

**BANKING ACT 2003**  
**As amended 2004**

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**BANKING ACT 2003**  
**Incorporating Banking Amendment Act 2004**

**An Act to provide for the licensing, regulation and supervision of banking business and for related purposes.**

**BE IT ENACTED** by the Parliament of the Cook Islands in Session assembled, and by the authority of the same, as follows:

**PART 1**  
**PRELIMINARY**

1. Short Title, commencement and application - (1) This Act may be cited as the Banking Act 2003.

(2) This Act shall come into force on the 1<sup>st</sup> day of June 2003.

(3) This Act applies to any statutory corporation or body established to carry on banking business in the Cook Islands, including without limitation the entity known and trading as the Bank of the Cook Islands.

(4) This Act has effect despite the Companies Act 1970-71 and the International Companies Act 1981-82 and if there is any conflict between the provisions of this Act and the provisions of the Companies Act 1970-71 or the International Companies Act 1981-82, the provisions of this Act prevail.

(5) Subject to section 40, nothing in this Act exempts a licensee from the provisions of the Development Investment Act 1995-96 or the Entry Residence and Departure Act 1971-72.

2. Interpretation (1) In this Act unless the contrary intention appears -

“accounting records” includes the working papers and other documents as are necessary to explain the methods and calculations by which financial statements are made up and includes data held electronically or in any other form of non paper based system;

“adviser” means a person appointed by the Commission under section 20(3)(b);

“approved auditor” means an auditor appointed under subsection 41(1);

“banking business” means -

- (a) the business of receiving funds through the acceptance of money deposits payable on demand or after a fixed period or after notice, or any similar operation through the sale or placement of bonds, certificates, notes or other securities, and the use of such funds either in whole or in part for loans or investment for the account and the risk of the person doing such business; and
- (b) any other activity prescribed by regulation as constituting customary banking practice that a bank engaged in activities described in paragraph (a) may additionally be authorised to do;

“Commission” means the Financial Supervisory Commission established under the Financial Supervisory Commission Act 2003;

“company” means a body corporate incorporated, formed or constituted under the laws of the Cook Islands or any other country;

“compliance inspection” means the activities referred to in section 15(1);

“Court” means the High Court of the Cook Islands;

“court appointed manager” means a person appointed by the Court as a court appointed manager under section 21;

“director” means an individual who exercises management and policy making functions at the highest level of a company, and includes an individual who is a member of the board of directors, committee, council or other governing body of a company;

“disqualified person” means a person referred to in subsection (4);

“dollars” and “\$” means dollars of the currency of the Cook Islands, unless otherwise stated or prescribed;

“domestic banking business” means banking business that is conducted:

- (a) with a person that is a resident of the Cook Islands, or is visiting the Cook Islands at the time of conducting banking business; or
- (b) with a person who is not a resident of the Cook Islands, provided such business is wholly conducted in the currency of the Cook Islands;

“domestic banking licence” means a licence of the class provided for in paragraph 4(1)(a);

“domestic licensee” means the holder of a domestic banking licence;

“eligible capital” of a company means the capital of that company that qualifies as eligible capital under international adequacy standards in accordance with the Basel Capital Accord;

“examiner” means a person appointed as an examiner under section 18(1);

“financial institution” has the same meaning as in the Financial Transactions Reporting Act 2003;

“financial statements” means profit and loss accounts, and balance sheets, and includes notes (other than directors’ reports) attached to, or intended to be read with, any of the profit and loss accounts or balance sheets and also includes if applicable, a consolidated profit and loss account and balance sheet;

“foreign bank” means a company that is incorporated or established, and licensed to carry on banking business, in a jurisdiction outside the Cook Islands;

“foreign licensee” means a licensee that is incorporated or established in a jurisdiction outside the Cook Islands;

“foreign supervisory authority” means an authority or body outside the Cook Islands that exercises functions corresponding or similar to the functions exercised by the Commission;

“holding company” has the same meaning as in the Companies Act 1970-71;

“international banking business” means banking business that is conducted with a person who is not a resident of the Cook Islands;

“international banking licence” means a licence of the class provided for in paragraph 4(1)(b);

“international company” means a company incorporated or registered under the International Companies Act 1981-82;

“international licensee” means the holder of an international banking licence;

“law enforcement authority” means an authority or body, within or outside the Cook Islands, dealing with the investigation of suspected criminal activity and includes the Financial Intelligence Unit established by the Financial Transactions Reporting Act 2003;

“licence” means a licence issued under section 7;

“licensee” means a company licensed under this Act to carry on banking business;

“manager” of a licensee means:

- (a) an individual who occupies the position of chief executive (however described) of the licensee; or
- (b) any other individual who under the immediate authority of the chief executive or a director exercises management functions for the licensee.

“Minister” means the Minister of Finance, and includes any member of the Cabinet or Minister of the Cook Islands Government acting for him or in his place;

“officer” of a licensee includes a director, manager or company secretary;

“prescribed” means prescribed by regulations made under this Act;

“prudential matters” in relation to a licensee includes matters relating to the conduct by the licensee of its affairs, with integrity, prudence and professional skill, in such a way as to keep itself in a sound financial position and not to cause or promote instability in the financial system.

“prudential supervision” means the supervision of prudential matters and includes:

- (a) the collection and analysis of information in respect of prudential matters relating to licensees; and
- (b) the encouragement and promotion of licensees to carry out sound practices in relation to prudential matters; and
- (c) the evaluation of the effectiveness and carrying out of such practices;

“records” include -

- (a) accounting records;
- (b) books, registers, documents and vouchers;
- (c) securities and financial instruments;
- (d) any record of information or date,

whether stored in paper, on disk or tape, or in electronic or any other non-paper based form;

“regulations” mean regulations made under this Act;

“resident of the Cook Islands” means;

- (a) an individual who ordinarily resides in the Cook Islands; or
- (b) a company incorporated or registered under the Companies Act 1970-71;
- (c) a company, partnership or other entity, wherever incorporated or established, with a place of business in the Cook Islands;

but does not include:

- (d) a licensee; or
- (e) a trustee of a trust registered under the International Trusts Act 1984; or

- (f) a company incorporated or registered under the International Companies Act 1981-82; or
- (g) a partnership registered under the International Partnerships Act 1984; or
- (h) such other persons as may be prescribed;

“restricted banking licence” means a licence of the class provided for in paragraph 4(1)(c);

“restricted licensee” means the holder of a restricted banking licence;

“significant interest” has the meaning given by subsection (2);

“subsidiary” has the same meaning as in the Companies Act 1970-71;

“trustee company” means a company licensed under the Trustee Companies Act 1981-82;

“voting stock” of a body corporate means any stock, share or other entitlement which carries with it the right for the holder, whether personally or through a nominee, to vote at any general meeting of the body corporate.

- (2) A person has a significant interest in a company if -
- (a) the person has a legal or equitable interest in that company or in a holding company of that company; and
  - (b) the interest, directly or indirectly
    - (i) enables the person to control 10 percent or more of the voting stock of the company at a general meeting of the company; or
    - (ii) entitles the person to a share of 10 percent or more in dividends declared and paid by the company; or
    - (iii) entitles the person to a share of 10 percent or more in any distribution of the surplus assets of the company;

whether or not the person holds the interest alone or with one or more other persons.

- (3) A person shall be deemed to be carrying on banking business if he –
- (a) advertises for or solicits banking business; or
  - (b) purports to be licensed or otherwise entitled to carry on banking business; or
  - (c) takes or uses any name, title or description implying or likely to lead the public to believe that he is licensed or otherwise entitled to carry on banking business; or
  - (d) makes any representation to be carrying on or licensed to carry on banking business on any letter-head, notice, or advertisement or in any other manner.
- (4) A person is a disqualified person if, at any time -
- (a) the person has been convicted of an offence against or arising out of this Act; or
  - (b) the person is or has been a director, or is or has been directly or indirectly concerned in the management of a licensee or a bank or

- other financial institution in the Cook Islands or any other country which has had its licence revoked or has been wound up by a court in any jurisdiction; or
- (c) the person has been convicted by a court in any jurisdiction for an offence involving dishonesty; or
  - (d) the person is or becomes bankrupt; or
  - (e) the person has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
  - (f) the person has compounded with his or her creditors.

