and
 - (c) a statement of the dividend or distribution paid to or to be paid to the Government in respect of the financial year; and
 - (d) details of any CSO agreement applicable during the financial year, and the revenue received by or payable to the Enterprise in respect of the agreement; and
 - (e) details of any significant changes in the Enterprise's affairs during the financial year; and
 - (f) details of any matter or circumstance that has arisen since the end of the financial year that has significantly affected, or may significantly affect the Enterprise's operations in future financial years; and
 - (g) details of any breaches of the Enterprise's Code of Conduct that have come to the board's notice during the financial year; and
 - (h) any other matter that the Minister has directed the Enterprise to include in the report.
- (7) A report under subsection (6) may omit material that, in the opinion of the board, is likely to result in unreasonable prejudice to the commercial interests of the Enterprise or a subsidiary of the Enterprise.
- (8) A report under subsection (3) may omit material that, in the reasonable opinion of the board of the Enterprise, is likely to result in unreasonable prejudice to the commercial interests of the Enterprise or a subsidiary of the Enterprise. The report must mention material that has been omitted.

- (9) The Minister must, table a copy of each report under subsection (3), at the next session of Parliament which is due to occur after receiving the report.

- (10) An Enterprise must, within a month after submitting its report to the Minister, publish in the newspaper in English and French, a summary of each annual report, including a statement showing actual performance against targets set in the relevant statement of corporate intent.

PART 5 SHAREHOLDING AND SUPERVISION

34 Role of the Minister

- (1) In the case of an Enterprise that is a company, the Minister may exercise, without consulting the shareholders, all the powers and rights that shareholders have in relation to the Enterprise under this Act, the Companies Act No. 25 of 2012 or any other Act or the constitution of the Enterprise.
- (2) For the purposes of this Act (including the Companies Act No 25 of 2012 or any other Act or the constitution of an Enterprise that is a company), resolution of the shareholders or the members of an Enterprise means a resolution effected by the Minister under subsection (3).
- (3) The Minister endorses a resolution by:
 - (a) recording the terms of the resolution in a document; and
 - (b) signing the document.
- (4) Any requirement that a resolution of the shareholders or the members of an Enterprise must be lodged with a corporate body or officer, is satisfied by lodging the resolution endorsed by the Minister with that body or officer.
- (5) Notice of a resolution endorsed by the Minister under subsection (3) is not required.
- (6) This section applies despite anything contrary in the Companies Act No 25 of 2012 or the constitution of an Enterprise that is a company.

35 Disclosure

- (1) The Minister may give a written direction to an Enterprise to disclose to the public or to a person or persons specified in the direction, which may include the Minister, specific information or documents relating to the affairs of the Enterprise or a subsidiary of the Enterprise.
- (2) The Minister must, before giving a direction under subsection (1), must consult the board and consider matters raised by the board.

- (3) Unless the direction says to the contrary, the board may impose reasonable conditions on the person specified in the direction, including conditions restricting further disclosure of the information or documents.
- (4) A direction under subsection (1) must not extend to information relating to an individual if the individual can be identified using the information.

36 Enterprise Monitoring Unit

- (1) The Enterprise Monitoring Unit is established.
- (2) The Enterprise Monitoring Unit consists of:
 - (a) a Chief Executive Officer, who is to be appointed by the Director General of the Ministry after consultation with the Minister; and
 - (b) public servants seconded to the Enterprise Monitoring Unit by the Public Service Commission.

