



*Commencement: 27/11/2009*

## **REPUBLIC OF VANUATU**

### **Telecommunications And Radiocommunications Regulation Act No. 30 Of 2009**

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## **REPUBLIC OF VANUATU**

Assent: 19/10/2009

Commencement: 27/11/2009

### **TELECOMMUNICATIONS AND RADIOCOMMUNICATIONS REGULATION Act No. 30 Of 2009**

An Act to establish a new regulatory framework for telecommunications, radiocommunications and for related purposes.

Be it enacted by the President and Parliament as follows:

## **PART 1. PRELIMINARY**

### **1. Objects**

The objects of this Act are to:

- (a) facilitate the development of the telecommunications sector; and
- (b) manage radio-frequency spectrum,

in order to promote national social and economic development.

### **2. Definitions**

- (1) In this Act, unless the contrary intention appears:

**Act** means the Telecommunications and Radiocommunications Regulation Act No. 30 of 2009;

**affiliate** means, in relation to any one person, any other person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified person;

**bottleneck facilities** means a facility essential for the production of telecommunications services, which, for technical reasons or due to economies of scope and scale, and the presence of sunk costs, cannot practicably be duplicated by a would-be competitor;

**competition** means workable or effective competition;

**competitive process** means a competitive and open process which is:

- (a). approved by the Tenders Board; and
- (b). conducted in accordance with that approval;

**conduct** includes any act and the omission to perform any act;

**control** means the power to determine the actions of another person in any manner, whether directly through the ownership of shares or other securities or indirectly through an agreement or arrangement of any type;

**costs** includes costs and disbursements on a standard or indemnity basis;

**customer** means a person who has a contractual relationship with a service provider for the use by that person of a telecommunications service provided by that service provider (which may include a reseller of the telecommunications service provided by that service provider), but does not include affiliates of the service provider;

**decision** of the Regulator includes any decision of any kind to do or not to do anything in relation to which the Regulator is empowered by this Act;

**dominant service provider** means a service provider designated by the Regulator under section 21 or under the terms of a prior licence;

**employ** includes the entry into a contract for services;

**end user** means a person who is the ultimate recipient of a telecommunications service or another service provided by means of that telecommunications service but does not include affiliates of a service provider;

**equipment** includes any thing or apparatus used in connection with telecommunications or radiocommunications;

**exception** means an exception granted by the Regulator under section 14 to a person or class of persons from the requirement to hold a licence;

**Government** means the Government of Vanuatu;

**gross revenue** means gross revenue earned by a service provider, before any deduction for costs, taxation, accounting or other purposes;

**interconnection** means the physical and logical linking of telecommunications networks operated by two service providers and the provision of voice, message and data origination, transit and termination interconnection services by one service provider to the other;

**interconnection agreement** means an agreement for the provision of interconnection between two service providers;

**ITU** means the International Telecommunication Union;

**knowingly** refers to the knowledge of a circumstance or a result or the awareness that the circumstance or result will exist in the ordinary course of events;

**licence** means a licence issued to a person or to a class of persons pursuant to this Act or a prior licence;

**licensee** means a person who holds either a licence issued pursuant to this Act or a prior licence;

**market** means a market in Vanuatu for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them;

**Minister** means the Minister responsible for telecommunications;

**Ministry** means the Ministry responsible for telecommunications;

**net revenue** means the gross revenue received by the service provider from the provision of telecommunications services and from interconnection less the sum of:

- (i). the interconnection charges paid by the service provider to another person; and
- (ii). payments made by the service provider to an unrelated person outside Vanuatu for the carriage of telecommunications traffic originating in Vanuatu to destinations outside Vanuatu; and
- (iii). any Value-Added Tax and business licence fees (excluding any fees payable under this Act) paid by the service provider to the Government;

**person** includes, unless the context requires otherwise, a licensee;

**prior licence** means a licence granting the right to operate a telecommunications network or provide a telecommunications service or services, issued or given prior to the coming into force of this Act;

**radiocommunications** means any emission of signs, signals, writing, images, sounds, or intelligence of any nature by radio waves;  
**radiocommunications device** means:

- (a) a radiocommunications transmitter; or
- (b) a radiocommunications receiver of a kind as may be specified by Regulations;

**Register** means any register required to be kept under section 10;

**Regulation** means any regulation made under this Act;

**Regulator** means the Telecommunications and Radiocommunications Regulator appointed (or deemed to be the Regulator) pursuant to section 4;

**service provider** means a person who:

- (a) provides or is entitled to provide a telecommunications service under a licence or exception; or
- (b) has applied for a telecommunications licence or exception under this Act;

**Settlement Agreement** means the Settlement Agreement executed by the Government and TVL on 19 December 2007, as amended from time to time;

**staff** includes any person employed under paragraph 7(5)(c) and any public servant who may temporarily be assigned to the Regulator under paragraph 7(5)(d);

**telecommunication** means the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not;

**telecommunications facility** means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation connected with telecommunications;

**telecommunications market** means a market in Vanuatu (which includes a market where the acquirers are outside Vanuatu and the suppliers are within Vanuatu) for telecommunications services, telecommunications equipment or telecommunications facilities, and includes any market determined by the Regulator pursuant to section 20;

**telecommunications network** means a system or series of systems comprising telecommunications facilities;

**telecommunications service** means:

- (a) a service to provide any form of telecommunication to or from any place in Vanuatu, by means of a telecommunication network, where that service is provided, directly or indirectly, to the public or to any person outside Vanuatu; and
- (b) does not include broadcasting of radio or television intended for reception by the general public;

**Tenders Board** means the Tenders Board established under section 9 of the Government Contracts and Tenders Act [CAP 245];

**Terms of Service** means the general terms and conditions upon which a service provider provides telecommunications services to customers as described in section 13;

**TVL** means Telecom Vanuatu Limited, and includes any of its affiliates;

**UAP** means the Universal Access Policy formulated under section 17;

**UAP Fund** means the Universal Access Policy Fund developed and approved pursuant to section 19;

**website** means the website of the Regulator, established pursuant to section 10.

### **3. Act to bind the State**

This Act binds the State and the Government of Vanuatu, except as to:

- (a) the payment of any fees, charges and levies whatsoever; and
- (b) the operation of Part 5.

## **PART 2. THE TELECOMMUNICATIONS AND RADIOCOMMUNICATIONS REGULATOR**

### **4. Appointment of Regulator**

- (1) The Regulator is to be appointed by the Minister on the recommendation of the Evaluation Committee.
- (2) The Evaluation Committee consists of:
  - (a) the Governor of the Reserve Bank of Vanuatu, who is the chairperson of the Evaluation Committee; and

- (b). a representative of the Judicial Services Commission, who is not actively involved in the politics of any political party; and
  - (c). a senior officer of the Vanuatu Chamber of Commerce, who is not actively involved in the politics of any political party.
- (3). An Evaluation Committee may be convened by the Minister to carry out the responsibilities as set out in subsection (4), wherever there is a vacancy in the office of the Regulator.
- (4). The Evaluation Committee is to:
- (a). evaluate all candidates for the position of Regulator according to merit; and
  - (b). recommend to the Minister one or two of the candidates, and if two is recommended, the order of preference.
- (5). The Evaluation Committee must not recommend a candidate who does not primarily reside in Vanuatu or who does not intend primarily to reside in Vanuatu during the term of appointment.
- (6). The Evaluation Committee may obtain advice from the Director-General of the Ministry in the evaluation of candidates.
- (7). The Minister is to:
- (a). negotiate with such candidates as the Evaluation Committee may recommend with a view to concluding satisfactory terms and conditions of appointment; and
  - (b). appoint a person with whom satisfactory terms and conditions of appointment may be agreed in writing.
- (8). The Minister must not appoint any person not recommended by the Evaluation Committee.
- (9). A Regulator may be appointed for a period not exceeding 3 years.
- (10). The Minister may extend at the end of the period referred to in subsection (9), the period of appointment for a further 6 months or, with the approval of the Evaluation Committee, for a further 3 years.
- (11). If the office of the Regulator is vacant, the Chief Executive Officer of the Utilities Regulatory Authority is deemed to be the Regulator until such time a person is appointed to be the Regulator.

