



REPUBLIC OF KIRIBATI

(No. 2 of 2013)

I assent

Ante Tuny
Beretitenti
17 May 2013

AN ACT TO IMPROVE THE EFFICIENCY AND EFFECTIVENESS OF STATE OWNED ENTERPRISES

Commencement

2013

MADE by the Maneaba ni Maungatabu and assented to by the Beretitenti

Part 1 Preliminary

1. Short title and commencement

- (a) This Act is the State-Owned Enterprises Act 2013.
- (b) This Act commences on a date appointed by notice by the Minister of Finance.

2. Purpose of Act

The purpose of this Act is to improve the efficiency and effectiveness of SOEs for the benefit of Kiribati and its people by:

- (a) specifying principles governing the operation of SOEs; and
- (b) establishing accountability requirements for SOEs, and the responsibilities of Ministers.

3. Definitions

In this Act:

"articles" means:

- (a) in the case of an SOE that is a company, the articles of association as contemplated by section 13 of the Companies Act (CAP 10A);

- (b) in any other case the trust deed, constitution, or other rules that apply to the governance and management of the SOE, and any Act (other than the Constitution) that applies to an SOE and contains provisions commonly found in articles of association of a company.

"board" means the board of directors (however described) of an SOE.

"controlled SOE" means an SOE in which responsible Ministers or other agents of the State have the right, directly or indirectly:

- (a) to appoint half or more of the directors (however described); or
- (b) to control half or more of the votes at a meeting of shareholders or the members or controlling body.

"CSO" means a community service obligation which is an obligation to provide or make available goods and services to a class of persons, or generally, that the SOE would not otherwise provide or make available, but is obliged to do so under an agreement contemplated by section 6.

"director" has the extended meaning given by section 9(1).

"Government involvement" in relation to an SOE means:

- (a) the right, directly or indirectly, to appoint one or more of the directors (however described); and
- (b) the right to control, directly or indirectly, the votes at a meeting of shareholders or the members or controlling body; and

"major transaction" means, in relation to an SOE:

- (a) the acquisition of or agreement (whether contingent or not) to acquire assets the value of which is more than one quarter of the value of the SOE's assets before the acquisition;
- (b) the disposition of, or an agreement (whether contingent or not) to dispose of assets of the SOE the value of which is more than one quarter of the value of the SOE's assets before the disposition;
- (c) a transaction that has or is likely to have the effect of the SOE acquiring rights or interests or incurring obligations or liabilities (including contingent liabilities) the value of which is more than one quarter of the value of the SOE's assets before the transaction;
- (d) if the SOE is a company, a transaction to which section 99 of the Companies Ordinance applies.

"Republic" means the Republic of Kiribati.

"responsible Ministers" in respect of an SOE means:

- (a) the Minister of Finance; and
- (b) the Minister assigned for the time being by the Beretitenti under section 47(1) of the Constitution to be the responsible Minister for that SOE; and if there is no such assignment, means the Beretitenti. If the Minister of Finance is so assigned by the Beretitenti, then there is only one responsible Minister.

"SOE" means a State-Owned Enterprise which is any company, corporation, or other entity that is listed in the First Schedule to this Act.

"SOEMAU" means the SOE Monitoring and Advisory Unit.

4. SOEs must be listed in First Schedule

- (1) Every company, corporation, or statutory entity that has Government involvement must be listed in the First Schedule to this Act.
- (2) This section does not apply to any company that is a subsidiary of a company, corporation, or statutory entity that has Government involvement.
- (3) This section does not apply to:
 - (a) the Kiribati Institute of Technology;
 - (b) the Telecommunications Regulatory Authority;
 - (c) the Kiribati Provident Fund
 - (d) any other company, corporation, or statutory entity that is declared by the Beretitenti acting in accordance with the advice of Cabinet, not to be an SOE.
- (4) If an SOE is to cease to be an SOE because it has been liquidated or disestablished, or for any other reason, the SOE must be removed from the First Schedule.
- (5) If an SOE is to cease to be an SOE for any reason other than its liquidation or disestablishment, notice of intention to remove it from the First Schedule must be published not less than one month before notice is given under subsection (6).
- (6) The Minister of Finance must give notice of an intention to remove an SOE as required under subsection (5), and of every addition to or removal of SOE from the First Schedule.

Part 2 – Principles

5. Principal objective

- (1) The principal objective of every SOE is to operate as a successful and sustainable business.
- (2) For the purposes of this section, a "successful and sustainable business" is a business that:

- (a) is as efficient and effective as a comparable business that is not owned by the Government; and
 - (b) services its debts incurred in the ordinary course of business without payments from the Government, except those in respect of CSOs as contemplated by section 6.
- (3) Every SOE must also be a good employer and exhibit corporate social responsibility.
- (4) For the purposes of subsection (3), a "good employer" is an employer that provides:
- (a) a safe working environment;
 - (b) equal opportunities for all staff;
 - (c) an impartial selection process for employing suitably qualified employees; and
 - (d) opportunities for individual employees to enhance their abilities.

6. Community Service Obligations

- (1) The Government may require an SOE to perform a CSO in respect of any class of persons, or generally, in accordance with this section.
- (2) Where the Government requires an SOE to perform a CSO, the Government and SOE must enter into an agreement under which the SOE will perform the CSO in return for payment by the Government of an agreed price.
- (3) An agreement under subsection (2) must:
- (a) be in writing;
 - (b) specify the type, quantity, and quality of the goods and services to be provided; or make available and
 - (c) specify the price to be paid by the Government or the means of determining that price.
- (4) An SOE must not fail or refuse to perform a CSO unless performance of it would be a breach of the Constitution or the laws of Kiribati.