## PART 2 LICENSING OF BANKING BUSINESS

3. Licence needed to carry on banking business - (1) No person shall carry on banking business in or from the Cook Islands unless the person is licensed under this Act.

(2) If the Commission has reason to believe that a person is contravening subsection (1), the Commission may cause an examination of the person's books, accounts and records to find out if there is a contravention.

(3) If a person refuses to make available books, accounts or records for examination by the Commission, the person is guilty of an offence.

(4) A person who is holding funds that have been obtained in contravention of subsection (1) must repay the funds in accordance with any written direction given by the Commission.

(5) A licensee must not carry on banking business in contravention of -

- (a) a term or condition of its licence; or
- (b) a provision of this Act, the regulations, or any other enactment; or
- (c) a directive issued by the Commission, whether generally or specifically to the licensee.

(6) A person who contravenes any part of this section is guilty of an offence punishable on conviction -

- (a) if the person is an individual - by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 3 years, or both; or
- (b) in any other case - by a fine not exceeding \$250,000.

4. Classes of licence - (1) A licence granted under this Act shall be in one of the following three classes -

- (a) a domestic banking licence, which shall authorise the licensee to carry on domestic banking business in and from within the Cook Islands;
- (b) an international banking licence, which shall authorise the licensee to carry on international banking business in or from within the Cook Islands;
- (c) a restricted international banking licence, which shall authorise the licensee to carry on international banking business of a type and nature specified in the licence and approved by the Commission.

(2) A domestic banking licence and an international banking licence may be issued to the same person.

(3) A restricted banking licence may only be issued to a foreign bank.

5. Existing licences - (1) On commencement of this Act every existing licensee is deemed to have been issued with a licence under this section to carry on banking business under this Act as follows –

(a) in the case of an existing licensee under the Banking Act 1969, a domestic banking licence;

(b) in the case of an existing licensee under the Offshore Banking Act 1981-82, an international banking licence.

(2) An annual fee paid in respect of existing licences for the period in which this Act commences shall be deemed to have been paid for, or on account of, the fee payable in respect of a licence issued under this section, for that period.

(3) A licence issued under this section shall cease to have effect twelve months after the coming into force of this Act. Provided however that in the case of the Bank of the Cook Islands Holdings Corporation (known and trading as the “Bank of the Cook Islands”), the licence deemed to be issued under this section shall cease to have effect on the 30<sup>th</sup> June 2004.

(4) Notwithstanding the provisions of any other Act, an existing licensee ceases to be subject to the Banking Act 1969 and the Offshore Banking Act 1981-82, and any licence issued under those Acts to an existing licensee entity ceases to be in force, from the date of commencement of this Act.

(5) In this section, an “existing licensee” means a company that as at the date of commencement of this Act was licensed as a bank under the Banking Act 1969 or the Offshore Banking Act 1981-82.

(6) For the purposes of this Act, and notwithstanding any other provision of this Act or any other enactment, the entity known and trading as the Bank of the Cook Islands shall be deemed to be an existing licensee under the Banking Act 1969.

*[Amended Act 2004/4]*

6. Application for licence to carry on banking business - (1) A person that wishes to conduct banking business in or from the Cook Islands must apply in writing to the Commission for a licence to carry on banking business.

(2) No person other than a body corporate or statutory corporation shall be eligible to apply for a licence under this Act.

(3) No person other than a foreign bank, or a wholly owned subsidiary of a foreign bank, shall be eligible to apply for a restricted banking licence.

(4) An application under subsection (1) must be in such form as is specified by the Commission and be accompanied by -

(a) a statement disclosing the ultimate and intermediate, if any, beneficial ownership of the applicant; and

(b) such documents as are specified by the Commission; and

(c) the prescribed application fee and the prescribed annual licence fee.

(5) The Commission may in writing request that an applicant provide such additional information and documents as the Commission considers necessary to determine the application.

(6) If a request has been made under subsection (5), the applicant must provide such additional information and documents to the Commission within the time specified by the Commission.

(7) If an application is refused, the Commission is to refund the annual fee to the applicant. However, the application fee is not refundable.

(8) An applicant must not furnish any information or document that is false or misleading in any material particular in connection with an application.

(9) If an applicant contravenes subsection (8), the applicant is guilty of an offence punishable on conviction by a fine not exceeding \$100,000.

(10) Every application to the Commission for a restricted licence or an international licence under this section shall be made through a trustee company.

7. Commission to issue or refuse licence within 3 months - (1) The Commission must within 3 months after receiving an application for a licence and all other information and documents requested by the Commission under subsection 6(5) -

(a) issue a licence to the applicant subject to such terms and conditions as the Commission considers fit; or

(b) refuse the application and inform the applicant of the refusal.

(2) The Commission must advise an applicant in writing of the reasons for its refusal to issue a licence under this section.

(3) As soon as practicable after a licence has been issued, the Commission must publish a notice to this effect in the Gazette.

8. Criteria for the issue of a licence - (1) The Commission must not issue a licence unless it is satisfied that -

(a) the ownership spread, reputation, financial capacity and financial history (if any) of the applicant are satisfactory; and

(b) each director and manager of the applicant is a fit and proper person and has sufficient experience in banking to be involved with operations or management of a bank; and

(c) each associate of the applicant is a fit and proper person to have an interest in a bank; and

(d) the risk management, accounting and internal control systems of the applicant are satisfactory; and

(e) the capital structure of the applicant is adequate and the amount of fully paid up capital of the applicant is at least \$2,000,000; and

(f) the applicant if issued with a licence intends to carry on banking business and the kind of banking business that the applicant intends to carry on is acceptable; and

(g) the applicant upon the issue of the licence will comply with this Act, any other enactment and the regulations; and

(h) the relationship between the applicant and its associates will not prejudice the effective supervision of the banking business of the applicant; and

(i) if a foreign bank is an associate of the applicant - the applicant and the foreign bank will be effectively supervised on a consolidated basis; and

- (j) issuing the licence is not against the public interest and would not be detrimental to the reputation of the Cook Islands.
- (2) In subsection (1), a person is an “associate” if the person -
  - (a) has a significant interest in the applicant; or
  - (b) is a subsidiary of the applicant; or
  - (c) is a holding company of the applicant.
- (3) If a person has a significant interest in the applicant and a significant interest in another company, that other company is an associate of the applicant for the purposes of subsection (1).

9. Criteria for issue of licences to foreign banks - (1) This section applies to an application for a licence to carry on banking business made by a foreign bank or a wholly owned subsidiary of a foreign bank.

(2) The Commission must not issue a licence to a foreign bank or its subsidiary unless satisfied -

- (a) of the matters set out in subsection 8(1); and
- (b) the reputation of the foreign bank is satisfactory; and
- (c) the relevant law and regulatory requirements relating to the licensing and supervision of banking business in the foreign bank’s home country is acceptable; and
- (d) there is sufficient evidence that the foreign bank is subject to comprehensive supervision and regulation on a consolidated basis by relevant authorities in the foreign bank’s home country; and
- (e) the foreign bank has provided written confirmation from the foreign supervisory authority in the foreign bank’s home country (in this section called the “home authority”) that the home authority has no objection to the foreign bank carrying on banking business in the Cook Islands; and
- (f) the foreign bank has provided a statement from the home authority that it is supervised on a basis consistent with the guidelines established by the Basel Committee on Banking Supervision, and the home authority is willing to cooperate in the supervision of the foreign bank; and
- (g) that the foreign bank has provided a written acknowledgment that the Commission may discuss its conduct and status with the home authority; and
- (h) with the capital, legal and operating structure and arrangements between the foreign bank and its subsidiary (if any); and
- (i) that proper resources and arrangements are in place, having regard to the scale and nature of the proposed operations of the foreign bank in the Cook Islands, to ensure the foreign bank’s compliance with its legal obligations, and the Commission’s supervisory functions under this Act; and
- (j) that the foreign bank will provide the Commission with any information that the Commission may require for it to carry out its prudential supervision functions under this Act; and
- (k) that the foreign bank will keep the Commission informed of any significant developments adversely affecting its financial

soundness or reputation and the financial soundness or reputation of its holding company (if any).