## **5. Disqualification**



(1). A person is not eligible to be appointed as Regulator if that person, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, has any pecuniary or proprietary interest in:

(a). a service provider; or

(b). a manufacturer or supplier of equipment, except where the supply is incidental to the general merchandising of goods by wholesale or retail.

(2). A person is not eligible to be appointed as the Regulator if that person:

(a). has a conviction or is convicted for any offence, in Vanuatu or elsewhere:

(i). involving dishonesty or corruption; or

(ii). where the applicable penalty includes imprisonment for one year or longer (irrespective of whether such penalty has been imposed); or

(b). is an undischarged bankrupt, in Vanuatu or elsewhere; or

(c). is unable to perform the Regulator's responsibilities, functions, duties and powers due to any physical or mental incapacity; or

(d). is a member of Parliament; or

(e). is an officer of a Municipal Council; or

(f). is an office-bearer or employee of any political party; or

(g). is an immediate family member of a person referred to in paragraphs (d), (e) or (f).

## **6. Termination or suspension of appointment of Regulator**

(1). The Minister is to terminate or suspend the appointment of the Regulator if the Minister is satisfied that the Regulator:

(a). would, if he were not already appointed, be ineligible for appointment under section 5; or

(b). has committed a serious breach of the terms and conditions of his or her appointment; or

(c). persistently breaches one of the terms and conditions of his or her appointment; or

(d). fails to fulfil the responsibilities, functions, duties and powers of the Regulator under this Act; or

(e). has become mentally or physically unfit to discharge all of his or her duties, for a period exceeding 28 days.

(2). Termination or suspension under subsection (1) is to be made upon the expiry of 28 days notice and reasons for the suspension or termination must be provided to the Regulator.

(3). If the Regulator is terminated following a period of suspension, the length of the period of suspension is to be included in the notice period for termination under subsection (2).

(4). The Regulator may resign at any time, however he or she must give 28 days notice to the Minister.

## **7. General functions and powers**

(1). Subject to the provisions of this Act, the Regulator is to regulate telecommunications and radiocommunications.

(2). Without limiting the generality of subsection (1), the Regulator is to:

(a). advise the Minister as to:

(i). policy; and

(ii). making of regulations; and

(iii). such other matters as the Minister may request; and

(b). implement, facilitate and enforce the provisions of this Act; and

(c). grant, suspend, vary and revoke licences and exceptions for which this Act provides; and

(d). allocate telephone number blocks and other telecommunication system numbers as administered by the ITU; and

(e). allocate, assign and manage the radio spectrum.

(3). The Regulator may, with the approval of the Minister, make such regulations as may be necessary or convenient to give effect to the provisions of this Act.

(4). Without limiting the generality of subsection (3), the Regulator may make

regulations:

- (a). prescribing standard terms in various licences and exemptions; or
- (b). prescribing procedures, forms and fees in respect of any licence or exception or anything which might be done by any person under this Act, except the provision of reasons for any decision by the Regulator; or
- (c). providing for the methodology by which any calculation required to be made under this Act is to be made; or
- (d). establishing and managing a national numbering plan and allocating blocks of numbers in accordance therewith; or
- (e). for the management and administration (including the exclusive management and administration) of country code top level domain names for Vanuatu and domain name registration for Vanuatu; or
- (f). imposing restrictions or limitations upon the importation, sale or use of any equipment used or likely to be used in connection with radiocommunications or telecommunications; or
- (g). prescribing the type of information required to be included in invoices for customers; or
- (h). imposing restrictions or limitations upon the use or disclosure of various types of personal end-user information; or
- (i). requiring a service provider to introduce and facilitate number portability; or
- (j). requiring licensees individually or by class, to keep and retain records and as to the nature and form thereof; or
- (k). requiring a service provider to introduce and facilitate selection or pre-selection of service providers, being a telecommunications service provided by a service provider to another service provider which:
  - (i). in the case of service provider selection, requires a call made by an end user of the first service provider with one of the second service provider's toll access codes prefixed to be delivered to the second service provider; and
  - (ii). in the case of service provider pre-selection, requires one of the second service provider's toll access codes being automatically prefixed to a call made by an end user of the first service provider and the delivery of that call to the second service provider.

(5). The Regulator is to have a separate and independent legal personality and may, by and under the name “Telecommunications and Radiocommunications Regulator”:

- (a). enter into contracts; and
- (b). sue and be sued; and
- (c). employ staff; and
- (d). accept, in his or her sole discretion, the secondment of public servants to his or her staff to act under his or her direction; and
- (e). authorise staff to act in his or her name.

(6). The Regulator must ensure that any contract with a value exceeding or is likely to exceed VT5,000,000 in any 12 months period is concluded as a result of a competitive process and that legal advice is obtained from the State Law Office.

(7). A contract concluded without compliance with subsection (6) is void and is deemed to be a serious breach of duty by the Regulator.

(8). The provisions of the Leadership Code Act [CAP 240] apply to the Regulator in relation to the exercise of his or her functions and powers under this Act.

(9). The provisions of the Public Service Act [CAP 246] does not apply to the Regulator or to his or her staff. This subsection do not apply to staff seconded under paragraph (5)(d).

(10). The provisions of the Government Contracts and Tenders Act [CAP 245] do not apply to contracts made under subsection (5).

(11). The Regulator may determine, with or without any kind of hearing, any questions of fact which may, in the Regulator’s opinion, be necessary or incidental to the performance of the Regulator’s responsibilities, functions, duties and powers set out in this Act.

(12). The Regulator must act independently and impartially in performing the responsibilities, functions, duties and powers set out in this Act and other laws. Nothing in this Act is to be interpreted so as to prevent the Regulator from:

- (a). having regard to such policies as may be developed by the Minister or the Government and Gazetted; or
- (b). consulting with or taking advice from, any person on any matter; or
- (c). acting in co-ordination with other countries, international agencies

or international standards; or

(d). making a decision that will or might have a differential or prejudicial impact on a service provider or any other person.

(13). Any licence, exception, approval, determination, contract, appointment, acceptance or notice which is to be given by, or entered into, by the Regulator under the provisions of this Act, must be given or entered into in writing.

## **8. Information gathering**

(1). If the Regulator believes that a person has information or documents relevant to the exercise of any of the Regulator's powers or functions, the Regulator may require the person to:

- (a). produce such documents; and
- (b). make copies of such documents for the Regulator; and
- (c). require the service provider to furnish such information.

(2). A person must comply with a requirement imposed under subsection (1) within such period as the Regulator may require, being not less than 14 days.

(3). A person must not, in relation to any requirement imposed under subsection (1), provide any document or information which is false or misleading in a material particular.

(4). The Regulator must compensate a person for the reasonable costs of copying documents pursuant to a requirement imposed under paragraph (1)(b).

(5). A person is not excused from giving information or producing a document or a copy of a document under this section on the ground that the information or the production of the document or copy might tend to incriminate the person or expose the person to a penalty under this Act.

