

TELECOMMUNICATIONS AMENDMENT BILL 2013

SAMOA

Explanatory Memorandum

Introduction

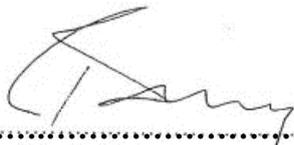
The Bill seeks to amend the Telecommunications Act 2005:

- to clarify the extent of powers of the Regulator in relation to its findings and determination in their relationship with the appeal mechanism, including regulating the filing of frivolous appeals and imposing time to file judicial review applications;
- to empower the Regulator to make rules for its practices and procedures; and
- to improve the dispute resolution mechanism.

Clauses:

- Clause 1:** - states that, when enacted, the Bill will be called the Telecommunications Amendment Act 2013, and will commence on the date of assent by the Head of State.
- Clause 2:** - amends section 2 to replace the definition of “telecommunications service”.
- Clause 3:** - amends section 3 to replace “approvals” with “type approval”.
- Clause 4:** - amends section 8 to make it subject to section 11 dealing with the right of appeal.
- Clause 5:** - amends section 9 to empower the Regulator to appoint staff and employees up to principal level. The rest will continue to be appointed under the Public Service Act 2004.

- Clause 6:** - amends section 11 to clarify extent of appeal for order, directive or exercise of discretion as separate appeal, to deal with other procedures for appeal, including withdrawals of appeals.
- Clause 7:** - amends section 11C(2)(c) to revise the qualifications requirements for tribunal members.
- Clause 8:** - amends section 11E to empower the Regulator to make rules for its processes, practice and procedures.
- Clause 9:** - amends section 11G to make minor consequential amendments and to clarify that the presiding member of the tribunal can make decision on procedural matters.
- Clause 10:** - amends section 11I to impose a time limit on any person seeking to judicial review any decision of the tribunal.
- Clause 11:** - amends section 52 to provide minor consequential amendments.
- Clause 12:** - amends section 71 to revamp the dispute resolution mechanism.
- Clause 13:** - replaces section 72 to give the customer the right to refer a matter that cannot be resolved between the customer and a service provider to the Regulator to assist in resolving the matter.
- Clause 14:** - adds proposed sections 72A and 72B to improve the dispute resolution mechanisms.
- Clause 15:** - amends section 73 as part of improving the process of dispute resolution mechanism.



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(Hon TUISUGALETAUA Sofara Aveau)
**MINISTER OF COMMUNICATIONS
AND INFORMATION TECHNOLOGY**

TELECOMMUNICATIONS AMENDMENT BILL 2013

SAMOA

Arrangement of Provisions

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2013, No.

A BILL INTITULED

AN ACT to amend the Telecommunications Act 2005.

BE IT ENACTED by the Legislative Assembly of Samoa in Parliament assembled as follows:

1. Short title and commencement-(1) This Act may be cited as the Telecommunications Amendment Act 2013, and shall be read with, and form part of the Telecommunications Act 2005 (hereinafter called the “Principal Act”).

(2) This Act commences on the date of assent by the Head of State.

2. Interpretation - In section 2 of the Principal Act, for the definition of “telecommunications service” substitute:

““telecommunications service” means a service provided by means of a telecommunications network, and includes the provision of telecommunications facilities (in whole or part) and any related equipment to a customer by lease, sale or otherwise;”.

3. Objectives of this Act - In section 3(1) of the Principal Act for “approvals” substitute “type approval”.

4. Responsibilities, functions and powers of the Regulator - In section 8(1)(u) of the Principal Act, before “in exercising” insert “subject to section 11”.

5. Office of the Regulator - For section 9(4)(a) and (b) of the Principal Act substitute:

- “(a) the staff and employees up to Principal level of the Office of the Regulator are appointed and employed by the Regulator, whilst contractual employees including the post of the Regulator are appointed and employed under the Public Service Act 2004; and
- (b) all staff and employees appointed by the Regulator under paragraph (a), except contractual employees, shall be under the direction and control of the Regulator; and”.

6. Appeal of orders of the Regulator to the Telecommunications Tribunal - In section 11 of the Principal Act:

- (a) in subsections (1) and (4), for “directive, decision” substitute “or a directive, or a decision”; and
- (b) in subsection (2)(a), before “bank” insert “non-refundable”; and

(c) after subsection (5) insert:

“(6) Subject to section 11G(2)(c), an order, or directive, or decision, or exercise of discretion of the Regulator appealed under this section shall remain in full force pending the Tribunal’s decision on such appeal.

(7) An appellant may only withdraw an appeal upon application to and with permission of the Tribunal.

(8) The Tribunal may refuse or permit withdrawal of an appeal:

(a) where issues of costs (incurred from a hearing) remain outstanding; or

(b) where it is in the public interest to continue; or

(c) where reasons provided by the appellant in his or her application are reasonable and justified noting that the deposit provided with the Notice of Appeal is non-refundable.

(9) If an appeal is withdrawn:

(a) any interim order of the Tribunal, other than an order made in respect of costs, shall immediately cease to have effect;

(b) no fresh appeal may be brought by the appellant in relation to an order, or directive, or decision, or exercise of discretion of the Regulator which was the subject of the appeal withdrawn; and

(c) the amount paid under subsection (2)(a) will not be refunded to the appellant.”.

7. Other tribunal members - In section 11C(2)(c) of the Principal Act, for “telecommunication background” substitute “a background in telecommunication law and regulation”.