37 Functions of the Enterprise Monitoring Unit

- (1) The function of the Enterprise Monitoring Unit is to provide financial, commercial and public policy analysis and advice to the Minister on all matters relating to the operation, performance and governance of Enterprises.
- (2) Without limiting subsection (1), the Enterprise Monitoring Unit has the following functions:
 - (a) to monitor production of statements of corporate intent, business plans, half yearly and annual reports of the Enterprises and to advise the Minister on the quality and content of the reports; and
 - (b) to analyse the performance of Enterprises against their statements of corporate intent, business plans, performance targets and primary objectives and report to the Minister; and
 - (c) to advise the Minister on the selection and appointment of directors of the Enterprises; and
 - (d) to regularly evaluate the performance of directors; and

- (e) monitor compliance with this Act by an Enterprise; and
 - (f) to advise the Minister on the implications of major transactions in relation to Enterprises; and
 - (g) to advise on the commercialization and privatization of Enterprises; and
 - (h) to advise Enterprises on best practices they should adopt to encourage and enhance service delivery and improve performance; and
 - (i) to advise the Minister on CSO proposals and CSO agreements; and
 - (j) to supervise the overall performance of Enterprises and public investment in, loans to, and guarantees of Enterprises; and
 - (k) to advise on the risks associated with the Enterprises generally that could potentially affect the Government's investment in the Enterprises.
- (3) The Enterprise Monitoring Unit must give the Minister, within 3 months after the end of each financial year, a report on the performance of each Enterprise.
- (4) The Enterprise Monitoring Unit must cause to be published in the Gazette, no later than 4 months after the end of each financial year, a summary report on the performance of each Enterprise, including:
- (a) summary financial statements; and
 - (b) a statement of the achievement of the Enterprise against appropriate non-financial performance measures; and
 - (c) an assessment of whether the Enterprise has achieved its primary objectives.
- (5) The Enterprise Monitoring Unit must give the Minister a report of its performance within 3 months after the end of each financial year.

- (6) The Minister must table the Report at the next session of Parliament after receiving the report.

38 Powers of the Enterprise Monitoring Unit

- (1) The Enterprise Monitoring Unit has all the powers necessary to perform its functions under this Act.
- (2) Without limiting subsection (1), the Enterprise Monitoring Unit has the power to require an Enterprise to:
- (a) to provide any specified document in the possession or control of the Enterprise; or
 - (b) to provide specified information about the Enterprise and its activities.
- (3) The Enterprise Monitoring Unit in exercising its power under subsection (1) is to, through its Chief Executive Officer, provide notice to the Enterprise.
- (4) The Chief Executive Officer of an Enterprise must comply with the requirements under subsection (2).

PART 6 MISCELLANEOUS

39 Power to delegate

- (1) A board may by resolution, delegate to any director, the Chief Executive Officer, any staff member or any subsidiary of the Enterprise, any of its powers and functions, but not the power of delegation.
- (2) The Chief Executive Officer of an Enterprise may in writing, delegate to any staff member of the Enterprise all or any of the Chief Executive Officer's powers and functions, but not the power of delegation.
- (3) A delegation may be subject to conditions specified in the resolution or instrument of delegation.
- (4) A delegated power or function must be exercised or performed in accordance with the resolution or instrument of delegation.
- (5) A delegation may be varied or revoked at any time and does not prevent the board or the Chief Executive Officer from exercising the delegated power or from performing the delegated function.

40 Transitional provision

A person who is occupying the position of a director or Chief Executive Officer or staff of an Enterprise immediately before the commencement of this Act are to continue:

- (a) on the same terms and conditions; and
- (b) with the same accrued and accruing entitlements; and
- (c) in the same position or with the same classification.

41 Regulations

The Minister may, make Regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) that are necessary or convenient to be prescribed for the better carrying out or giving effect to the provisions of this Act.

42 Commencement

This Act comes into force on the day on which it is published in the Gazette.

SCHEDULE 1

**COMMERCIAL GOVERNMENT BUSINESS
ENTERPRISES**

Airports Vanuatu Limited

Air Vanuatu (Operations) Limited

National Bank of Vanuatu

National Housing Corporation

Vanuatu Agriculture Development Bank

Vanuatu Broadcasting & Television Corporation

Vanuatu Commodities Marketing Board

Vanuatu Post Limited