(6). No information or documents obtained under this section are admissible in evidence against a person in any criminal proceedings.

(7). Information furnished or documents provided under this section must not be disclosed by the Regulator except:

- (a). with the written permission of the person from whom the same was obtained; or
- (b). in the course of proceedings under Part 9; or
- (c). was required by a court order; or

(d). where, in the opinion of the Regulator, the information comprises, or will be reproduced in, aggregated data so that it does not identify any particular service provider; or

(e). where such disclosure is required by this Act or any other law.

## **9. Equipment inspection**

(1). If the Regulator reasonably believes that any person has in their control or is using any equipment contrary to this Act or a Regulation, the Regulator may:

(a). search any premises, vehicle, ship or aircraft for the equipment and may be accompanied by a police officer; and

(b). inspect, take photographs or make sketches of the equipment; and

(c). operate the equipment, if necessary to ascertain its nature or the manner of its use.

(2). No compensation is payable in respect of the exercise or purported exercise by the Regulator of any power in this section, except that reasonable compensation is to be paid for any loss or damage to equipment which results from the negligence of the Regulator.

## **10. Official records and website**

(1). The Regulator is to keep and maintain a register of all licences, exceptions, interconnection agreements and determinations made under this Act and must, subject to subsection (4), make the same available for public inspection upon reasonable notice.

(2). The Regulator must establish an official website.

(3). The website must, in addition to any other requirements imposed by this Act, display:

(a). Regulations made under this Act; and

(b). the register; and

(c). relevant Government policy documents.

(4). Any document may be expurgated for public inspection or display on the Website if, and only to the extent that, it contains confidential information.

## **11. Annual report**

- (1). The Regulator must provide to the Minister an annual report including, but not limited to:
  - (a). a summary of the activities of the Regulator; and
  - (b). such financial statements and auditor's reports as are required by this Act or other law; and
  - (c). a list of all entries and deletions to the Register in the preceding year; and
  - (d). a summary of material litigation involving the Regulator; and
  - (e). a list of consultants and advisors retained by the Regulator and a description of the matters in relation to which they have consulted or advised.
- (2). A contravention of subsection (1) is deemed to be a serious breach of duty by the Regulator.
- (3). The annual report provided to the Minister pursuant to subsection (1) must be made available to the public on the website.

### **PART 3. LICENCES AND EXCEPTIONS**

#### **12. Requirement to hold licence**

- (1). A person must not provide a telecommunications service except under and in accordance with a licence or exception.
- (2). A person must not install or operate a radiocommunications device in Vanuatu or its territorial waters or airspace, or in any ship or aircraft registered in or under the law of Vanuatu, except:
  - (i). under and in accordance with a licence or exception; or
  - (ii). when such radiocommunications device is registered for use by a foreign registered ship or aircraft for the appropriate class of operation in the country of registration of the ship or aircraft.
- (3). A person must not import, offer for sale, sell or use any equipment which may be prescribed by Regulations without a licence.

#### **13. General provisions relating to licences**

- (1). Subject to Regulations, a licence may be issued by the Regulator.

- (2). Regardless of form and content, a licence is a unilateral grant of permission and must not be regarded as a contract or bilateral agreement.
- (3). A licence may be issued to a person or to a class of persons and may be issued according to and within such divisions or categories as may be provided by Regulations.
- (4). Subject to any Regulations, the Regulator must determine the terms and conditions of, and the fees payable for, licences.
- (5). The Regulator must make copies of licences available for inspection by the public.
- (6). Licences for substantially similar telecommunications services or radio frequencies must not unfairly discriminate between licensees.
- (7). Discrimination must not be regarded as unfair under subsection (6) only by reason of the imposition of a different licence fee in respect of the assignment of radio spectrum as between any prior licence and any licence issued under this Act.

#### **14. General provisions relating to exceptions**

- (1). Subject to Regulations, exceptions may be given by the Regulator where, in the Regulator's opinion, issuing a licence would not be efficient or necessary.
- (2). Regardless of form and content, an exception is a unilateral grant of permission and must not be regarded as a contract or bilateral agreement.
- (3). An exception operates only in respect of the specific matters and circumstances described therein and must not otherwise relieve any person from any obligation or liability unless expressed or necessarily to be implied.
- (4). An exception may be given to a person or to a class of persons and may be given according to and within such divisions or categories as may be provided by Regulations.
- (5). Subject to any Regulations, the Regulator must determine the terms and conditions of an exception.
- (6). The Regulator must make copies of exceptions available for inspection by the public.
- (7). An exception may be revoked at any time by the Regulator.

#### **15. Amendment, revocation and renewal of licences**

- (1). The Regulator may amend the terms and conditions of, or revoke a licence



if:

- (a). the amendment or revocation has been requested or agreed by the licensee; and
  - (b). the licensee has materially failed to comply with a licence term or condition, this Act or Regulations and has not remedied that failure within a period of 30 days after notice by the Regulator under paragraph (7)(a); and
  - (c). changes to international treaties or commitments by the Government to other governmental organisations or international agencies require an amendment or a revocation, and the amendment or revocation is only to the extent that is reasonably required as a result of such changes; and
  - (d). the development of new technologies or standards for radio systems makes it reasonably necessary that radio spectrum be reallocated for reasons of efficiency or to facilitate the introduction of new types of services, in each of which case licence holders must, to the extent reasonably practicable, be provided an alternative spectrum assignment sufficient to their needs; and
  - (e). changes to the laws of Vanuatu require an amendment or a revocation, and the amendment or revocation is only to the extent that is reasonably required as a result of such changes; and
  - (f). the licensee enters into receivership or liquidation, takes any action for its voluntary winding-up or dissolution, or is the subject of any order by a competent court or tribunal for its compulsory winding-up or dissolution.
- (2). In relation to paragraph (1)(b) the Regulator must first consider whether an amendment of the licence is a satisfactory means of addressing the failure to comply.
- (3). Prior to amendment or revocation of a licence, the Regulator must:
- (a). notify the licensee in writing that it is considering the relevant action; and
  - (b). consider any comments made by the licensee within the time frame stated by the Regulator in the notice.
- (4). The notice issued by the Regulator under subsection (3):
- (a). must give the licensee sufficient time to prepare comments on the relevant action, taking into account the nature of the proposed action; and

- (b). must set out any procedures the Regulator will follow in considering the relevant action; and
  - (c). may invite comments from other interested parties or the public, at the Regulator's discretion.
- (5). If the Regulator amends or revokes a licence, the Regulator must provide the licensee with sufficient time to comply with the amendment or revocation.
- (6). Upon application of a licensee, a licence must be renewed by the Regulator on the same conditions, subject to subsection (7).
- (7). The Regulator may renew a licence on different conditions, or deny the renewal of a licence, if:
- (a). the licensee has materially failed to comply with a term or condition of the licence, the Act, or any Regulation and has not remedied that failure within a period of 30 days after notice by the Regulator; or
  - (b). changes to international treaties, commitments by Government to other governmental organisations or international agencies or the laws of Vanuatu require a renewal on new conditions or the denial of a renewal.

## **16. Transfer**

A licence or exception issued to a person must not be ceded, transferred, assigned, pledged, devised, bequeathed, vested upon trust or otherwise disposed of or alienated without the prior written consent of the Regulator. The consent may be given subject to reasonable terms and conditions.