10. Conditions of a licence including annual fees - (1) A licence issued under this Act must not be assigned or transferred and any purported assignment or transfer is null and void.

(2) A licence is subject to such terms and conditions as are determined by the Commission.

(3) The Commission may -

- (a) vary or revoke a condition of a licence; or
- (b) impose further conditions on a licence.

(4) Before taking action under subsection (3), the Commission must, by 21 days notice in writing to the licensee concerned, inform it of the changes proposed and afford it an opportunity to make submissions in writing to the Commission about the changes.

(5) The licensee must make its submission to the Commission within 14 days after the date of receipt of the notice.

(6) The Commission must take into account any submissions received in deciding whether or not to proceed with the changes.

(7) A licence issued under this Act remains in force until it is revoked by the Commission under section 11.

(8) A licensee must pay to the Commission the prescribed annual licence fee on each anniversary of the licence being issued.

(9) A licensee that fails to pay the fee by the due date is liable to a prescribed surcharge payable to the Commission.

(10) An annual licence fee and any surcharge are debts due to the Commission and are recoverable in a court of competent jurisdiction.

(11) If a licensee fails to pay -

- (a) an annual licence fee by the due date; or
- (b) a surcharge referred to in subsection (9) by the due date,

and continues to transact banking businesses, the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

11. Revocation or Suspension of licence - (1) The Commission may revoke or suspend the licence of a licensee if -

- (a) the Commission is entitled to take enforcement action against the licence under section 17; or
- (b) the licensee has failed to commence carrying on banking business within 3 months after the issue of its licence; or
- (c) the licensee has ceased to carry on banking business for a period exceeding 3 months; or
- (d) the licensee has made a written request to the Commission for its licence to be revoked.

(2) If the Commission intends to revoke or suspend a licence, under subsection (1)(a), (1)(b) or (1)(c), the Commission must give 21 days notice in writing to the licensee of its intention, and the grounds upon which it intends to revoke or suspend the licence.

(3) The licensee may within 14 days after receiving the notice under subsection (2) submit in writing reasons why its licence should not be revoked or suspended.

(4) The Commission may revoke or suspend a licence -

- (a) if the licensee does not make a submission under subsection (3); or

- (b) having taken into account the submission made by the licensee, the Commission is of the opinion that the licensee has failed to show good reason why its licence should not be revoked or suspended.
- (5) The Commission must give a licensee written notice of a revocation or suspension.
- (6) A revocation or suspension takes effect -
  - (a) on the date the notice referred to in subsection (5) is given to the licensee; or
  - (b) such later date as is specified by the Commission in the notice.
- (7) If a licence is revoked or suspended under this section, the licensee must -
  - (a) cease to carry on banking business on and from the date the revocation or suspension takes effect; and
  - (b) forthwith return to the Commission the original licence and all copies of the licence in its custody or control.
- (8) Subject to subsection (9), the period of suspension of a licence under subsection (1) shall not exceed 30 days.
- (9) If it is satisfied that is in the public interest to do so, the Commission may extend the period of suspension of a licence under this section for one or more further periods not exceeding 30 days each.

12. Appeals against revocation - (1) A person may appeal to the Court against a decision of the Commission to revoke or suspend a licence.

(2) An appeal must be made to the Court within 21 days after the date the licence was revoked or suspended, or within such further time as the Court may allow.

(3) Unless the Court otherwise orders, an appeal does not operate to suspend the decision of the Commission.

(4) In determining an appeal, the Court may confirm, vary, or revoke the decision of the Commission.

13. Surrender of licence - (1) A licensee which has ceased to carry on the business in respect of which its licence was granted may apply to the Commission to surrender its licence if the licensee -

- (a) produces evidence that it has repaid all deposits held or administered by it; or
- (b) is being wound up voluntarily and produces evidence that it is solvent and is able on demand to repay all its deposits held by it and all its other creditors,

and the Commission may thereupon approve the surrender of the license and publish a notice of the surrender in any publication deemed necessary.

(2) In the case of an application under subsection (1)(b), the Commission may request the Attorney-General to apply to the court for an order that the licensee be wound up, either by the court or subject to the supervision of the court, and where the court so orders the provisions of the Companies Act 1970-71 relating to the winding up of a company by or subject to the supervision of the court shall mutatis mutandis apply.

**PART 3**  
**SUPERVISION AND ENFORCEMENT**

14. Banking supervision - (1) The functions of the Commission include -
- (a) to undertake in accordance with the provisions of this Act and the regulations the prudential supervision of the banking business of licensees with a view to maintaining stability and confidence in the financial system of the Cook Islands;
  - (b) to review banking business and implement internationally accepted standards for the prudential supervision of banking business;
  - (c) to recommend to the Minister such amendments to this Act and the regulations as the Commission considers necessary to enable it to supervise banking business in accordance with internationally accepted standards;
  - (d) to collect and analyse such information as may be required by the Commission in respect of prudential matters relating to licensees; and
  - (e) to encourage and promote licensees to carry out sound practices in relation to prudential matters; and
  - (f) to evaluate the effectiveness and carrying out of those practices.
- (2) In carrying out the functions under subsection (1) in relation to a licensee, the Commission must have regard to the following matters -
- (a) the capital adequacy of the licensee in relation to the size and nature of its banking business;
  - (b) the asset concentration and risk exposure of the licensee;
  - (c) the separation of banking business of the licensee from the financial interests of any person having a significant interest in the licensee;
  - (d) the adequacy of the liquidity of the licensee in relation to its liabilities;
  - (e) the quality of the licensee's assets and the adequacy of its loss provision;
  - (f) the internal controls, risk management and accounting systems of the licensee;
  - (g) the quality of the management of the licensee; and
  - (h) such other matters as the Commission considers relevant.
- (3) The Commission may formulate in writing guidelines and issue directives for the purpose of the prudential supervision of the banking business of -
- (a) all licensees; or
  - (b) a specified class of licensees; or
  - (c) one or more specified licensees or classes of licensees.
- (4) The Commission may vary or revoke a directive or guideline.

15. Compliance inspection - (1) The Commission may, for the purposes of the prudential supervision of the banking business of licensees, do all or any of the following -

- (a) inspect the premises and the business, within or outside the Cook Islands, including the systems and controls, of a licensee;
- (b) inspect the assets, including cash, belonging to or in the possession or control of a licensee;
- (c) examine and make copies of records belonging to or in the possession or control of a licensee, being records that in the opinion of the Commission relate to the carrying on of banking business by the licensee.

(2) If, after a compliance inspection, the Commission is satisfied that a person is or has been an officer, employee, subsidiary or agent of a licensee or holds or has held a significant interest in a licensee, or otherwise may have relevant records or information concerning the licensee, the Commission may, by notice in writing, require the person -

- (a) to produce any records in the person's possession or control; or
- (b) to provide any information within the person's knowledge or belief,

concerning the banking business carried on or formerly carried on by the licensee.

(3) A notice issued under subsection (2) must state the time period within which and the place where the records must be produced or the information provided.

(4) A person who fails to comply with a notice issued under subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding \$50,000 or a term of imprisonment of not more than 2 years, or both.

16. Participation of a foreign supervisory authority - (1) Subject to subsection (2), the Commission may, upon the request of a foreign supervisory authority, permit that authority to take part in a compliance inspection undertaken by the Commission under section 15.

(2) The Commission must not permit a foreign supervisory authority to take part in a compliance inspection unless it is satisfied that -

- (a) the compliance inspection is necessary for the effective consolidated supervision of the licensee; and
- (b) the foreign supervisory authority is subject to adequate legal restrictions on further disclosure of information obtained during the compliance inspection; and
- (c) the foreign supervisory authority will not, without the written permission of the Commission -
  - (i) disclose information obtained during the compliance inspection to any person other than an officer or employee of the authority engaged in prudential supervision; or
  - (ii) take any action on information obtained during the compliance inspection.