Part 3 – Structure and formation of SOEs

7. Shares in SOEs

- (1) All the shares in each SOE are owned by the Republic, and the shareholder and beneficial owner to be registered under sections 6 and 24 of the Companies Ordinance is the Republic.
- (2) The shares referred to in subsection (1) are under the control of the responsible Ministers of the relevant SOE, and they jointly have all the rights and powers of shareholders.

- (3) Despite subsection (2), the responsible Ministers must not sell or otherwise dispose of the shares in an SOE, nor enter into any transaction under which, if default occurs, effective control of the shares would pass to any other person.
- (4) Subsection (3) does not apply if section 11 is complied with.
- (5) If an SOE is removed from the First Schedule to this Act, this section continues to apply except that the shares may be sold or disposed of by the responsible Ministers acting in accordance with the advice of the Cabinet.

8. Ministers may subscribe for or acquire shares in SOEs

- (1) The responsible Ministers may subscribe for or acquire shares in an existing SOE, or a SOE that is yet to be formed, and those shares must be held by the Republic.
- (2) Any money required to be paid as subscription for or otherwise acquiring shares of an SOE shall be paid out of money appropriated for that purpose.

9. SOEs that are not companies

- (1) If an SOE is not a company, references in this Act, in relation to the SOE to:
 - (a) shares; include any form of voting rights in that organisation;
 - (b) the directors and the board; include trustees, managers, or office holders (however described in that SOE);
 - (c) shareholders; include any partners, joint venture partners, members, or other persons holding capital or voting rights in relation to that SOE;
 - (d) the articles; include any trust deed, rules, or other documents constituting that SOE or governing its activities, including any Act (other than the Constitution) that contains provisions commonly found in the articles of a company; or
 - (e) subsidiaries include any entity that is under the effective control of the SOE.
- (2) If an SOE that is not a company is subject to another Act in respect of the appointment and conduct of its directors or in respect of voting rights, then this Act prevails over that other Act in respect of those matters.

10. Partial private ownership of controlled SOE

- (1) The articles of every controlled SOE must contain a provision that prohibits the sale, other disposal or issue of shares other than to the Republic of Kiribati to be held by the responsible Ministers in accordance with the Act.
- (2) If the articles of an SOE do not explicitly contain the provision referred to in subsection (1), then the articles are deemed by this subsection to contain that provision.
- (3) This section does not apply to the extent that section 11 applies.

11. Cabinet may approve changes to articles

- (1) The responsible Minister's acting in accordance with the advice of the Cabinet may, by notice in the Gazette, approve amendments to the articles of a controlled SOE to permit:
 - (a) the sale, or other disposition or issue of shares in a controlled SOE to persons other than the Republic so long as a majority of the shares will continue to be held by the Republic after the sale, other disposition, or issue;
 - (b) the appointment of a specified number of directors, being less than half the total number of directors, by persons other than the responsible Ministers.
- (2) Any approval under subsection (1) may be subject to conditions, which must be included in the articles and notified in general terms, including (but not limited to):
 - (a) conditions restricting the further sale or other disposition of shares in private ownership, or requiring that before any such shares are sold or disposed of they are first offered to the Republic;
 - (b) the price for the sale or other disposition or issuing of the shares, or a mechanism for determining that price;
 - (c) a requirement that no meeting of directors commence or continue, or that the directors do not conduct any business without a meeting, unless a majority of directors who are appointed by the responsible Ministers are present at the meeting or consent to the business being conducted.

Part 4 – Governance and Management

Ministers

12. Responsible Ministers' accountability

Subject to the provisions of this Act, the responsible Ministers of an SOE are accountable to Maneaba ni Maungatabu for the performance of their rights and powers as shareholders of the SOE.

13. Cabinet to approve significant matters

- (1) The board of an SOE must obtain the written approval of the Beretitenti, acting in accordance with the advice of the Cabinet before:
 - (a) entering into a major transaction;
 - (b) amending its articles;
 - (c) doing any act that will put the SOE in breach of its statement of intent, or allowing any omission to occur that is likely to have the same effect;

- (d) entering into any financing or other transaction that gives any party other than the Government the power to take effective control of the SOE or any material assets of the SOE in the event of a default; or
 - (e) entering in to any borrowing or financial transaction that causes any liability (contingent or otherwise) for the Government.
- (2) This section prevails over any contrary provision in the articles of the company, but does not affect any provision in the articles that can be read consistently with it.

Directors

14. Directors' principal duty to act in SOE's interests

- (1) It is the principal duty of each director, and the board, to act in good faith and in the interests of the SOE.
- (2) The directors must not:
 - (a) act, or agree to the SOE acting, in a manner that contravenes the principal objectives this section, the provisions of the SOE's statement of intent, its articles, or the law;
 - (b) cause, allow or agree to the SOE carrying out any activity that is likely to create a substantial risk of serious loss to the SOE's creditors; or
 - (c) agree to the SOE incurring an obligation unless the directors believe at the time on reasonable grounds that the SOE will be able to perform the obligation when it is required to do so and without causing the company substantial loss.
- (3) This section does not give any rights to a person other than the responsible Ministers.
- (4) No person dealing with an SOE is required to verify whether any action or omission might constitute a breach of this section, and no person dealing with an SOE, nor the SOE itself, is entitled to challenge the validity of an action or omission by the SOE on the grounds that it is or may be a breach of this section.