## **PART 4. Universal Access**

### **17. Universal Access Policy**

- (1). The Minister must develop a policy for improving access to telecommunications service for locations which are not or not adequately served by existing services.
- (2). The policy referred to in subsection (1) must be approved by the Council of Ministers.
- (3). The Minister must consult with the Regulator, and hold consultations with interested parties, when developing the UAP.

### **18. Subsidies**

(1). The Regulator may conclude contracts on behalf of the Government, for the payment of subsidies in consideration of the provision of telecommunications services in accordance with the UAP.

(2). Nothing in Part 5 applies to contracts made pursuant to subsection (1).

### **19. Universal Access Policy Fund**

(1). For the purposes of the UAP, the Minister must establish a trust fund which must be administered by the Regulator as trustee.

(2). Funds in the UAP Fund are deemed to be Public Money and to have been appropriated.

(3). Subject to subsection (4), the UAP Fund is to be applied (in order of priority) to:

(a). compensation payable to TVL relating to TVL loss-making customers, pursuant to the Settlement Agreement; and

(b). subsidies to service providers as may be agreed under section 18.

(4). Any person may voluntarily contribute towards the UAP Fund and such person may specify that such contribution be applied in a specific manner.

(5). Funds received pursuant to subsection (4) must be deposited in the UAP Fund and applied only in the manner specified, if any.

(6). Subject to subsection (7), a licensed service provider is liable to pay an annual levy to the UAP Fund. The levy is to be calculated as follows:

(a). the Regulator will estimate the amount necessary for the allocations of the UAP Fund in respect of the forthcoming year from 1 July to 30 June; and

(b). the Regulator will calculate the amount of the levy by apportioning the estimate obtained under paragraph (a) among each licensed service provider according to the proportion represented by their net revenue for the preceding year from 1 April to 31 March as against the net revenue of all service providers.

(7). A service provider must not be required to pay a sum greater than:

(a). 4% of its net revenue in respect of the period mentioned in paragraph (b); or

(b). 80% of the amount obtained under paragraph (a).

(8). The Regulator must furnish service providers with an invoice calculated in accordance with subsection (6) which contains reasonable particulars of the applicable calculations and such invoice must be paid within 30 days.

(9). If any part of the amount obtained under paragraph (6)(a) remains unallocated after 30 June in the year to which it relates, such amount are to stand to the credit of the subsequent year's estimate.

(10). The UAP Fund must be audited annually by an independent qualified auditor and a copy of the auditor's report and books of account must be provided to the Minister.

(11). A contravention of subsection (10) is deemed to be a serious breach of duty by the Regulator.

## **PART 5. Competition**

### **20. Determination of relevant telecommunications markets**

(1). The Regulator may determine relevant telecommunications markets for the purposes of this Act having regard to:

(a). the extent to which one telecommunications service can substitute another telecommunications service; and

(b). the extent to which end users will substitute one telecommunications service for another telecommunications service; and

(c). the extent to which a service provider not currently offering a telecommunications service may begin to offer that telecommunications service without incurring significant additional costs; and

(d). telecommunications services that are provided to the retail market; and

(e). telecommunications services that are provided to the wholesale market; and

(f). the geographical area served by a telecommunications service; and

(g). any other relevant matter.

(2). Determinations made under subsection (1) are to be posted on the website.

(3). A determination under this section is not a pre-requisite to the existence of any contravention of a provision of this Part.

### **21. Designation of dominance**

- (1). Subject to the terms of any prior licence, the Regulator may designate a service provider dominant within a telecommunications market if:
  - (a). the service provider's gross revenues from that telecommunications market constitutes 40 percent or more of the total gross revenues of all service providers from that telecommunications market; or
  - (b). the Regulator reasonably considers that, either individually or acting in concert with others, the service provider:
    - (i). enjoys a position of economic strength or controls a bottleneck facility in the relevant telecommunications market; and
    - (ii). such strength or control affords the service provider the power to behave to an appreciable extent independently of competitors, customers, end users or potential competitors in that telecommunications market.
- (2). More than one service provider may be designated dominant in the same telecommunications market.
- (3). A designation under this section remains in force until revoked by the Regulator.

## **22. Anti-competitive practices**

- (1). A service provider must not engage in conduct which has the purpose or effect, or is likely to have the effect, of substantially lessening competition in a telecommunications market.
- (2). Without limiting the generality of subsection (1), a service provider must not propose, enter into, or give effect to, any contract, arrangement or understanding containing a provision:
  - (a). directly or indirectly fixing, controlling or maintaining the price, or other terms of supply or acquisition, of a telecommunications service; and
  - (b). directly or indirectly determining which person will win a contract or business opportunity relating to telecommunications services; and
  - (c). apportioning, sharing or allocating the provision of telecommunications services among service providers; and
  - (d). preventing or restricting the supply or acquisition of a telecommunications service to or from a person or class of persons; and

- (e). directly or indirectly fixing, controlling or maintaining the price or other terms of supply or acquisition, or otherwise preventing or restricting the supply, of any goods or services to or by another service provider.
- (3). No provision of a contract that has the purpose, effect, or is likely to have the effect of substantially lessening competition in a telecommunications market is enforceable.

### **23. Abuse of dominance**

- (1). A dominant service provider must not abuse its dominance by:
- (a). restricting the entry of any person into any telecommunications market; or
  - (b). preventing or deterring any person from engaging in competition with the dominant service provider in any telecommunications market; or
  - (c). eliminating or removing any person from that or any other telecommunications market.
- (2). Without limiting the generality of subsection (1) a dominant service provider is deemed to have abused its dominance if that dominant service provider:
- (a). engages in any anti-competitive conduct under section 22 in that or any other telecommunications market; or
  - (b). fails to supply a bottleneck facility to a service provider within a reasonable time and on commercially reasonable terms and conditions; or
  - (c). discriminates in the provision of interconnection to other service providers or in the supply of other telecommunications services or facilities to other service providers; or
  - (d). bundles telecommunications services, whereby the service provider requires, as a condition of supplying a service to a person, that the person acquire another service that it does not require, where it is technically feasible to unbundle the telecommunications service required by the person; or
  - (e). offers another service provider more favourable terms or conditions that are not justified by cost differences if it acquires another service that it does not require; or
  - (f). supplies competitive telecommunications services at prices below variable costs (or such other cost standard as is established by the

Regulator) for an extended period of time as determined by the Regulator;  
or

(g) uses revenues or the allocation of costs from one telecommunications service to cross-subsidise a more competitive telecommunications service, except where such cross subsidy is specifically approved by the Regulator or by approval of tariffs for relevant telecommunications services; or

(h) reduces the margin of profit available to another service provider that acquires or seeks wholesale telecommunications services from the dominant service provider, by increasing the prices for the wholesale telecommunications services provided to that service provider, or decreasing the prices of the retail telecommunications services in markets where they compete, or both; or

(i) fails to make available to other service providers technical specifications, information about bottleneck facilities, or other information which is required by such other service providers to provide telecommunications services and which is not available from other sources; or

(j) adopts technical specifications for networks or systems to prevent interoperability with a network or system of the dominant service provider; or

(k) uses information obtained from another service provider, for purposes related to interconnection or supply of telecommunications services by the dominant service provider, to compete with that service provider.

## **24. Pre-approval**

(1) A person may invite the Regulator to approve conduct which may not amount to a contravention of any provision of this Part.

(2) An invitation for approval under subsection (1) must be made prior to engaging in the conduct in respect of which it is sought.

(3) The Regulator may approve conduct if the Regulator believes that the conduct will not or is unlikely to:

(a) substantially lessen competition; or

(b) otherwise inhibit competition,  
in any telecommunications market,

(4). Where the Regulator approves any conduct under this section, such conduct must not be taken to amount to a contravention of any provision under this Part.