17. Enforcement action - (1) The Commission may take enforcement action against a licensee, if -

- (a) in the opinion of the Commission, the licensee:
  - (i) has contravened this Act or the regulations; or
  - (ii) carries on banking business in a manner detrimental to the public interest or to the interest of any depositors or creditors; or

- (iii) is or is likely to become insolvent; or
- (iv) has failed to comply with a directive given to it by the Commission within the time specified; or
- (v) is in breach of any term or condition of its licence; or
- (vi) has furnished the Commission with any false, inaccurate or misleading information; or
- (b) the licensee –
  - (i) is compulsorily wound up; or
  - (ii) has passed a resolution for voluntary winding up; or
  - (iii) is dissolved; or
- (c) the licensee, or an officer or shareholder of the licensee is convicted of any offence involving dishonesty by any court in the Cook Islands or in a jurisdiction outside the Cook Islands; or
- (d) a receiver and/or manager has been appointed, in respect of the licensee's banking business; or
- (e) possession has been taken of any of the licensee's property by or on behalf of the holder of a debenture secured by a registered charge; or
- (f) in the opinion of the Commission, a person -
  - (i) who has a share or interest in the licensee, either equitable or legal; or
  - (ii) who is an officer of the licensee;
 and is not a fit and proper person to have an interest in or to be concerned with the management of the licensee; or
- (g) in the opinion of the Commission, the licensee or a subsidiary or holding company of the licensee has refused or failed to co-operate with the Commission on a compliance inspection conducted by the Commission.

(2) If the Commission is of the opinion that an enforcement action must be taken against a licensee, such action may consist of all or any of the following:

- (a) revocation or suspension of the licence of the licensee under section 11;
- (b) appointment of an examiner to carry on an investigation under section 18;
- (c) appointment of a qualified person to audit the licensee on the conduct of its banking business;
- (d) appointment of court appointed manager under section 21.

18. Appointment of examiner - (1) The Commission may by notice in writing appoint an examiner to investigate and report to the Commission on a licensee if -

- (a) the Commission intends to take enforcement action under section 17; or
- (b) a written request for an investigation is made to the Commission by:
  - (i) shareholders holding not less than one third of the total number of issued shares in the licensee; or
  - (ii) depositors holding not less than one tenth of the gross amount of the deposit liabilities of the licensee.

(2) If a request for an investigation is made under paragraph (1)(b), the Commission may refuse to appoint an examiner until the shareholders or depositors, have provided security for the costs of the investigation to the satisfaction of the Commission.

(3) An investigation referred to in subsection (1) may be made in respect of -

- (a) the nature, management, conduct or state of the licensee's banking business or any aspect of it; and
- (b) the ownership and control of the licensee.

(4) An examiner appointed under subsection (1) may exercise any of the powers conferred upon the Commission under this Part.

(5) As soon as practicable after the conclusion of an investigation under this section, the examiner must submit a full report of the investigation to the Commission.

(6) The Commission may direct that the costs and expenses of and incidental to the investigation are paid by the licensee.

19. Directives - (1) If the Commission is of the opinion that a licensee -

- (a) is following unsound or unsafe practices in the conduct of its banking business that are:
  - (i) likely to jeopardise its obligations to its depositors or other creditors; or
  - (ii) likely to adversely affect the operation or stability of the financial system in the Cook Islands; or
- (b) has contravened or failed to comply with the terms and conditions of its licence or any of the provisions of this Act;

the Commission may issue a directive to the licensee.

(2) The directive may require the licensee -

- (a) to cease the practice, contravention or non-compliance; and
- (b) to take such action (including action to replace or strengthen management) as may be specified in the directive to correct the conditions resulting from the practice, contravention or non-compliance.

(3) If any act is required or permitted to be done under this Act and no form is prescribed or procedure laid down in this Act or the regulations, the Commission may, in response to an application made to it or on its own motion, issue written directives as to the manner in which the act should be done, and an act done in accordance with a directive is valid.

20. Insolvency of Licensees - (1) If a licensee considers that it -

- (a) is insolvent; or
- (b) is likely to become insolvent; or
- (c) is likely to be unable to meet its obligations;

the licensee must immediately notify the Commission in writing.

(2) The Commission must take action under subsection (3) if -

- (a) a licensee notifies the Commission under subsection (1); or
- (b) the Commission is satisfied that, or an auditor's report under section 42 or 43 or an inspection or examination under section 15 or 18 shows that, the licensee:
  - (i) is carrying on its banking business in a manner that is detrimental to the interests of its depositors, its creditors or the public; or

- (ii) is likely to be unable to meet its obligations when they fall due.

following -

- (3) When subsection (2) applies, the Commission must do one or more of the following -
  - (a) direct the licensee to take whatever action in relation to its business as the Commission may specify;
  - (b) appoint a suitably qualified person to advise the licensee on the proper conduct of its business and report to the Commission as and when required by the Commission;
  - (c) apply to the Court under section 21;
  - (d) revoke or suspend the licensee's licence;
  - (e) present a petition to the Court pursuant to the provisions of the Companies Act 1970-71 for the winding up of the licensee if sufficient grounds exist under that legislation.
- (4) If an adviser is appointed under paragraph (3)(b), the licensee -
  - (a) must allow the adviser access to its books, accounts, records and other documents; and
  - (b) must give such information and provide such facilities as are necessary to enable the adviser to carry out his or her duties.
- (5) The adviser is to be paid such remuneration by the licensee as the Commission directs.
- (6) The provisions of the Companies Act 1970-71 relating to the winding up of companies shall apply mutatis mutandis to licensees as if those licensees were incorporated as companies under the Companies Act 1970-71.
- (7) If a liquidator has been appointed under this section for a foreign licensee, the liquidator's powers apply in relation to the foreign licensee's operations in the Cook Islands and to its property, rights, assets and liabilities relating to its banking business in the Cook Islands wherever situate.

21. Court Appointed Manager - (1) The Commission may apply to the Court for an order that the Commission, or a person nominated by it, be appointed as a court appointed manager of a licensee and each of its subsidiaries (if any).

- (2) The Court must not make an order unless satisfied that -
  - (a) an appointment is necessary to protect the stability of the financial system in the Cook Islands; or
  - (b) an appointment is necessary to protect the interests of depositors or creditors of the licensee concerned; or
  - (c) it is in the public interest to make an appointment.
- (3) If an order is made, from the date specified in the order:
  - (a) the management of the banking business of the licensee and each subsidiary vests in the court appointed manager to the exclusion of any managers, directors or officers of the licensee; and
  - (b) no person shall, except with the consent of the court appointed manager transfer, dispose or otherwise deal with property belonging to the licensee or in its custody or control.
- (4) An order referred to in section (1) may -

- (a) include any order in relation to the licensee that the Court would be able to make in relation to a company that is in liquidation under the Companies Act 1970-71, including a moratorium on actions or enforcement action against the licensee on such terms as the Court considers appropriate;
  - (b) provide that any subsidiary of the licensee be subject to control and management under this section in like manner to the licensee;
  - (c) fix and provide for the remuneration of the court appointed manager;
  - (d) require such persons as it considers necessary to appear before the Court for the purposes of giving information or producing records concerning the licensee or the banking business carried on by the licensee.
- (5) A court appointed manager shall have such powers and authority as the Court specifies, including the following -
- (a) the powers to carry on or cease to carry on, or sell the business of the licensee and in so doing, to have all the powers, rights and authorities of the licensee and its members in general meeting as are necessary to do so, including the power to petition the Court to wind up the licensee;
  - (b) such of the powers of a liquidator under the Companies Act 1970-71 as are specified by the Court.
- (6) If a licensee or subsidiary that becomes subject to management and control under this section is already in liquidation or receivership –
- (a) the liquidation or receivership shall cease; and
  - (b) the person appointed as liquidator or receiver shall be discharged,
- provided that if the control and management of the licensee or subsidiary under this section is terminated, the Court may order that the liquidation or receivership shall be revised, upon such terms as the Court may specify.
- (7) An order made under section (1) must make provision for reports to be submitted by the court appointed manager to the Court and to the Commission.
- (8) In exercising powers under this section, a court appointed manager must have regard to -
- (a) the need to avoid significant damage to the financial system in the Cook Islands; and
  - (b) the preservation of the position of depositors and the maintenance of the ranking of claims of creditors.
- (9) A court appointed manager must comply with any written directions of the Commission relating to the exercise of powers under this section unless such directions conflict with any order of the Court.
- (10) A court appointed manager may apply to the Court to seek directions in relation to the exercise of powers under this section.
- (11) An application to the Court under subsection (1) is to be made by notice of motion.
- (12) If a court appointed manager has been appointed under this section for a foreign licensee, the court appointed manager's powers apply in relation to the licensee's operations in the Cook Islands and to its property, rights, assets and liabilities relating to its banking business in the Cook Islands wherever situate.