15. Directors' functions

All decisions relating to the governance and operation of an SOE are to be made by, or under delegated authority of, the board in accordance with the SOE's articles and statement of intent.

16. Board meetings

- (1) The board of each SOE must meet at least every two months and at other times as the Chairman may require.
- (2) This section prevails over any contrary provision in the articles of the SOE; but does not affect any provision that can be read consistently with it.

17. Director appointments

- (1) When appointing a director, the responsible Ministers must consider:
 - (a) comments and recommendations from SOEMAU; and
 - (b) the balance of skills, knowledge and experience that will exist on the board of the SOE after the appointment, having regard to the nature and scope of the SOE's activities and its objectives.
- (2) No board may have a majority of directors who are currently employed by the Government.
- (3) No employee of a Ministry or Government department is eligible to hold office as a director of an SOE if that Ministry or department is accountable to the responsible Minister who is not the Minister of Finance.
- (4) No Chief Executive or other employee of an SOE is eligible to be a director of that SOE.
- (5) No person who is a Member of the Maneaba ni Maungatabu is eligible to be a director of any SOE.
- (6) This section prevails over any contrary provision in the articles of an SOE; but does not affect any provision that can be read consistently with it.

18. Review of directors' performance

- (1) The responsible Ministers must review the performance of the SOE's directors individually and collectively at least every 2 years.
- (2) Each director's performance, and the performance of the board as a whole, must be reviewed against the performance of the SOE in relation to:
 - (a) the principal objective in section 14 (1);
 - (b) the SOE's objectives in its statement of intent;
 - (c) the requirements of its articles, and its compliance with the laws of the Republic;
 - (d) the efficiency and effectiveness (financial and otherwise) of its commercial operations; and
 - (e) the efficiency and effectiveness of its performance of any CSOs.

Accountability

19. Statements of intent

- (1) The board of every SOE must deliver to the responsible Ministers a draft statement of intent not later than 2 months before the commencement of the financial year of the SOE.

- (2) A statement of intent must specify for the SOE and its subsidiaries (if any) the following information for the next financial year and the next two financial years:
- (a) the objectives of the SOE;
 - (b) the nature and scope of the activity to be undertaken;
 - (c) the performance targets and other measures by which the performance of the SOE may be judged in relation to its objectives;
 - (d) a statement of financial performance;
 - (e) a statement of financial position;
 - (f) a statement of anticipated borrowing;
 - (g) the accounting policies;
 - (h) whether the SOE anticipates that it will generate a return that covers the cost of capital, and if not, why not;
 - (i) a statement of the principles to be adopted in determining any annual dividend;
 - (j) any activity which the SOE requests or has agreed to be treated as a CSO; and
 - (k) any other matters as agreed by the responsible Ministers and the board.
- (3) On receipt of the draft statement of intent, the responsible Ministers may comment on the draft statement of intent within 1 month.
- (4) The board must consider any comments on the draft statement of intent that are made to it in accordance with subsection (3), and must deliver the completed statement of intent to the responsible Ministers on or before the commencement of the financial year or such later date as the responsible Ministers decide.
- (5) The board may amend the statement of intent at any time if the board:
- (a) gives the responsible Ministers written notice of the amendment; and
 - (b) considers any comments that the responsible Ministers may have on the change within 1 month of receipt of the amendment.
- (6) The board must amend the statement of intent if so directed by the responsible Ministers; and may note in the statement of intent that the amendment has been directed by the responsible Ministers.

20. Annual report

- (1) The board of each SOE must deliver to responsible Ministers an annual report within 3 months after the end of the financial year of the SOE that includes:

- (a) a record of the SOE's operations, and its subsidiaries (if any) during that financial year;
 - (b) audited consolidated financial statements for that financial year consisting of:
 - (i) statements of financial position;
 - (ii) statements of financial performance; and
 - (iii) any other necessary statement;
 - (c) the auditor's report on those financial statements; and
 - (d) any information required by the SOE's statement of intent, or the responsible Ministers.
- (2) Every report under subsection (1) must:
- (a) include information necessary to enable an informed assessment of the SOE's operations and performance, including a comparison of the performance of the SOE against its statement of intent; and
 - (b) state the dividend (if any) payable to the State for the financial year reported.

21. Half-yearly reports

- (1) The Board shall deliver to the responsible Ministers a report within 2 months after the end of the first half of each financial year of a SOE that includes:
 - (a) a report of the SOE's operations during that half-year;
 - (b) a statement of financial position;
 - (c) any information required by the SOE's statement of intent or the responsible Minister; and
 - (d) any other necessary information.

22. Extensions of time

The responsible Ministers may, after consulting the Auditor General, allow an SOE an extension of time to deliver an annual report or half year report, and must notify the Beretitenti.

23. Auditor General to be auditor of SOEs and subsidiaries

- (1) The Auditor General is the auditor for every SOE.
- (2) If the responsible Ministers approve, the Auditor General may appoint a person or firm that is a qualified auditor to audit an SOE on the Auditor General's behalf.

24. Annual report and half-yearly report to be presented to Maneaba ni Maungatabu and made publicly available

- (1) The responsible Ministers must provide the Maneaba ni Maungatabu with copies of the following documents from each SOE not later than the first sitting day of the next session after they are received:
 - (a) the statement of intent;
 - (b) the annual report; and
 - (c) the half-yearly report.
- (2) The responsible Ministers must by notice publish where the documents referred to in subsection (1) can be inspected (which may be online) no later than:
 - (1) 1 week after they have been provided to Maneaba ni Maungatabu; or
 - (2) 4 weeks after they have been received by the responsible Minister, if they have not been provided to Maneaba ni Maungatabu whichever occurs first.