## **25. Transfers of control of service providers**

(1). No transfer of control of a service provider is to be effected without the prior approval of the Regulator in circumstances where:

(a). a dominant service provider, or an affiliate of a dominant service provider, is:

(i). the person ultimately acquiring control of the service provider; or

(ii). the person whose control is being transferred; or

(b). as a result of the transfer:

(i). a person, alone or with its affiliates, would control service providers whose gross revenues in a telecommunications market in Vanuatu constitute forty per cent (40%) or more of the total gross revenues of all service providers in that telecommunications market; or

(ii). a person, alone or with its affiliates, would be in a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers, end users or potential competitors in a telecommunications market in Vanuatu.

(2). The following do not require the prior approval of the Regulator under subsection (1):

(i). a transfer of control between persons that are shareholders of the service provider; or

(ii). a reorganisation of the group structures of any shareholders of the service provider that does not result in any change of control of the ultimate holding company; or

(3). A contract or agreement which contravenes subsection (1) is void.

(4). The licence of a person who contravenes subsection (1) is voidable at the discretion of the Regulator.

(5). The Regulator must not unreasonably withhold approval when required under subsection (1).



## **PART 6. Interconnection**

### **26. Interconnection by all service providers**

(1). Every service provider who provides or intends to provide telecommunications services to the public (hereinafter referred to as an “**access seeker**”) has the right to require, by notice in writing, any other service provider that operates a telecommunications network in Vanuatu (hereinafter referred to as an “**access provider**”) to negotiate in good faith, an interconnection agreement for the provision of interconnection by the access provider.

(2). Upon receipt of a notice under subsection (1), an access provider must enter into, and participate in, good faith negotiations with the access seeker to enter into such an interconnection agreement.

(3). The following actions or practices are deemed to contravene the duty in subsection (2) to negotiate in good faith:

(a). obstructing or delaying negotiations, or failing to make reasonable efforts to resolve outstanding disputes; or

(b). refusing to provide information about the access provider’s own telecommunications services, telecommunications network or telecommunications facilities that are necessary for the interconnection agreement; or

(c). misleading or coercing an access seeker into reaching an agreement it would not otherwise have made; or

(d). interfering in any way with an access seeker’s ability to communicate with the Regulator, including requiring an access seeker not to disclose information requested by the Regulator; or

(e). refusing to permit amendment of the interconnection agreement to take into account changes in circumstances, including changes to this Act.

(4). A service provider must not be required to enter into an interconnection agreement on terms that would, in its reasonable opinion, and where the Regulator has not made an order otherwise, either:

(a). cause or be likely to cause material danger, damage or injury to any person or any property; or

(b). cause material damage or otherwise materially interfere with the operation of its telecommunications network or telecommunications facilities or the provision of its telecommunications services to its end users.

## **27 Reference Interconnection Offers**

- (1). The Regulator may notify a service provider (hereinafter referred to as a **“nominated service provider”**) that operates a telecommunications network in Vanuatu, requiring them to, within 90 days of the date of the notice, propose the terms and conditions of a reference interconnection offer for the provision of interconnection by the nominated service provider.
- (2). The Regulator may require the terms and conditions to relate to particular parts of the nominated service provider’s telecommunications network or particular types of interconnection services. The proposed terms and conditions must comply with any Regulations applicable to interconnection.
- (3). If the nominated service provider has not proposed terms and conditions within the required period, the Regulator may determine these terms and conditions.
- (4). The Regulator will consult with the nominated service provider and any other interested parties in assessing or determining the terms and conditions and may make such changes as the Regulator may require to these terms and conditions proposed by the nominated service provider. Once the Regulator has determined the terms and conditions, this will become the nominated service provider’s reference interconnection offer (**“RIO”**).
- (5). The prices for interconnection in the RIO are to be determined by the Regulator under section 30.
- (6). Subject to subsection (5), the Regulator may, from time to time, require changes or updates to the RIO, including where such changes or updates are necessary as a result of changes in the Act.
- (7). The Regulator must publish the RIO on the Website and shall provide a copy to any service provider, upon request.
- (8). A service provider who provides or intends to provide telecommunications services to the public may, instead of following the process in subsections 26(1) and (2), notify a nominated service provider requiring them to enter into an interconnection agreement with that other service provider in the form of the nominated service provider’s RIO. The nominated service provider shall, within 10 working days after receipt of that notice, enter into this interconnection agreement and, once entered into, the nominated service provider shall comply with its obligations under the interconnection agreement.

## **28. Publication of interconnection agreements**

- (1). Every service provider must, within 10 working days after execution of an interconnection agreement or any amendment to an interconnection agreement,

file a copy of the executed interconnection agreement or amendment with the Regulator (including any interconnection agreement based on an RIO).

(2). A service provider may designate certain information contained in an interconnection agreement filed with the Regulator in accordance with subsection (1) as confidential information and not to be disclosed to any person other than the Regulator.

(3). The Regulator must determine whether all or certain portions of the information designated by a service provider under subsection (2) is to be treated as confidential in these terms.

## **29. Requirements for interconnection**

(1). Interconnection agreements (including an interconnection agreement based on a RIO) must:

(a). be consistent with this Act and comply with any applicable Regulations; and

(b). meet all reasonable requests for interconnection at any technically feasible point; and

(c). in all other respects, incorporate reasonable terms and conditions for interconnection, including technical standards and specifications.

(2). Every access provider must:

(a). apply similar conditions to all access seekers seeking the same or similar interconnection services; and

(b). provide interconnection to access seekers under substantially the same conditions and of substantially the same quality as it provides for its own telecommunications services, or those of its affiliates; and

(c). make available, upon request from an access seeker, in a timely manner all necessary or reasonably required information and specifications to access seekers; and

(d). only use information received from an access seeker for the purposes for which it was supplied to the access provider and shall not disclose the information or otherwise use the information to obtain a competitive advantage.

## **30. Interconnection charges**

(1). If there is any dispute over prices for interconnection provided by access providers or where the Regulator is to determine these prices under section 27, the

Regulator must determine the prices by benchmarking against cost-oriented prices for interconnection in other jurisdictions selected by the Regulator.

(2). The Regulator may use any other method of calculation or determination of the prices, but only where the Regulator determines that it is unable to identify an appropriate selection of cost-oriented prices in other jurisdictions.

### **31. Interconnection disputes**

(1). If two or more service providers fail to reach agreement on any terms and conditions for interconnection within a period of 30 days from the date of receipt of a written notice provided under section 27, the dispute may be referred by one or more service providers to the Regulator for determination.

(2). If a dispute is referred to the Regulator in accordance with subsection (1), the Regulator may order the service providers to provide interconnection on such terms and conditions as the Regulator determines, or as may be prescribed by Regulations.

### **32. Non-compliant interconnection agreements**

An interconnection agreement which is not in compliance with any provision of this Act or any licence is void.

## **PART 7. TARIFFS**

### **33. Tariff approval**

(1). A service provider must not impose any charge or make any claim or demand in respect of a tariff not filed with the Regulator.

(2). Dominant service providers must, if required at any time by the Regulator and in addition to complying with subsection (1), make a request to the Regulator, in writing, to obtain the Regulator's prior approval for all increases in any tariffs, rates or charges that the dominant service provider intends to charge for telecommunications services.

(3). If required under the terms of any licence, the Regulator may only require such an approval for increases in any tariffs, rates or charges that are above certain levels specified in the licence. If required under the terms of any licence, the Regulator may be restricted from refusing any increases in any tariffs, rates or charges in particular circumstances.