22. Cessation of court appointed manager - (1) Subject to subsection (2), a licensee and its subsidiaries continue to be subject to the control and management of a court appointed manager until such time as all deposits with the licensee have been repaid or the Commission is satisfied that suitable provision has been made for their repayment.

(2) The Court, on the application of the Commission or of its own motion, may terminate the appointment of a court appointed manager if the Court is satisfied that it is no longer necessary for the protection of the depositors or creditors of a licensee that the court appointed manager remain in control of the licensee and each of its subsidiaries.

## **PART 4** **OBLIGATIONS AND RESTRICTIONS ON LICENSEES**

### *Division 1 - Obligations on Licensees*

23. Physical presence - (1) Subject to subsection (6), a licensee must occupy premises in the Cook Islands, approved by the Commission, within 30 days, or such longer period as the Commission allows, after being issued with a licence under section 7.

(2) The Commission must not give its approval under subsection (1) to any premises unless it is satisfied that -

- (a) the premises are located at a fixed address in the Cook Islands; and
- (b) the licensee will carry on banking business under its licence from those premises; and
- (c) the licensee will maintain at those premises operating records including financial statements relating to the banking business conducted under its licence; and
- (d) the employee or employees of the licensee will operate from those premises; and
- (e) those premises adequately symbolize the physical presence of the licensee in the Cook Islands.

(3) A licensee must within 30 days, or such longer period as the Commission allows, after being issued with a licence under section 7, appoint such employees, and have in place such facilities, as the Commission considers appropriate having regard to the nature and scale of the banking business to be carried on by the licensee under its licence.

(4) At least one employee of a licensee must have a day to day knowledge of the banking business conducted by the licensee under its licence and sufficient authority within the licensee to participate in the management of that day to day banking business.

(5) A licensee must not change the address of its premises in the Cook Islands unless it has obtained the approval of the Commission in writing for the change.

(6) This section shall not apply to a restricted licensee.

(7) If a licensee contravenes subsection (1) or (3), the licensee is guilty of an offence, punishable on conviction by a fine not exceeding \$50,000.

24. Maintenance of minimum capital - (1) A licensee must maintain at all times eligible capital -

- (a) in such minimum proportion in relation to its assets, liabilities or risk exposures; and
- (b) subject to subsection (2), in such amount;

as the Commission determines in writing.

(2) A licensee must maintain at all times paid up capital of not less than \$2,000,000.

(3) If a licensee contravenes subsection (1) or (2), the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

(4) If the eligible capital of a licensee is reduced below its minimum capital requirement, the licensee must, within 7 days after becoming aware of the reduction, advise the Commission in writing of the reduction.

25. Computation and form of minimum capital - (1) The Commission must determine in writing the computation and form of eligible capital required to be maintained under section 24 by a licensee after consultation with the licensee.

(2) Without limiting subsection (1), the Commission may in making a determination have regard to the following -

- (a) the scale and nature of the licensee's financial liabilities, including its deposits;
- (b) the nature of the licensee's assets and the degree of risk associated with them; and
- (c) the nature of the banking business carried on by the licensee.

(3) A licensee must comply with a determination made by the Commission within one month, or such longer period as the Commission allows, after the determination is made.

(4) The Commission may in writing vary or revoke a determination.

(5) The Commission may under subsection (1) determine different requirements for the computation and form of capital for different classes of licensees.

26. Keeping of accounting records - (1) A licensee must keep and maintain accounting records that are necessary to disclose with reasonable accuracy the financial position of the licensee at intervals not exceeding three months or such other interval as the Commission may require in writing.

(2) A licensee that contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding \$250,000.

27. Appointments - (1) Except in the case of a foreign bank, or an existing licensee while a licence issued under section 5 remains in effect, a licensee must have at least two directors who are individuals one of whom must be a resident of the Cook Islands.

(2) A licensee must not appoint in relation to the licensee's banking business conducted under its licence a disqualified person as an officer.

(3) A restricted licensee must appoint a trustee company as its agent in the Cook Islands for the purpose of service of any proceedings, demands or other notices as may be required under this Act or any other enactment, or in any court proceedings.

(4) A disqualified person must not -

(a) accept an appointment as an officer; or

(b) if the person is already an officer, continue as an officer.

(5) A licensee that contravenes subsection (1) or (2) is guilty of an offence punishable on conviction by a fine not exceeding \$100,000.

(6) An individual who contravenes subsection (5) is guilty of an offence punishable on conviction by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 2 years, or both.

28. The Commission may remove officers - (1) The Commission may direct in writing a licensee to remove a person who is an officer of the licensee if the Commission is satisfied that the person -

(a) is a disqualified person; or

(b) does not meet one or more of the criteria for fitness and propriety set out in the prudential guidelines.

(2) Before directing the licensee to remove a person, the Commission must give written notice to the person and the licensee giving each of them a reasonable opportunity to make submissions on the matter.

(3) A direction takes effect on the day specified in it, which must be at least 7 days after it is made.

(4) If the Commission directs a licensee to remove a person, the Commission must give a copy of the direction to the person and the licensee.

(5) If a licensee fails to comply with a direction under this section, the licensee is guilty of an offence punishable on a conviction by a fine not exceeding \$50,000.

29. Operations outside the Cook Islands - (1) A licensee, other than a foreign bank, must not create a subsidiary or operate a branch, agency or office in any place outside of the Cook Islands unless it obtains the prior written approval of the Commission.

(2) The Commission must not give its approval under subsection (1) unless it is satisfied that -

(a) the authority responsible for banking supervision in the jurisdiction in which the branch, agency or office will be located consents to the establishment of the branch, agency or office; and

(b) the branch, agency or office will be subject to adequate banking supervision; and

(c) the Commission will have access to the information and documents it considers necessary to supervise the banking business of the licensee in accordance with this Act.

(3) The Commission may give an approval on such terms and conditions as it considers appropriate.

(4) If a licensee contravenes subsection (1) or fails to comply with a term or condition of an approval, the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

30. Business name - (1) A licensee must not without the prior written approval of the Commission carry on business in or from the Cook Islands under a name, description or title that is different to the name, description or title under which it is licensed.

(2) If the Commission is of the opinion that a licensee is carrying on business under a name, description or title that -

- (a) is identical to the name title or description of any other person or so closely resembles the name title or description that it is likely to mislead or deceive; or
- (b) is likely to suggest falsely the patronage of or a connection with some person of authority within or outside the Cook Islands; or
- (c) is likely to suggest falsely that the licensee has special status in relation to or derived from the Government of any country or has the official backing of any Government, or acts on behalf of, any Government;

the Commission may, by notice in writing, direct the licensee to change or cease using the name, title or description within such time specified in the notice.

(3) A licensee that contravenes subsection (1) or fails to comply with a directive under subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

31. Notice Of Changes - (1) If a licensee makes an alteration -

- (a) to its memorandum or articles of association; or
- (b) to any other instrument providing for its incorporation or establishment;

the licensee must immediately give to the Commission full particulars, in writing, of such alteration, verified by a statutory declaration made by a director of the licensee.

### ***Division 2 - Restrictions on Licensees***

32. Transfer of dividends and profits - A licensee must not declare or pay any dividend, or make any other transfer from its profits or reserves, if to do so would contravene the requirements of section 24.

33. Subsidiaries - (1) A licensee must not -

- (a) create a subsidiary; or
- (b) conduct banking business through a subsidiary; or
- (c) permit a subsidiary to carry on business in any way;

in the Cook Islands unless it has obtained the prior written approval of the Commission.

(2) A licensee may apply for its licence to extend to a wholly owned subsidiary of the licensee.