25. Other information

- (1) Subject to section 26, in response to a written request from the responsible Ministers, the board of an SOE must supply to the responsible Ministers, or their nominee, information relating to the affairs of the SOE and its subsidiaries (if any).
- (2) No person who acts in accordance with such a request incurs any civil or criminal liability for doing so.

26. Protected information

- (1) The board is not obliged to supply under section 25(1):
 - (a) information that relates to:
 - (i) an individual employee of the SOE or any subsidiary of it;
 - (ii) a customer of the SOE or any subsidiary of it; or
 - (ii) any other person;where the information supplied would allow the person to be identified; or
 - (b) information that, in the opinion of the board, could reasonably be expected to cause direct financial loss to the SOE or any of its subsidiaries, if the information became public.
- (2) The board cannot invoke subsection (1) if satisfactory provision has been made to ensure appropriate confidentiality.

Employees

27. Chief Executive Officer appointment

- (1) The board must appoint a Chief Executive Officer who is responsible for managing the SOE and implementing the decisions of the Board.
- (2) The Chief Executive Officer must be employed under a written performance based contract that specifies, as a minimum:
 - (a) the specific objectives of the SOE;
 - (b) the performance expectations of the SOE and the Chief Executive Officer;
 - (c) the review process of the performance of the Chief Executive Officer; and
 - (d) an undertaking by the Chief Executive Officer to adhere to the SOE's statement of intent and the principal objective in section 19.

28. Other staff

The Chief Executive may, within parameters set by the board, employ staff as necessary for the effective and efficient operation of the SOE.

Part 5 – Other matters

29. SOE Monitoring and Advisory Unit

- (1) There must be a SOEMAU, that is a part of the Ministry of Finance.
- (2) The objective of the SOEMAU is to advise and assist the Government by:
 - (a) advising responsible Ministers and the Government on the assets and liabilities of the Government in relation to each SOE including but not limited to:
 - (i) reviewing statements of intent and half yearly and annual reports of SOEs;
 - (ii) monitoring the performance of SOEs against their objectives;
 - (ii) evaluating proposals involving major transactions.
 - (b) assisting responsible Ministers with the appointment and performance evaluation of directors;
 - (c) advising responsible Ministers and Government on the overall SOE sector including but not limited to:
 - (i) the overall performance of the SOE sector and Government's investment in, loans to, and guarantees of SOEs; and
 - (ii) the impact of the SOE sector on Government's overall financial position; and

- (iii) the risks associated with the SOE sector that could potentially affect Government finances.

(3) In the furtherance of its objective, SOEMAU must:

- (a) provide or arrange for training and continuing education of directors and potential directors of SOEs;
- (b) maintain a register of directors and potential directors;
- (c) provide assistance to the responsible Ministers in the identification and evaluation of candidates for directorships of SOEs; and
- (d) provide assistance to the boards of SOEs in the identification and evaluation of candidates for the role of Chief Executive Officer.

(4) SOEMAU must provide the Minister of Finance with an annual report on the performance of each SOE, within three calendar months of the end of the financial year of the SOE, and a further report within one month after receiving the audited annual report of the SOE if it has not then been received.

(5) SOEMAU must provide the Minister of Finance with an annual report of its own performance within 3 calendar months of the end of its financial year.

30. Government guarantees etc

- (1) The Government may give a guarantee, indemnity, or security in respect of the performance of any obligation by an SOE.
- (2) A general description of every such guarantee, indemnity or security, and the Auditor General certificate as to the maximum potential liability of the Government under it must be included in the next annual report of the SOE.

31. Restriction on lending and financial assistance to SOEs

- (1) The Government must not lend money, or provide any other financial assistance to any SOE on terms and conditions that are more favourable than those the Government would receive if the Government were borrowing the money itself. This restriction does not apply if the financial assistance is provided as part of an agreement under section 6 for the performance of a CSO.
- (2) Where a board requests financial assistance from the Government, the board must make the request in writing to the responsible Ministers.
- (3) If the Government provides financial assistance to an SOE the board must record that it received financial assistance, and its terms, in the next annual report of the SOE.
- (4) For the avoidance of doubt, requests for financial assistance are relevant for the annual review of directors under section 18.

- (5) In this section, "financial assistance" includes the forgiveness or deferral of interest or debt repayments to the Government.

32. Government to purchase goods and services under purchase contracts

- (1) If the Government decides to obtain goods and services from any SOE, the Government and the SOE must enter into a contract for the supply of those goods and services that specifies:
- (a) the type, quantity, quality of the goods and services;
 - (b) the price, or means for determining the price, to be paid for the goods and services.

33. Savings provision

A failure by a SOE, or any subsidiary, to comply with any provision of this Act, or any statement of intent does not affect the validity or enforceability of any deed, agreement, right, or obligation entered into, obtained or incurred by that organisation.

34. Transfer of State assets and liabilities to SOEs

- (1) Notwithstanding any Act, rule of law, or agreement, the responsible Ministers for an SOE may, on behalf of the State, do any one or more of the following:
- (a) transfer to the SOE assets and liabilities of the State (being assets and liabilities relating to the activities to be carried on by the SOE);
 - (b) authorise the SOE to act on behalf of the State in providing goods or services, or in managing assets or liabilities of the State;
 - (c) grant to the SOE leases, licences, easements, permits, or rights of any kind in respect of any assets or liabilities of the State;

for such consideration, and on such terms and conditions, as the responsible Ministers may determine.