(4). Subject to Part 5, nothing in subsections (1) or (2) prevents a service provider from imposing any charge or making any claim or demand being less than that provided by any filed or approved tariff.

(5). The Regulator may dispense with the requirement in subsections (1) or (2)

in whole or in part where he or she considers that:

- (a). competitive market forces will be sufficient to protect the interests of end-users; and
  - (b). competition in any market is unlikely to be inhibited.
- (6). In deciding whether to approve any tariff of a dominant service provider the Regulator must consider the extent to which the proposed tariff is based on the cost of efficient service provision and must not contain excessive charges which are made as a result of the dominant service provider's dominant position, in the opinion of the Regulator.
- (7). If a dominant service provider has made a written request for the approval of any intended increases in any tariffs, rates or charges in accordance with subsection (2), the Regulator must, within 30 working days following the receipt of such a request, do one of the following:
- (a). approve the tariffs of the dominant service provider; or
  - (b). require a change in the tariffs for telecommunications services; or
  - (c). require the provision of additional information from the dominant service provider.
- (8). If the Regulator does not do any of the actions listed in subsection (7) within 30 working days following the receipt of a request for approval from a dominant service provider, that request for approval is deemed to be approved by the Regulator for the purposes of this section.
- (9). For the purposes of this Part 7, tariffs, rates and charges do not include interconnection charges, which are subject to Part 6.

#### **34. Publication of tariffs**

- (1). Unless the Regulator orders otherwise, when a dominant service provider files a tariff or schedule of tariffs with the Regulator, that dominant service provider must:
- (a). from the date on which the tariff or schedule of tariffs is filed until the date on which the tariff or schedule of tariffs is approved:
    - (i). publish an electronic copy on its official website; and
    - (ii). maintain a paper copy available to the public at either its main or registered business offices or at both offices; and
    - (iii). declare any discounts to the standard published tariffs that

may be given to any customer or end user or group of customers or end users and set out the criteria used to determine the customer's or end user's ability to qualify to receive the discount; and

(b). within 10 days from the date on which the tariff or schedule of tariffs is filed, place a notice setting out the tariffs, and the details of any discounts and qualification criteria for such discounts, in Bislama, French and English in a newspaper of general circulation in Vanuatu.

(2). A dominant service provider must maintain a complete and up to date schedule of all tariffs approved by the Regulator (clearly distinguishing Regulator approved tariffs from tariffs published pursuant to subsection (1):

(a). in an electronic copy on its official website; and

(b). in a paper copy available to the public at either its main or registered business offices or at both offices.

### **35. Tariffs for services to other service providers**

(1). Tariffs charged by a dominant service provider to other service providers:

(a). must be filed with the Regulator in accordance with section 34; and

(b). must comply with any orders made by the Regulator in relation to such tariffs.

### **36. General principles for tariff regulation**

The Regulator may adopt any approach to tariff regulation of service providers that is consistent with this Act, including, but not limited to, price cap regulation, rate-rebalancing and other forms of cost-based regulation.

### **37. Cost studies**

(1) The Regulator may require a dominant service provider to prepare or otherwise participate in the development of a cost study of its telecommunications services if it determines that a cost study would be an effective and necessary means of preventing anti-competitive conduct or would otherwise be effective and necessary in implementing any scheme of tariff regulation.

(2). If the Regulator requires a dominant service provider to prepare or otherwise participate in the development of a cost study:

(a). the dominant service provider is to file with the Regulator a study of its costs of providing the different categories of service, distinguishing annual capital costs from annual operating costs; and

- (b). the Regulator is to determine the cost categories, form, approach, procedures and timing of the cost study; and
  - (c). the purpose of the cost study shall be to determine the costs to the dominant service provider of providing different types of telecommunications services.
- (3). Prior to issuing an order to require the preparation of or participation in a cost study, the Regulator must consult with the dominant service provider required to file a cost study and other interested parties.

### **38. Price cap regulation method**

- (1). The Regulator may require a dominant service provider to propose or otherwise participate in the development of a method of price cap regulation.
- (2). If the Regulator requires a dominant service provider to propose a method of price cap regulation:
- (a). the dominant service provider must file with the Regulator a proposal for implementation of a method of price cap regulation of its service tariffs; and
  - (b). the proposal must identify the proposed starting tariffs for relevant services, proposed groupings or baskets, the application of price cap formulas and the specific proposed price cap formulas for price cap regulation.
- (3). The Regulator may:
- (a). prescribe guidelines for the development of a proposal for a method of price cap regulation; or
  - (b). give directions for the further development of a proposal that has been filed with the Regulator in accordance with section 34.
- (4). Prior to requiring the proposal of or participation in a method of price cap regulation, the Regulator must consult with the dominant service provider required to propose that method of price cap regulation.

## **PART 8. CUSTOMER RELATIONS AND PROTECTION**

### **39. Fair dealing practices**

- (1). A service provider must not demand payment from a customer or end user for any service, equipment or facility not requested.
- (2). Except in the case of pre-paid telecommunications services, service

providers must provide customers with invoices:

- (a). in writing (although they may be provided in an electronic format if the customer consents or requests); and
  - (b) on a regular basis; and
  - (c). in a plain and simple format; and
  - (d). that provide accurate information on the services and equipment provided and the amounts due for each; and
  - (e). that clearly indicate the method of calculation of tariffs for any telecommunications service for which invoices are based on the length of calls or other measure of usage; and
  - (f). that comply with any applicable Regulations.
- (3). In relation to customers and end users that are subscribed to pre-paid telecommunications services, a service provider must, upon request, provide the means by which the costs of every debit against the pre-paid credit balance during the 7 days prior to the request may be verified by the customer.
- (4). A service provider is to retain accurate records of all customer and end user invoices for a period of at least 6 months from their billing date and make them available to the Regulator upon request.
- (5). A service provider must not, in relation to the supply or proposed supply of any telecommunications service, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.

#### **40. Personal information**

- (1). A service provider must not, without the consent of the end user, divulge any personal end user information to any other person who is not an agent or employee of the service provider, unless required by law or authorised by warrant or by the Regulator.
- (2). A service provider must not, without the consent of the end user, collect any personal end user information not reasonably necessary for the provision of any telecommunications service to the end user, unless required by law or authorised by warrant or by the Regulator.

#### **41. End user disputes and complaints**

- (1). A service provider must establish procedures to deal with disputes and complaints from end-users.



(2). A service provider must keep, and maintain for 18 months, records of all disputes and complaints from end users and the amount of time taken to respond to such complaints, which information is to be made available to the Regulator upon request.

(3). The Regulator may investigate and attempt to mediate any end-user dispute brought to its attention.

#### **42. No unjustified discrimination**

(1). A service provider that is a dominant service provider is to offer all customers and end users the same terms and quality of service, including tariffs charged, unless:

(a). different terms or quality of service are objectively justified based on differences in the product provided or in supply conditions, including different costs or a shortage of available facilities or resources; or

(b). otherwise specifically permitted by an order of the Regulator.

(2). The prohibition in subsection (1) against different terms and quality of service applies as between:

(a). end users of the telecommunications services provided by the dominant service provider; and

(b). customers of the dominant service provider who rely on telecommunications services from the dominant service provider in order to provide telecommunications services to end users; and

(c). customers of the dominant service provider and the dominant service provider itself.

(3). If different terms or quality of service are offered by a dominant service provider, the dominant service provider is obliged to:

(a). justify the different terms or quality of service to the satisfaction of the Regulator, considering the objective justifications in paragraph (1)(a); or

(b). cease the discrimination when directed by the Regulator.