(3) An application under subsection (2) must be made in writing to the Commission accompanied by evidence that the subsidiary is wholly owned by the licensee and providing a description of the type of banking business being, or to be, carried out by the subsidiary.

(4) The Commission may extend a licence to include any subsidiary referred to in subsection (2), subject to any terms and condition it thinks fit.

34. Business Acquisitions - (1) A licensee must consult with, and obtain the written approval of, the Commission before entering into any agreement for -

- (a) the purchase or acquisition of the business of another licensee; or
- (b) the purchase or acquisition of the business of a financial institution in the Cook Islands.

(2) The grounds on which the Commission may withhold its approval under subsection (1) include restraint of trade, monopoly of business and adverse effect on the soundness of the financial system in the Cook Islands.

35. Restriction on disposition of significant interest - (1) A person owning or holding a significant interest in a licensee must not sell, transfer, charge or otherwise dispose of the person's interest or any part of the person's interest, unless the person has obtained the prior written approval of the Commission.

(2) A licensee must not, unless it has obtained the prior written approval of the Commission -

- (a) cause, permit or acquiesce in a sale, transfer, charge or other disposition referred to in subsection (1); or
- (b) issue or allot any shares or cause, permit or acquiesce in any other reorganisation of its share capital that results in:
  - (i) a person acquiring a significant interest in the licensee; or
  - (ii) a person who already owns or holds a significant interest in the licensee, increasing or decreasing the size of the person's interest.

(3) The Commission may give an approval under subsection (1) or (2) on such terms and conditions as it considers appropriate.

(4) If a person contravenes subsections (1) or (2), the person is guilty of an offence punishable on conviction -

- (a) if an individual by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 2 years; or both; or
- (b) if a body corporate by a fine not exceeding \$100,000.

36. Restrictions on advances exceeding 25 percent of capital - (1) A licensee and each subsidiary must not -

- (a) make any advance or credit facility to:
  - (i) any person or body (whether corporate or unincorporated); or
  - (ii) any group of bodies that is under the control of a particular person; or
- (b) give any financial guarantee or incur any other liability on behalf of that person, body or group;

if to do so would result in the total value of the advances, credit facilities, financial guarantees and other liabilities made or given to that person, body or group exceeding 25 percent of the value of the licensee's eligible capital.

(2) For the purposes of subsection (1), a group of bodies is under the control of a particular person if that person -

- (a) holds, or has the power to vote for, at least 51 percent of the voting shares or stock of each of the bodies in the group; or

- (b) exercises practical control over the policies of each of the bodies in the group.
- (3) Subsection (1) does not apply to the following -
  - (a) transactions between banks or between branches of a bank;
  - (b) the purchase of telegraphic transfers;
  - (c) any advance or credit facility made to, or guaranteed by, the government;
  - (d) the purchase of bills of exchange or documents of title to goods if the holder of those bills or documents is entitled to:
    - (i) payment on those bills or documents outside the Cook Islands for exports from the Cook Islands; or
    - (ii) advances made against those bills or documents;
  - (e) any advance or credit facility that is fully secured by cash or a deposit redeemable in cash if:
    - (i) there is a written agreement that is legally binding in all relevant jurisdictions between the licensee and the person lodging the cash or deposit as collateral; and
    - (ii) the written agreement establishes the direct and unconditional right of the licensee to the cash or deposit.
- (4) For the purposes of paragraph (3)(e), a common law or bankers' right of set off is insufficient on its own to satisfy that paragraph.
- (5) For the purposes of paragraph (3)(e), the currency in which the collateral is lodged may differ from that of the exposure against which it is held. However, it must be valued at current market exchange rates with a margin approved by the Commission.
- (6) The Commission may approve in writing an exposure for a licensee under subsection (1) that exceeds the 25 percent limit in that subsection, if the licensee agrees to reduce the exposure to within that limit within a period of time specified by the Commission.
- (7) If a licensee contravenes subsection (1), the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.
- (8) This section shall not apply to a foreign bank.

37. Restrictions on advances without security - (1) A licensee and each subsidiary must not -

- (a) make, or permit to be outstanding, unsecured advances or unsecured credit facilities which in total exceed \$200,000 or one percent of the value of the licensee's eligible capital (whichever is the higher); or
  - (b) give any financial guarantees exceeding that amount without security; or
  - (c) incur any other liability related to the business of banking exceeding that amount without security;
- to, or on behalf of, all or any of the following -
- (d) a director of the licensee or a subsidiary whether the unsecured advances or credit facilities, or guarantees or other liabilities, are obtained by or on account of the director jointly or severally;

- (e) any partnership, body corporate or other body in which the licensee or subsidiary, or any one or more of its directors, is a partner, director, manager, officer or agent;
  - (f) any partnership, body corporate or other body of which any one or more of the licensee's or subsidiary's directors is a guarantor.
- (2) If a licensee contravenes subsection (1), the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

- (3) In this section -  
 "director" includes a spouse, father, mother, son or daughter of a director;

"unsecured advances" or "unsecured credit facilities" means:

- (a) advances or credit facilities made without security; or
  - (b) if an advance or credit facility has been made with non-marketed securities - any part of that advance or credit facility which at any time exceeds four fifths of the licensee's valuation; or
  - (c) if an advance or credit facility has been made with any other security - any part of that advance or credit facility which at any time exceeds four fifths of the market value of the assets constituting that security.
- (4) This section shall not apply to a foreign bank.

38. Other restrictions on advances - (1) A licensee and each subsidiary must not make any advance or credit facility against the security of its own shares.

(2) A licensee and each subsidiary must not grant to any of its directors or shareholders any advance, credit facility or guarantee unless granted on substantially the same terms, including interest rates and security, as those prevailing at the time for comparable transactions by the licensee or subsidiary with members of the public.

(3) A licensee and each subsidiary must not make, or permit to be outstanding, to any of its officers or employees unsecured advances or unsecured credit facilities, the total amount of which for that officer or employee exceeds his or her salary for one year.

(4) If a licensee contravenes any part of this section, the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

(5) This section shall not apply to a foreign bank.

(6) In this section, references to a director or a shareholder includes a spouse, father, mother, son or daughter of a director or shareholder respectively.

39. Engaging in business - (1) A licensee must not for its own account acquire or hold share capital in a commercial, agricultural, industrial or other undertaking if to do so would result in the combined value of all of those shares exceeding 25 percent, or such higher percentage as the Commission approves in writing, of the value of the licensee's eligible capital.

(2) Subsection (1) does not apply to -

- (a) the acquisition and disposal of shares by a licensee as a trustee, mortgagee or nominee; or
- (b) the acquisition and disposal of shares by a licensee upon the order and for the account of a customer; or
- (c) any shareholding that a licensee acquires in the course of the satisfaction of debts due to it, however, any such shareholding must

be disposed of within such reasonable period as is determined by the Commission after consultation with the licensee taking into account relevant commercial factors; or

- (d) any part of the share capital of any company held or acquired by a licensee under an underwriting or sub-underwriting contract for a period not exceeding 6 months or such other period as the Commission may approve in writing in any particular case;
- (e) any shareholding held by a licensee in a subsidiary for the execution of nominee, executor or trustee functions or any other functions incidental to banking business; or
- (f) a foreign bank; or
- (g) the acquisition and disposal of shares in a financial institution.

(3) For the purposes of subsections (1) and (2), a shareholding acquired or held by a licensee includes share capital acquired or held by a subsidiary of the licensee for the subsidiary's own account, whether or not the subsidiary is licensed under this Act.

(4) If a licensee contravenes subsection (1), the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

40. Restrictions involving restricted licensees - (1) Every document required or permitted to be lodged with or filed with the Commission by or in relation to a restricted licensee under the provisions of this Act shall be lodged with the Commission through a trustee company.

(2) Banking business undertaken in the Cook Islands by a restricted licensee shall only be conducted through a trustee company.

(3) A restricted licensee carrying on business through a trustee company under this section, shall be deemed not to be carrying on business in the Cook Islands for the purposes of the Development Investment Act 1995-96.

## **PART 5** **AUDIT, DISCLOSURE AND TAX EXEMPTIONS**

41. Appointment of approved auditor - (1) A licensee must appoint one or more persons (whether as individuals or as members from time to time of any firm or firms) to be the auditor of the licensee.