- (2) The responsible Ministers must ensure that any land or any lease, licence, or easement of land, is transferred for a fair market price, rental, or annual fee as the case may be.
- (3) Assets that are fixed to, or are under or over, any land may be transferred to an SOE under this Act whether or not any interest in the land is also transferred. Where any such asset is so transferred, the asset and the land shall be regarded as separate assets each capable of separate ownership.
- (4) Any asset or liability of the State may be transferred to an SOE under this Act whether or not any Act, agreement, or law relating to the asset or liability prohibits or permits such transfer or requires any consent to such a transfer.
- (5) Where a transfer of the kind described in subsection (4) of this section takes place:

- (a) the transfer shall not entitle any person to terminate, alter, or in any way affect the rights or liabilities of the State, or the SOE, under any Act or agreement;
 - (b) where the transfer is registrable, the person responsible for keeping the register must register the transfer forthwith after written notice of the transfer is received by him or her from any person authorised for this purpose by the responsible Ministers;
 - (c) the laying before the Maneaba ni Maungatabu or publication by notice of reference to contract or other document relating to the transfer is notice of the transfer, and any third party must after the date of such contract or document deal with the SOE in place of the State.
 - (d) the State remains liable to any third party as if the asset or liability had not been transferred; but is indemnified by the SOE in respect of any liability to that third party.
 - (e) any satisfaction or performance by the SOE in respect of the asset or liability is to be taken to be also satisfaction or performance by the State;
 - (f) any satisfaction or performance in respect of the asset or liability by any third party to the benefit of the SOE is to be taken to be also to the benefit of the State.
- (6) No provision in any agreement limiting the State's right to sell any assets to third parties, or for determining the consideration for the sale of any assets to third parties, or obligating the State to account to any person for the whole or part of the proceeds of sale by the State of any assets to third parties, or obliging the State to pay a greater price than otherwise by reason of or as a consequence of the sale of any assets to third parties, has any application or effect in respect of any agreement or transfer entered into or effected under this Act or such an agreement or transfer.
- (7) Where:
- (a) rights or obligations to provide goods or services to third parties are transferred to an SOE under this Act; and
 - (b) those goods or services have previously been provided by the State on terms and conditions wholly or partly prescribed by any Act; and
 - (c) the Beretitenti, acting in accordance with the advice of the Cabinet has declared that this subsection shall apply in respect of those goods or services –

the goods or services shall, to the extent that those terms and conditions are not already contained in contracts between the State and third parties, from the date of transfer be deemed to be provided pursuant to contracts between the SOE and the third parties (whether or not the Act is repealed). Each such contract is deemed to include such of the terms and conditions contained in that Act (will all necessary modifications), and such of the following provisions as are specified by the Beretitenti:

 - (d) A condition permitting termination at any time by the third party on giving 14 days' notice to the SOE; and

- (e) A condition permitting variation or termination at any time by the SOE on giving to the third party 1 months' notice in such manner (including newspaper advertising) as the SOE thinks fit.
- (8) Where any land that is subject to any lease, licence, permit, or right, created on terms and conditions wholly or partly set out in any Act has been or is to be transferred to an SOE enterprise under this Act, the Beretitenti, acting in accordance with the advice of the Cabinet may declare that specified provisions of that Act shall continue to apply in relation to the land and such licence, lease, permit or right.
- (9) Where a declaration is made under subsection (8) of this section, the provisions of the Act referred to in the declaration, with all necessary modifications, continue to apply in relation to the land and the terms or conditions of the lease, licence, permit or right subject to any agreement to:
 - (a) amend or revoke any such term or condition; or
 - (b) revoke any such term or condition and substitute another term or condition for it –

made between the owner for the time being of the land and the holder for the time being of the lease, licence, permit or right.
- (10) The Minister of Finance must ensure that every declaration made under subsection (7) or subsection (8) is laid before the Maneaba ni Maungatabu as soon as practicable if it is sitting, or if it is not sitting then that it is published by notice, and thereafter every person is deemed to have notice of the declaration.

35. Employment transfers

- (1) No person is entitled to any redundancy payment nor other benefit, nor to accelerate any retirement or other entitlement by reason of their transfer of employment, voluntary or otherwise, from the State to a SOE so long as their terms and conditions of employment in the SOE, taken overall, are no less favourable than those in their former position.
- (2) No person is entitled to any redundancy payment, nor other benefit, nor to accelerate any retirement or other entitlement by reason of the removal of an SOE from the Schedule to this Act.

36. Consequential amendments and repeals

The enactments specified in the Second Schedule are amended or repealed as indicated in that Schedule.