#### **43. Terms of Service**

(1). The Regulator may require a service provider to submit a draft Terms of Service to the Regulator for approval.

(2). A draft Terms of Service submitted by a service provider must:

- (a). be consistent with this Act, the regulations, rules, orders and licence conditions; and
  - (b). describe the basic terms of the business relationship between the service provider and its customers and end users in the provision and use of telecommunications services; and
  - (c). set out the terms and processes regarding billing and the payment of invoices by end users, including any action that is to be taken where invoices are not paid by the time they are due to be paid; and
  - (d). explain the processes in the event of a billing or invoice error, including the process that shall be followed in the event of an invoice dispute; and
  - (e). set out the calculation of refund that will be granted to end users by the service provider in the event of a prolonged failure in the service(s) provided to the end user.
- (3). The Regulator is to approve all draft Terms of Service, with or without changes, provided that the Regulator is satisfied that the draft Terms of Service comply with the requirements of this section and this Act.
- (4). Prior to approving any draft Terms of Service, the Regulator must consult with the service provider and other interested parties.
- (5). Once the Terms of Service have been approved by the Regulator in accordance with this section , the approved Terms of Service;
- (a). replaces the customer and end user Terms of Service then in use by the service provider; and
  - (b). becomes binding on the service provider and its customers and end users.

## **PART 9. ENFORCEMENT**

### **44. General principles of liability**

- (1). A person other than the Regulator (or any person acting under the authority of the Regulator), who contravenes a provision of Parts 3, 5, 6, 7 or 8 of this Act, or a Regulation, is liable to a penalty.
- (2). A person who is knowingly engaged in conduct amounting to a contravention of a provision of this Act is taken to have contravened that provision and is liable accordingly.

(3). A person who aids, abets, counsels or procures or by act or omission is in any way directly or indirectly concerned in the contravention of a provision of this Act is taken to have contravened that provision and is liable accordingly.

(4). A person may be liable under subsections (2) or (3) even if no proceedings have been initiated against any another person or if any other person has been found not to be liable.

(5). A body corporate contravenes a provision of this Act if:

(a). an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy; or

(b). an employee, agent or officer of the body corporate, acting within the actual or apparent scope of his or her actual or apparent authority,

engaged in the conduct comprising the contravention.

(6). Subject to such defences as are provided under this Act, liability under this section is strict.

(7). All matters required to be proved in proceedings under this section may be proved on the balance of probabilities.

(8). The party asserting a contravention under this section has the burden of proving each and every element thereof.

#### **45. Defences**

(1). It is a defence to proceedings for any contravention of this Act that the contravention in respect of which the proceedings were instituted was caused by an honest and reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person.

(2). It is a defence to a proceeding for any contravention of this Act that the contravention in respect of which the proceedings were instituted was:

(a). due directly to the act or default of another person beyond control;  
or

(b). to an accident or some other cause beyond control; or

(c). reasonable precautions were taken and due diligence exercised to avoid the contravention.

(3). It is a defence to any proceedings in respect of a contravention of section 22 that the contravention did not have the purpose or effect and is not

likely to have the effect, of substantially lessening competition in any telecommunications market.

(4). It is a defence to any proceedings in respect of a contravention of section 23 that the contravention did not have the purpose or effect and is not likely to have the effect of inhibiting competition in any telecommunications market.

(5). It is a defence to any proceedings in respect of a contravention of paragraph 23(2)(c) that the discrimination was reasonably based on differences in supply conditions.

(6). The party asserting a defence under this section has the burden of proving each and every element thereof.

(7). In subsections (1) and (2) references to “another person” do not include a person who was, in relation to the person against whom the contravention is alleged at the time the contravention occurred:

- (a). a servant or agent; or
- (b). in the case of a body corporate, an officer, servant or agent.

#### **46. Penalties**

(1). Subject to subsection (5), the maximum penalty to which a person is liable for a contravention of section 23 is:

- (a). for an individual - VT6,000,000; and
- (b). for a corporation - VT60,000,000.

(2). Subject to subsection (5), the maximum penalty to which a person is liable for a contravention of section 22 is:

- (a). for an individual - VT4,000,000; and
- (b). for a corporation - VT40,000,000.

(3). Subject to subsection (5), the maximum penalty to which a person is liable for a contravention of any sections to which neither subsections (1) nor (2) apply is:

- (a). for an individual - VT2,000,000; and
- (b). for a corporation - VT20,000,000.

(4). In determining the amount of a penalty the court is to have regard to the general principles of sentencing applied by courts of criminal jurisdiction from time to time.

(5). If the court is satisfied that a person has profited from a contravention of this Act, the maximum penalty to which that person is liable is:

- (a) 3 times the amount of such profit; or
- (b) the maximum penalty provided by whichever of subsections (1), (2) or (3) is applicable,

whichever is the greater.

(6). For the purposes of subsection (5) the court is entitled to estimate the quantum of profit derived from a contravention based upon such evidence as may be available.

#### **47. Other remedies**

(1). If a person is found to be liable to a penalty under this Part, the Supreme Court may, in addition to, or in lieu of, a penalty:

- (a) declare any rights; or
- (b) order an account to be taken; or
- (c) rescind any contract; or
- (d) order money to be refunded to any customer, end-user or service provider; or
- (e) order that any profits derived or substantially derived by a contravention of this Act be forfeited to the State; or
- (f) make an order for any mandatory or prohibitive injunction, whether temporary or permanent; or
- (g) order that a person make corrective advertising on such terms as the court shall determine; or
- (h) order that any person acquiring an interest in contravention of section 26, divest themselves of such interest.

(2). In determining the appropriateness and the terms of any remedy under this section the court is to have regard to the general principles associated with such remedies as applied by courts of civil jurisdiction from time to time.

(3). The Regulator is not required to provide an undertaking as to damages as a pre-requisite to an injunction under this section.

#### **48. Jurisdiction of Supreme Court**

(1). The Supreme Court has jurisdiction with respect to any matter arising under this Act.

(2). The Regulator may recover any fee due under this Act as a debt.

(3). Proceedings in respect of contraventions of this Act are to be instituted by the Regulator in the civil jurisdiction of the Supreme Court in accordance with applicable rules of court.

(4). The Chief Justice may make rules relating to practice and procedure in relation to proceedings arising under this Act.

(5). The Supreme Court must not be deprived of jurisdiction under this Act only because conduct amounting to a contravention of this Act occurred wholly or partly outside Vanuatu.

#### **49. Civil Liability**

(1). A person who suffers loss or damage by conduct of another person that was done in contravention of any provision of Part 5 or 8 may recover the amount of the loss or damage (and interest thereon) by action against:

(a). that other person; or

(b). any person knowingly concerned in the contravention.

(2). An action under subsection (1) may be commenced at any time within 2 years after the date on which the contravention occurred.

(3). Nothing in subsection (1) limits, restricts or otherwise affects any right or remedy a person would have if that subsection were not enacted, provided that there is no double recovery of damages.

(4). Proceedings under this section may be commenced by the Regulator, as representative of a class of persons suffering loss or damage.

(5). The Regulator may, subject to any conditions imposed by the court, intervene in any proceeding instituted under subsection (1).

#### **50. Costs**

(1). The Regulator may recover, and become liable for costs according to the general principles applicable in civil cases between individuals.

(2). The Regulator is entitled to costs calculated in accordance with the rates applicable in civil proceedings between individuals whether or not the Regulator in fact paid, or is liable to pay, for legal representation.