(2) An appointment of an auditor by a licensee is subject to the prior written approval of the Commission, which must not be given unless -

- (a) the Commission is satisfied that the auditor is qualified to act as an auditor; and is sufficiently experienced in auditing banking business; and
- (b) the auditor has no financial interest in the licensee, other than as a depositor; and
- (c) the auditor is not a shareholder, director, officer, agent or employee of the licensee.

(3) If a licensee fails to appoint an approved auditor or at any time fails to fill a vacancy for an auditor with an approved auditor, the Commission may appoint an auditor and fix the remuneration to be paid by the licensee to that auditor.

(4) A licensee must give notice in writing to the Commission if the licensee proposes to terminate the appointment of an approved auditor.

(5) If a person appointed as an auditor to a licensee -

- (a) subsequently acquires a financial interest in the licensee, other than as a depositor; or
- (c) becomes a shareholder, director, officer, agent or employee of the licensee;

the person ceases by virtue of this section to be the auditor of the licensee.

(6) If a licensee contravenes subsection (1), the licensee is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

42. Financial Reports - (1) A licensee must cause to be prepared an auditor's report on the financial statements of the licensee and its subsidiaries (if any) for each financial period of the licensee.

(2) The auditor must state in the report -

- (a) whether the auditor has obtained all information and explanations which to the best of the auditor's knowledge were necessary for the purposes of the audit; and
- (b) whether in the auditor's opinion proper books of account have been kept by the licensee and its subsidiaries; and
- (c) whether in the auditor's opinion the balance sheet and the profit and loss account of the licensee and its subsidiaries are in agreement with the books of account and returns of the licensee and the subsidiaries; and
- (d) whether in the auditor's opinion the balance sheet of the licensee and its subsidiaries gives a true and fair view of the state of affairs of the licensee and the subsidiaries for the period covered by the report; and
- (e) whether in the auditor's opinion the profit and loss account of the licensee and its subsidiaries gives a true and fair view of the profit or loss of the licensee and the subsidiaries for the period covered by the report; and
- (f) in any case in which the auditor has called for an explanation or information from officers or agents of the licensee or a subsidiary – whether in the auditor's opinion the explanation or information is satisfactory.

(3) The following documents must be presented at the annual general meeting of the shareholders of a licensee -

- (a) the licensee's financial statements;
- (b) the licensee's auditor's report;
- (c) the licensee's directors' report.

(4) The licensee must provide to the Commission copies of its financial statements and its auditor's report within four months after the close of the licensee's financial year or within such further time as the Commission approves in writing.

43. Duty to Disclose - (1) The approved auditor of a licensee must report as soon as practicable to the Commission information relating to the affairs of the licensee obtained in the course of an audit if the auditor is of the opinion that –

- (a) the licensee is insolvent or is likely to become insolvent or is likely to be unable to meet its obligations or is in serious financial difficulties; or
- (b) a criminal offence involving fraud or dishonesty may have been committed; or
- (c) serious irregularities have occurred, including irregularities that may place at risk the interest of depositors and creditors; or
- (d) losses incurred that substantially reduce the capital of the licensee; or
- (e) the licensee is unable to confirm that the claims of creditors are adequately covered by the licensee's assets; or
- (f) the licensee has failed to comply with a directive or guideline issued by the Commission under Part 3.

(2) If an auditor contravenes subsection (1), the auditor is guilty of an offence punishable on conviction by a fine not exceeding \$50,000.

(3) No civil, criminal or disciplinary proceedings lie against an auditor arising from the disclosure in good faith of information to the Commission pursuant to this section.

(4) The auditor must, before disclosing any information to the Commission under subsection (1), take reasonable steps to inform the licensee concerned that the auditor intends to disclose the information.

(5) The auditor of a licensee must, if requested to do so by the Commission, discuss the audit of the licensee directly with the Commission and provide such additional information regarding the audit as the Commission may require. However, the auditor must take reasonable steps to inform the licensee concerned that the auditor intends to discuss the audit with the Commission and to disclose information to it.

44. Licensee to provide Commission with report - (1) After consultation with a licensee including about costs, the Commission may, by notice in writing, require the licensee to provide the Commission with a report, prepared by its auditor or a person nominated by the Commission on all or any of the following -

- (a) an opinion on asset quality;
- (b) adequacy of provisions for losses;
- (c) adequacy of the accounting and control system;
- (d) such other matters as the Commission determines.

(2) No civil, criminal or disciplinary proceedings lie against an auditor arising from the disclosure in good faith of information to the Commission pursuant to this section.

45. Audit exemption for foreign banks - A foreign bank is exempt from sections 42 and 44 if -

- (a) the licensee obtains a report on the annual financial statements of the licensee made by a duly qualified auditor in accordance with the laws of the country in which the licensee is incorporated; and
- (b) a copy of that report, the audited financial statements of the licensee and the report of the directors of the licensee is provided to the Commission as soon as practicable; and
- (c) the Commission is satisfied that the audit has been carried out in accordance with international auditing standards.

46. Disclosure of information by the Commission - (1) Subject to subsections (2) and (3), each of the following -

- (a) the Commission;
- (b) an employee or officer of the Commission;
- (c) an examiner;

(d) any other person acting under the authority of the Commission;

must not disclose any information relating to a protected person if the information has been acquired in the discharge of duties or in the performance of functions or in the exercise of powers under this Act.

(2) Subsection (1) does not apply to a disclosure if -

- (a) the disclosure is required or authorised by the Court; or
- (b) the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act; or
- (c) the disclosure is made with the express or implied consent of the protected person; or
- (d) the disclosure is made as required by or under a warrant; or
- (e) the information disclosed is or has been available to the public from another source; or
- (f) the information disclosed is in a form of a summary or in statistics expressed in a manner that does not enable identification of the protected person to whom the information relates; or
- (g) subject to subsection (3), the disclosure is made to a foreign law enforcement authority or a foreign supervisory authority; or
- (h) the disclosure is otherwise required or authorised by or under any law.

(3) The Commission or any other person referred to in subsection (1) must not disclose information concerning the affairs of a protected person to a foreign law enforcement authority or a foreign supervisory authority under paragraph (2)(g) unless the Commission is satisfied -

- (a) that the foreign supervisory authority or the foreign law enforcement authority is subject to adequate legal restrictions on further disclosure; and
- (b) that the information disclosed is reasonably required by the foreign authority for the purpose of its regulatory or law enforcement functions.

(4) If information concerning the affairs of a protected person is disclosed to a person in accordance with any paragraph of subsection (2), that person may disclose that information, subject to any applicable restrictions on further disclosure contained in any law, for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act.

(5) If a person contravenes any of the provisions of this section, the person is guilty of an offence punishable on conviction -

- (a) if an individual by a fine not exceeding \$50,000; or imprisonment for a term not exceeding 2 years, or both; or
- (b) if a body corporate to a fine not exceeding \$250,000.

- (5) In this section, “protected person” means -
- (a) a person who has applied for a licence under this Act; or
  - (b) a licensee; or
  - (c) a depositor or other customer of a licensee.

47. Disclosure of protected and other information generally - (1) Subject to subsection (2), a person must not disclose protected information or any other information relating to -

- (a) the banking business of a licensee; or
- (b) a depositor or other customer of the licensee.

(2) Subsection (1) does not apply to a disclosure if -

- (a) the disclosure is required or authorised by the Court; or
- (b) the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act; or
- (c) the disclosure is made as part of a suspicious transaction report under the Financial Transactions Reporting Act 2003; or
- (d) the disclosure is made with the express or implied consent of the licensee or person concerned; or
- (e) the disclosure is made as required by or under a warrant; or
- (f) the information disclosed is or has been available to the public from another source; or
- (g) the disclosure is otherwise required or authorised by or under any law of the Cook Islands; or
- (h) the disclosure is made to the Commission or a law enforcement agency in the Cook Islands and the person making the disclosure believes on reasonable grounds that the disclosure is reasonably necessary for the investigation or prosecution of a criminal offence.

(3) If information is disclosed to a person in accordance with any paragraph of subsection (2), that person may disclose that information, subject to any applicable restrictions on further disclosure contained in any law, for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act.