FIRST SCHEDULE

State-Owned Enterprises

Air Kiribati Ltd (AKL)
Betio Shipyards Ltd (BSL)
Bobotin Kiribati Ltd (BKL)
Captain Cook Hotel Ltd (CCHL)
Central Pacific Producers Ltd (CPPL)
Kiribati Copra Cooperative Society (KCCS)
Kiribati Copra Mill Ltd (KCML)
Kiribati Insurance Corporation (KIC)
Kiribati Oil Co. Ltd (KOIL)
Kiribati Solar Energy Co. Ltd (KSEC)
Otintaai Hotel Ltd (OHL)
Te Atonimarawa Aggregate Mining Company (TAAMC)
Telecom Services Kiribati Ltd (TSKL)
Television Kiribati Ltd (TKL)
Broadcasting and Publications Authority (BPA)
Development Bank of Kiribati (DBK)
Kiribati Housing Corporation (KHC)
Kiribati Ports Authority (KPA)
Public Utilities Board (PUB)
Plant and Vehicle Unit (PVU)

SECOND SCHEDULE

PART 1

ENACTMENTS AMENDED

Broadcasting and Publications Authority Ordinance [Cap 6A]

The Ordinance is amended by inserting, after section 2, the following section:

2A Application of State Owned Enterprises Act 2012

- (11) So long as the Authority is an SOE to which the State-Owned Enterprises Act 2012 applies, that Act and any decisions of the Beretitenti, acting in accordance with the advice of the Cabinet, duly notified under that Act prevails over this Act. Where the provisions of both Acts can be applied consistently, then both provisions apply.
- (12) Without limiting the generality of **subsection (1)** while that subsection applies:
- (a) all references in this Act to "the Minister" are references to "the responsible Ministers";
 - (b) all references in the State-Owned Enterprises Act 2012 to "the board" are references to "the Authority";
 - (c) Part IV and Schedule 1 continue to apply except to the extent that they are inconsistent with the State-Owned Enterprises Act 2012;
 - (d) section 21 does not apply, and appointments of the Chief Executive Officer and other staff must be in accordance with **sections 27 and 28** of the State-Owned Enterprises Act 2012.
 - (e) section 24 (which exempts the Authority from liability for income tax and customs duties) does not apply.

Companies Ordinance [CAP 10A]

The Ordinance is amended by inserting, after section 25B (as inserted by section 2 of the Companies (Amendment) Act 2000), the following section:

"25C Companies that are SOEs

So long as a company is an SOE within the meaning of the State Owned Enterprises Act 2012, sections 25A and 25B continue to apply; but subject to the provisions of that Act."

Development Bank of Kiribati Act 1986

The Act is amended by inserting, after section 4, the following section:

4A Application of State-Owned Enterprises Act 2012

- (1) So long as the Bank is an SOE to which the State-Owned Enterprises Act 2012 applies, that Act and any decisions of the Beretitenti acting in accordance with the advice of the Cabinet duly notified under that Act prevail over this Act. Where the provisions of both Acts can be applied consistently, then both provisions apply.
- (2) Without limiting the generality of **subsection (1)**, while that subsection applies:
 - (a) all references in this Act to "the Minister" are references to "the responsible Ministers";
 - (b) section 13(1) of this Act is subject to **section 17(2)** of the State-Owned Enterprises Act 2012 (which provides that no board may have a majority of directors who are currently employed by the Government);
 - (c) section 23 (as amended by the Development Bank of Kiribati (Amendment) Act 1993 and the Development Bank of Kiribati (Amendment) Act 1997 applies only in respect of the General Manager, and the employment of the Deputy General Manager is a matter for the General Manager to determine under **section 28** of the State-Owned Enterprises Act 2012, and this Act;
 - (d) **section 27** of the State-Owned Enterprises Act 2012 also applies to the appointment of the General Manager who is also the Chief Executive of the Bank.

Housing Corporations Ordinance [Cap 40A]

The Ordinance is amended by inserting, after section 3, the following section:

3A Application of State-Owned Enterprises Act 2012

- (1) So long as the Corporation is an SOE to which the State-Owned Enterprises Act 2012 applies, that Act and any decisions of the Beretitenti, acting in accordance with the advice of the Cabinet, duly notified under that Act prevail over this Act. Where the provisions of both Acts can be applied consistently, then both provisions apply.
- (2) Without limiting the generality of **subsection (1)**, while that subsection applies:
 - (a) all references in this Act to "the Minister" and "the Minister of Finance" are references to "the responsible Ministers";
 - (b) section 27 (which exempts the Corporation from customs duty, import levies and other similar taxes) does not apply;
 - (c) clause 1(2) of Schedule 1 does not apply, and **section 17** of the State-Owned Enterprises Act 2012 applies.

Kiribati Ports Authority Act 1990

The Act is amended by inserting, after section 4, the following section:

4A Application of State-Owned Enterprises Act 2012

- (1) So long as the Authority is an SOE to which the State-Owned Enterprises Act 2012 applies, that Act, and any decisions of the Beretitenti, acting in accordance with the advice of the Cabinet, duly notified under that Act, prevail over this Act. Where the provisions of both Acts can be applied consistently then both provisions apply.
- (2) Without limiting the generality of **subsection (1)** while that subsection applies:
 - (a) all references in this Act to "the Minister" are references to "the responsible Ministers";
 - (b) section 28 and clause 1 of Schedule 2 apply only in respect of the Ports Manager, and the appointment of Deputy Ports Masters and other staff is a matter for the Ports Master to determine under **section 28** of the State-Owned Enterprises Act 2012, and this Act;
 - (c) **section 27** of the State-Owned Enterprises Act 2012 also applies to the appointment of the Ports Master;
 - (d) clause 1(2) of Schedule 1 does not apply, and **section 17** of the State-Owned Enterprises Act 2012 applies.