## **PART 10. REVIEW OF DECISIONS OF THE REGULATOR**

### **51. Provision of reasons**

(1). Any person aggrieved by a decision of the Regulator may invite the Regulator to give reasons for such decision and the Regulator shall, if he has not already provided reasons, comply within a reasonable time.

(2). Nothing in subsection (1) prevents the Regulator providing reasons or supplementary reasons at any time without invitation.

### **52. Internal review**

(1). Any person aggrieved by a decision of the Regulator may invite the Regulator to reconsider such decision.

(2). The Regulator is to reconsider a decision when invited under subsection (1) if the invitation is received within 30 days of the decision being notified or published, as the case may be.

(3). The Regulator may reconsider a decision when invited under subsection (1) if the invitation is received after 30 days of the decision being notified or published, as the case may be.

(4). An invitation under subsection (1) must be in writing and must contain all the material upon which the invitation is based.

(5). In reconsidering a decision the Regulator may:

- (a). confirm the decision; or
- (b). vary the decision; or
- (c). revoke the decision; or
- (d). if the decision is revoked, make a new decision.

(6). The regulator must not reconsider any decision in respect to which a person has applied to the Supreme Court for judicial review.

### **53. Judicial review**

- (1). A person aggrieved by a decision of the Regulator may seek judicial review of the decision in the Supreme Court.
- (2). No application for judicial review must be brought after 3 months of the decision being notified or published, as the case may be.
- (3). Judicial review must not be available in respect of:
  - (a). any act, omission or decision arising from section 7 in relation to:
    - (i). a contract entered into or not entered into under paragraph (3)(a), except to the extent that a contract is ultra vires; or
    - (ii). proceedings commenced under paragraph 3(b); or
    - (iii). staff employed, not employed, seconded, not seconded, authorised to act in the Regulator's name, not authorised to act in the Regulator's name, dismissed or otherwise dealt with under subsection (3) or otherwise; or
  - (b). a decision under section 18 to enter into, or not enter into, a contract, except to the extent that a contract is ultra vires; or
  - (c). a decision under section 24; or
  - (d). a decision under subsection 52(3) declining to reconsider a decision; or
  - (e). a decision under subsection 52(5), except to the extent of any variance, revocation or new decision; or
  - (f). any decision of the Regulator under section 54 or an expert appointed by the Regulator under subsection 54(7); or
  - (g). any advice given by the Regulator to the Minister; or
  - (h). a decision to commence or continue or not to commence or continue proceedings for a contravention of this Act.
- (4). Nothing in paragraphs (3)(d) or (e) limits the ability to review the original decision in respect of which internal review was sought except that there is no duplication of review in respect of the same matters.

#### **54. External expert review**

- (1). This section applies to a person who:



- (a). is aggrieved by a decision of the Regulator under section 15, Part 6 or Part 7; and
  - (b). has sought and obtained internal review under section 52; and
  - (c). remains aggrieved by the decision to the extent of any part thereof as was not revoked under subsection 52(5).
- (2). A person to whom subsection (1) applies (an “appellant”) may, within 30 days, invite the Regulator to have the merits of the decision in question reviewed in whole or in part by an independent expert.
- (3). An invitation under subsection (2) must be in writing and shall contain all the material upon which the appellant relies.
- (4). Upon receipt of an invitation under subsection (2) the Regulator must, within 30 days, accept or decline the invitation in whole or in part and:
- (a). if (and to the extent that) the invitation is accepted:
    - (i). identify a suitable independent expert (the “expert”) and ascertain the general method and quantum of his or her proposed fee structure; and
    - (ii). notify the appellant of the identity of the expert, giving reasonable particulars of his or her expertise, experience and proposed fee structure; and
    - (iii). offer the appellant 14 days within which to object to the expert; or
  - (b). if (and to the extent that) the invitation is declined, give reasons therefore.
- (5). In deciding whether to accept or decline an invitation under subsection (4) the Regulator is to consider:
- (a). the importance and financial implications of the decision in question to the service provider; and
  - (b). the extent to which the decision in question turns on facts and issues within the province of any area of expertise related to radiocommunications, telecommunications or accounting; and
  - (c). the extent to which a delay in the implementation of the decision in question would negatively affect the interests of any licensee or the extent of competition in any market.

(6). If an objection is made under subparagraph (4)(a)(iii) the Regulator must, if he or she is satisfied that the objection is well founded, repeat the process described in paragraph (4)(a).

(7). The Regulator is to appoint the expert but the appellant is liable for all fees and disbursements of the expert and must promptly pay directly to the expert such deposit or interim or other payments as the Regulator may think fit and demand in respect thereto.

(8). The Regulator may terminate a review under this section if the appellant:

(a). fails to pay in accordance with subsection (7); or

(b). engages in any correspondence or communication (other than relating solely to payment) not in the presence, or with the prior consent of, the Regulator;

in either of which event no further or other review under this section will be available and any amount which is or becomes due and owing to the expert may be recovered by the Regulator from the appellant as a debt.

(9). The expert must provide any person whose interests are or may be directly affected by the outcome of the review under this section an opportunity to provide evidence or make submissions in Port Vila.

(10). The expert, to the extent of paragraph (4)(a), review the decision in question de novo and may:

(a). determine any questions of fact; and

(b). receive evidence from any person without regard to the laws of evidence; and

(c). schedule and conduct hearings without technicality; and

(d). subject to any Regulations, determine all matters of procedure; and

(e). obtain legal advice from the State Law Office as to his or her powers and duties under this section.

(11). The decision of the expert is to be, to the extent of paragraph 4(a), final and binding as to the decision in question and there is no appeal or review of any kind from such decision.

## **PART 11. Miscellaneous**

### **55. Immunity of the Regulator**

- (1). The Regulator is not liable to any action or claim, other than by way of judicial review, arising from the exercise or intended exercise of any of the functions or powers under this Act in good faith.
- (2). Subject to subsection 7(8) and to his or her terms of appointment, the Regulator is not to be personally liable to any action or claim arising from the exercise or intended exercise of any of the functions or powers under this Act.
- (3). Any person authorised by the Regulator to act in his or her name is to have the same immunity as the Regulator, to the extent of that authority.
- (4). Neither the Government nor the Republic of Vanuatu is to be vicariously liable for any conduct to which subsections (1), (2) or (3) apply.

## **56. Regulations**

Subject to subsection 7(3) the Minister may make such regulations as may be necessary or convenient to give effect to the provisions or the objects of this Act.

## **57. Financial management**

- (1). All penalties recovered under this Act are deemed to be Public Money.
- (2). All fees and costs recovered under this Act are deemed to be Public Money and are appropriated for the use of the Regulator.
- (3). The Regulator must produce annual financial statements in accordance with international accounting standards which are to be audited annually by an independent qualified auditor and a copy of the auditor's report and financial statements are to be provided to the Minister.
- (4). A contravention of subsection (3) is deemed to be a serious breach of duty by the Regulator.

## **58. Savings and transitional provisions**

- (1). Every document, regulation and act of authority made under the Telecommunications Act [CAP 206] and relevant to any matter set out in this Act continue and have effect under the corresponding provisions of this Act until such time as they are altered, amended or cancelled, as the case may require, under the provisions of this Act.
- (2). The Telecommunications Regulator appointed under the Telecommunications Act [CAP 206] is, upon the date on which this Act comes into force, the Regulator and is to remain so until 30 September 2010 or such sooner time as the terms of his appointment may provide.

**59. Commencement**

This Act commences on the day on which it is published in the Gazette.