(4) If a person contravenes a provision of this section, the person is guilty of an offence punishable on conviction -

- (a) if an individual by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 2 years, or both; or
- (b) if a body corporate by a fine not exceeding \$250,000.

(5) Subsection (1) does not apply to the Commission or any other person referred to in subsection 46(1).

(6) In this section, “protected information” means:

- (a) whether or not a person has an account with a licensee; or
- (b) the name in which an account of a depositor or other customer of a licensee stands; or
- (c) the balance and history of any such account; or
- (d) the amount or other details of any individual transaction undertaken by any licensee for a depositor or other customer of the licensee.

48. Exemption from taxes and stamp duty - (1) Despite anything contained in any other Act, where a licensee is incorporated or registered under the International Companies Act 1981-82 -

- (a) no income tax, duty or any other direct or indirect tax or impost is payable in the Cook Islands upon the income, profits, gains, interest, earnings or dividends earned or paid in respect of the international banking business of an international licensee or a restricted licensee; and
- (b) no estate, inheritance, succession or gift tax, rate, duty, levy or other charge is payable in the Cook Islands with respect to any shares, debt obligations or other securities in connection with the international banking business of an international licensee or a restricted licensee;
- (c) no duty, levy, tax or other charge is payable in the Cook Islands in respect any bill of exchange, promissory note or any other document, instrument or certificate executed by, or for or in connection with the international banking business of an international licensee or a restricted licensee.

(2) The banking business of a licensee is zero rated for the purposes of the Value Added Tax Act 1997.

## PART 6 MISCELLANEOUS

49. Offences - (1) A person who with intention to deceive makes any representation to any person described in paragraphs (3)(a), (b) or (c) that the person knows to be false or does not believe to be true is guilty of an offence punishable on conviction -

- (a) if an individual by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 2 years or both;
- (b) if a body corporate to a fine not exceeding \$250,000.

(2) An officer or employee, or a former officer or employee, of a licensee or a person who holds information on behalf of the licensee who knowingly -

- (a) makes a false or misleading entry in any book, or record; or
- (b) makes or provides any false or misleading statement, report, return, document or information; or
- (c) omits an entry or alters or conceals an entry in any book or record so as to mislead; or
- (d) conceals or destroys within six years of its creation any information, book, voucher, record, report, return, minutes or document relating to the accounts, transactions, affairs, or a business of the licensee so as to mislead;

is guilty of an offence punishable on conviction by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 2 years or both.

(3) An officer or employee, or a former officer or employee, of a licensee or a person who holds information on behalf of a licensee who obstructs or endeavours to obstruct:

- (a) an approved auditor in the proper performance of the auditor's duties; or
- (b) the Commission or an examiner in an examination of the licensee, or any branch, agency, office or subsidiary of the licensee; or
- (c) an examiner or court appointed manager in the proper performance of his or her duties;

is guilty of an offence punishable on conviction by a fine not exceeding \$50,000 or imprisonment for a term not exceeding 2 years or both.

(4) Any person who -

- (a) fails to comply with the requirements of this Act or any of the regulations, notices or directives issued under this Act; or
- (b) aids or abets, or counsels or procures, any person to commit an offence under this Act;

for which a penalty is not expressly provided is guilty of an offence punishable on conviction by a fine not exceeding \$25,000.

50. Court to have jurisdiction - (1) The Court has jurisdiction in any proceedings arising under this Act.

(2) The Attorney General is empowered to institute proceedings to prevent and restrain any breach of the provisions of this Act and to prosecute offences committed under this Act.

(3) The Court may, at any time during the course of any proceedings arising under this Act and before giving judgement, make such temporary restraining order or prohibition as it considers just in the circumstances.

(4) This section does not limit the powers of the Court.

51. Bank Holidays - (1) If the Commission considers it necessary or expedient in the public interest, it may by order declare any day a non-business day for licensees.

(2) Without limiting subsection (1), the Commission may in the event of cyclone, earthquake or other natural disaster declare in such manner as it considers appropriate any day a non-business day for licensees. The declaration may relate to any part of or to the whole of the Cook Islands.

(3) Any day declared to be a non-business day is taken to be a bank holiday, but is not to be regarded as a public holiday.

(4) A licensee is not obliged on a day declared by the Commission to be a non-business day to make a payment or to do any other act that the licensee would not be required to make or do on a public holiday.

(5) The obligation to make the payment or to do the act is taken to be an obligation to make the payment or to do the act on the next day that is not a Saturday, Sunday, a bank holiday or public holiday.

52. Protection of the term 'bank' etc - (1) A person (other than a licensee) must not use in the name, description or title under which the person is carrying on business in the Cook Islands -

- (a) the term "bank" or a derivative of the word "bank" in any language; or
- (b) any other word that indicates that the person is conducting banking business;

unless the Commission has given its prior written approval to the use.

(2) If a person contravenes subsection (1), the person is guilty of an offence punishable on conviction -

- (a) if an individual by a fine not exceeding \$50,000; or imprisonment for a term not exceeding 2 years, or both;
- (b) if a body corporate by a fine not exceeding \$250,000.

(3) This section does not apply to an association of licensees, or their employees, formed for the protection of their common interests.

(4) The prior approval in writing of the Commission must be obtained for the incorporation or registration of a company in the Cook Islands which has as part of its name or description the words “banking”, “savings and loan” or their equivalents in any language.

(5) If approval for such incorporation or registration is granted by the Commission for the purpose of submitting an application for a licence under section 6, such approval does not in any way imply that a licence will be issued.

53. Indemnity from liability - No action lies against the Commission, an employee or officer of the Commission, an examiner or any other person acting under the authority of the Commission in respect of any act done in good faith in the discharging of any duty, the performance of any function or the exercise of any power under this Act.

54. Court proceedings - (1) Civil proceedings under this Act to which a licensee is a party or which relate to a licensee are to be heard in camera, unless the Court otherwise orders.

(2) Any documents produced or evidence given in civil proceedings under this Act must not be disclosed to a person if that person is not a party to those proceedings unless the Court otherwise orders.

(3) If a notice of legal proceedings under this Act is served on a licensee, a copy of the notice must be served on the Commission.

(4) This section does not apply to criminal proceedings under this Act or any other enactment.

55. Retention of documents - (1) This section applies to any cheque, bank draft, bill of exchange or promissory note received by a licensee before, on or after commencement of this Act.

(2) A licensee must retain -

- (a) all cheques and bank drafts drawn on the licensee and that are in its possession; and
- (b) all bills of exchange and promissory notes made payable at the licensee and that are in its possession;

until the expiration of 6 years from:

- (c) the date of the cheque, bank draft, bill of exchange or promissory note if it is payable on demand; or
- (d) the due date of the bank draft, bill of exchange or promissory note in any other case.

(3) A licensee is taken to comply with subsection (2) if -

- (a) a copy of a cheque, bank draft, bill of exchange or promissory note is made by the licensee on microfilm, microfiche, tape, disc, or in electronic or photographic storage media; and
- (b) the copy is retained by the licensee for the same period that applies to the original under subsection (2).

(4) A cheque, bank draft, bill of exchange or promissory note must not be destroyed within 6 years after a demand for the delivery of it has been made to the licensee by the person entitled to it.

(5) Despite any other Act or law, if the original of a cheque, bank draft, bill of exchange or promissory note is not available, a copy of it made in accordance with this section is taken to be admissible as evidence in any legal proceedings to the same extent as the original would have been admissible.

56. Regulations - The Queen's Representative by Order in Executive Council may, on the advice of the Commission, make regulations prescribing all matters required or permitted by this Act to be prescribed or provided, or is necessary or convenient to be prescribed for the carrying out or giving effect to this Act and its due administration, and may in particular, but without limitation, make regulations prescribing-

- (a) offences and penalties, not exceeding \$5000 for non-compliance of the Act or the regulations; or
- (b) fixing and determining fees and charges to be paid under this Act; or
- (c) forms and procedures required for the purpose of this Act.

57. Repeals - The Banking Act 1969 and the Offshore Banking Act 1981-82 are hereby repealed.

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This Act is administered by the Financial Supervisory Commission