Public Utilities Ordinance [Cap 83]

The Ordinance is amended by inserting, after section 3, the following section:

3A Application of State-Owned Enterprises Act 2012

- (1) So long as the Board is an SOE to which the State-Owned Enterprises Act 2012 applies, that Act and any decisions of the Beretitenti, acting of the advice of the Cabinet, duly notified under that Act prevail over this Act. Where the provisions of both Acts can be applied consistently, then both provisions apply.
- (2) Without limiting the generality of subsection (1), while that subsection applies:
 - (a) all references in this Act to "the Minister" and "the Minister of Finance" are references to "the responsible Ministers";
 - (b) section 23 (which relates to exemptions from customs duty, import levies, other duties and income tax) does not apply;
 - (c) clause 1(2) of Schedule 1 does not apply and **section 17** of the State-Owned Enterprises Act 2012 applies;
 - (d) clauses 1(3) to (5) do not apply and the appointment of staff is a matter for the General Manager to determine under **section 28** of the State-Owned Enterprises Act 2012, and this Act;
 - (e) **section 27** of the State-Owned Enterprises Act 2012 also applies to the appointment of the General Manager who is also the Chief Executive Officer of the Board.

PART 2

ENACTMENTS REPEALED

Air Tungaru Corporation Ordinance [Cap 1A]
Betio Shipyards Limited (Special Provisions) Act 1988
Captain Cook Hotel Limited (Special Provisions) Act 1992
Kiribati Oil Company Limited (Special Provisions) Act 1987
Kiribati Shipping Company Limited (Special Provisions) Act 1990
Telecom Kiribati Limited (Special Provisions) Act 1988

EXPLANATORY MEMORANDUM

General Purpose

The purpose of this Act is to bring corporate disciplines to government controlled businesses, while retaining the capacity to provide social services on a formal basis.

The Act draws on international precedents and experience, but is tailored to the needs of the Republic of Kiribati.

Current SOEs are all 100% owned by the State. Provision is made for partial private ownership, but with safeguards to ensure appropriate protection of State assets so long as the SOE is subject to the legislation.

If an SOE is to be totally privatized (as was the case with Kiribati Supply Company Limited) then the SOE would be removed from the legislation. This will require prior public notice to be given.

A section by section explanation of the main provisions in the Act follows. It is intended to assist the members of the Maneaba ni Maungatabu and the people of Kiribati in their consideration of the Act, and is not intended to be used by the Courts, or others, in interpreting any legislation once it is in force.

Section Analysis

Section 1 relates to the short title and commencement, which will be on a date appointed by the Minister of Finance.

Section 2 sets out the general purpose of the Act, which is to improve the efficiency and effectiveness of SOEs for the benefit of the Republic and its people. The Act does this by specifying principles and establishing accountabilities.

Section 3 defines terms used in the Act.

A "CSO" is a Community Service Obligation. Essentially that is an obligation on the SOE to make available goods or services, when commercially it would not do so.

"Controlled SOE" is an SOE in which half or more of the voting rights, or the right to appoint half or more of the directors, is controlled by the Government.

"Government involvement" means the right to appoint one or more directors of an SOE or the right to vote. The term is only used in the context of requiring companies that have Government involvement to be listed in the Schedule and so subject to the Act's requirements, and in the corresponding description of subsidiaries in **section 9**.

A "major transaction" is one that involves more than 25% of the value of a SOE's assets. Under **section 13**, the approval of Cabinet is needed before an SOE can enter into a major transaction.

The "responsible Ministers" for each SOE are the Minister of Finance and the appropriate Minister assigned by the Beretitenti.

Section 4 requires all SOEs to be listed in the First Schedule. There are 22 listed in the Schedule to the Act. Of those, one is a co-operative company (KCCS), six are statutory corporations (BPA, DBK, KMC, KPA, KPF and PUB) and one is a business unit (PVU). The rest are companies constituted under the Companies Ordinance.

Subsidiaries are not required to be listed, as the Act will apply to them through their parent SOEs.

If an SOE is to cease to be an SOE, or is liquidated, or disestablished, it must be removed from the First Schedule. If removal is for any reason other than liquidation or disestablishment, at least one month's prior public notice must be given.

Section 5 sets out the principal objective, which in every case is that the SOE is to operate as a successful and sustainable business. SOEs must also be good employers and exhibit corporate social responsibility.

Section 6 is the CSO clause. The Government can require an SOE to enter into an agreement to perform a CSO. The agreement must specify the terms, including the price to be paid by the Government, and the SOE must perform the CSO unless it would be contrary to law to do so.

Section 7 provides that all the shares in a SOE are owned by and must be registered in the name of the Republic of Kiribati. They are under the control of the responsible Ministers.

Responsible Ministers have all the rights and powers of shareholders except that they cannot sell or dispose of the shares other than in limited circumstances. Those are either that partial private ownership has been approved under **section 11**, or the SOE has been removed from the Schedule.

Section 8 empowers the responsible Ministers to subscribe for or acquire shares in an existing SOE, or an SOE to be formed.

Section 9 is a machinery provision that ensures that if a SOE is not a company then; shares include any voting rights; directors include trustees, managers or officeholders; shareholders include members or persons holding voting rights; articles include trust deeds, rules or other government documents; and subsidiaries include any entities under the effective control of the SOE.

The Act will prevail over any other Act in matters of governance and voting rights where the SOE is not a company.

Section 10 makes it clear that the articles of every controlled SOE must contain a provision prohibiting the sale, disposal, or issue of shares in a SOE to anyone other than the Republic (to be held by the responsible Ministers).

If the articles do not have those actual provisions, then they are deemed to contain them.

There is an exception if **section 11** applies. *Section 11* allows the Cabinet to approve changes to the articles of a controlled SOE to allow partial private ownership. A majority of shares must remain with the Republic and the majority of directors must still be appointed by the responsible Ministers. **Section 11(2)** provides for pre-emptive rights in favour of the Republic, and other conditions that ensure control remains with the Government.

Section 12 provides that the responsible Ministers are accountable to the Maneaba ni Maungatabu for the performance of their rights and powers as shareholders (as conferred by **section 7(2)**).

If a controlled SOE were to be sold down to a minority Government position it would probably cease to be an SOE and removed from the **First Schedule**. Alternatively, if it was to return to SOE status, it could be added to the Schedule again; but the removal process ensures that creditors and suppliers are aware of the reduction of the State interest.

Section 13 required the board of an SOE to obtain the written approval of Cabinet before taking significant action in relation to the SOE.

This requirement prevails over anything contrary to the articles of the SOE, but is in addition to any provision that is consistent with the articles. So, for example, if special resolutions or other approvals are required by the articles, then they would still be required as well as the approval of Cabinet.

Section 14 makes it clear that the principal duty of the directors is to act in the interests of the SOE.

In addition, the directors must not allow the SOE to act in breach of its statement of intent, its articles, or the law.

The directors also must not allow the SOE to create a substantial risk of serious loss to creditors nor allow it to incur obligations that it cannot perform without substantial loss.

Only the responsible Ministers can enforce these provisions or bring actions against the directors for breach.

Third parties are not required to look into whether the directors are in breach of this section and are not entitled to challenge any action for being in breach of it.

Section 15 sets out the directors' general governance functions.

Section 16 requires board meetings at least 2 monthly. If the articles require more frequent meetings, then that requirement applies.

Section 17 sets out the rules for the appointment of directors by the responsible Ministers.

Generally, the Minister must consider the comments and recommendations of the SOEMAU and the balance of skills, knowledge and experience that will exist or the board offer the appointment.

Specific constraints are:

- No board can have a majority of Government employees.
- No employee of a Ministry or department can be a director of an SOE if the SOE is within that portfolio.
- No chief executive or employee of an SOE can be a director of that SOE.
- No member of the Maneaba ni Maungatabu can be a director of an SOE.

Section 18 requires the responsible Ministers to review the performance of the directors individually and collectively every 2 years. This involves a review of the performance of the SOE also.

Section 19 requires the board of each SOE to produce a draft statement of intent (**SOI**). The section lists the mandatory contents. The SOI must be sent to the responsible Ministers for comment.

If the board and the Ministers cannot agree on the content then the responsible Ministers can direct that amendments be made.

Section 20 requires the board of each SOE to produce an annual report. As well as audited financial statements, the annual report must include enough information to enable an assessment of performance, and a comparison of actual performance against the SOI.

Section 21 requires half yearly reports to the responsible Ministers.

Section 22 provides that the Director of Audit is the auditor of every SOE, but, with the consent of the responsible Ministers, the Director of Audit can appoint any qualified person or firm to audit an SOE.

Section 22 requires the SOI, annual report, and half yearly reports to be presented to the Maneaba ni Maungatabu and made publicly available.

Section 25 requires the board of an SOE to supply the responsible Minister with further information on request, and protects those who do so from civil or criminal liability.

Section 26 empowers the board to refuse to give personal information or information that might cause financial loss if released, unless provision for confidentiality has been made.

Section 27 relates to the appointment of Chief Executive Officers of SOEs.

Chief Executive Officers must have written contracts setting out what is expected of them and how their performance will be reviewed.

Section 28 provides that all other employees are engaged by the Chief Executive Officer within parameters set out by the board.

Section 29 creates the SOEMAU that will be part of the Ministry of Finance.

The objective of the unit is to advise and assist the Government in respect of the performance and operation of SOEs, the appointment and evaluation of directors, and in respect of the SOE sector generally.

Section 30 empowers the Government to give guarantees, identities and security for the performance of obligations by SOEs.

Section 31 provides that the Government cannot lend money or provide financial assistance to SOEs on terms more favourable than those the Government would receive if borrowing itself.

"Financial assistance" includes forgiveness or deferral of interest or debt repayments to the Government.

There is an exception for funding of CSOs.

Requests for financial assistance will be taken into account in the evaluation of the performance of directors.

Section 32 requires that contracts between the Government and SOEs for the supply of goods and services must be in writing.

Section 33 ensures that a breach of the Act by an SOE does not invalidate any action.

Section 34 provides for the transfer of State assets and liabilities to SOEs. This can include land. Assets on land can be transferred even if the land is not transferred. The transfer can occur irrespective of restrictions in other Acts.

Transfers do not affect the rights of other parties, nor do they accelerate any termination or other rights.

Section 35 deals with employment matters. It provides that there is no redundancy nor acceleration of retirement benefits where a person is transferred from State employment of SOE employment on the same terms and conditions. The same applies if the SOE ceases to be an SOE.

Section 36 makes consequential amendments to other enactments.

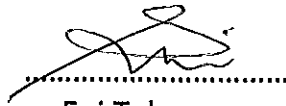
The **First Schedule** lists the initial SOEs.

The **Second Schedule** makes consequential amendments to other Acts, and repeals spent Acts.

Titabu Tabane
Attorney General

CERTIFICATE OF THE CLERK OF THE MANEABA NI MAUNGATABU

This printed impression of the State-Owned Enterprises Act 2013 has been carefully examined by me with the Bill which passed the Maneaba ni Maungatabu on the 23rd April 2013 and is found by me to be a true and correctly printed copy of the said Bill.



Eni Tekanene
Clerk of the Maneaba ni Maungatabu

Published by exhibition at the Maneaba ni Maungatabu this ^{17th}..... day of May 2013.



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Clerk of the Maneaba ni Maungatabu