8. Tribunal proceedings - For section 11E(5) of the Principal Act, substitute:

“(5) The tribunal has the power to control its own processes and may make rules in relation to a matter of practice and procedure to facilitate the just and timely resolution of the matters before it.

(6) Without limiting subsection (5), the tribunal may make rules in relation to:

- (a) the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference;
- (b) dispute resolution processes;
- (c) receipt and disclosure of evidence, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit;
- (d) the exchange of records and documents by parties;
- (e) the filing of written submissions by parties;
- (f) the filing of admissions by parties;
- (g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an application and specifying the time within which and the manner in which the party must respond to the notice;
- (h) service and filing of notices, documents and orders, including substituted service;
- (i) requiring a party to provide an address for service or delivery of notices, documents and orders;
- (j) providing that a party's address of record is to be treated as an address for service;
- (k) procedures for preliminary or interim matters;
- (l) amendments to an application or responses to it;
- (m) the addition of parties to an application;
- (n) adjournments;
- (o) the extension or abridgement of time limits provided for in the rules;
- (p) the transcribing or tape recording of its proceedings and the process and fees for reproduction of a tape recording if requested by a party;
- (q) establishing the forms it considers advisable;

- (r) the joining of applications;
- (s) exclusion of witnesses from proceedings;
- (t) the effect of a party's non-compliance with the tribunal's rules;
- (u) access to and restriction of access to tribunal documents by any person;
- (v) witness fees and expenses;
- (w) applications to set aside any summons served by a party.

(7) In an application, the tribunal may waive or modify one (1) or more of its rules in exceptional circumstances.

(8) The tribunal must make accessible to the public any rules of practice and procedure made under this section.”.

9. Tribunal decisions - Section 11G of the Principal Act is amended by the following:

- (a) in subsection (1), for “All” substitute “Subject to subsection (4), all”; and
- (b) in subsection (2)(a) and (b) for “decision or order”, wherever occurring substitute “order, directive, decision or exercise of discretion”; and
- (c) in subsection (2)(c) -
 - (i) for “decision” substitute “order, directive, decision or exercise of discretion”;
 - (ii) between “appeal relates” and “shall not” insert “shall be modified or”;
- (d) after subsection (3), insert:

“(4) In the absence of a majority or if the Tribunal so authorises, the presiding member of the Tribunal may:

- (a) make decisions on matters of procedure; or
- (b) hear and determine any preliminary or interlocutory matter, before the Tribunal hears any substantive matter.”.

10. Appeal shall bar litigation - Section 11I of the Principal Act is amended:

- (a) for the section heading “**Appeal shall bar litigation**” substitute “**Appeal and judicial review**”; and
- (b) after subsection (2), insert:

“(3) Subject to this section, any person may seek judicial review of a decision of the Tribunal, and an application for a judicial review shall be made within 28 days of the decision being made and in accordance with the rules of court.”.

11. Customer complaints - In section 52(3) of the Principal Act:

- (a) omit “or between service providers,” and “71,”; and
- (b) after “72” insert “, 72A, 72B”.

12. Service provider disputes - In section 71 of the Principal Act:

- (a) in subsection (1), omit “(1)”; and
- (b) delete subsection (2).

13. Customer disputes - For section 72 of the Principal Act substitute:

“**72. Customer disputes** - Where a service provider and customer have been unable to resolve a matter among themselves, the customer may apply to the Regulator for assistance in resolving the dispute.”.

14. Insertion of new provisions - After section 72 of the Principal Act insert:

“**72A. Dispute resolution**-(1) An application made under section 71 or 72 shall be made in such manner as the Regulator may require.

(2) After receipt of an application under section 71 or 72, the Regulator shall determine whether:

- (a) to conduct or arrange mediation of the dispute pursuant to section 72B; or

(b) to deny the application for assistance in resolving the dispute.

(3) The Regulator may deny an application for assistance in resolving a dispute made under section 71 or 72 if it determines that:

(a) reasonable efforts have not been made to reach an amicable settlement;

(b) there are alternative means available for resolving the dispute consistent with this Act; or

(c) the dispute is frivolous or vexatious.

(4) The costs of dispute proceedings include the costs of the Regulator and the parties, including without limitation legal and expert fees and expenses, including without limitation travel expenses.

(5) The Regulator may make orders for either party to pay advances on account at any time during the dispute proceeding.

(6) At the end of the dispute proceeding, or if an application made under section 71 or 72 is withdrawn, the Regulator may make such order for costs as it sees fit under the circumstances.

72B. Mediation-(1) If the Regulator refers the dispute to mediation pursuant to section 72A(2), the Regulator may appoint any one (1) or more of its officers or employees, expert consultants or professional mediators to conduct the mediation.

(2) The Office of the Regulator shall administer financial and organisational matters relating to the mediation.

(3) Subject to subsection (4), the Regulator shall offer the parties the opportunity, acting in agreement with one another and with the facilitation of the Regulator, to:

(a) select the mediator or mediators;

(b) set the terms of engagement of the mediator or mediators;

(c) set the time and place of any mediation meetings; and

(d) determine any matters of process for the mediation.

(4) If the parties fail to agree on any matter under subsection (3), the Regulator shall determine the matter.

(5) The Regulator may for good reason consistent with this Act reject any mediator selected by the parties and the agreed terms of engagement.

(6) Mediation under this section may include:

- (a) consulting with the parties together or separately to facilitate communication between them;
- (b) assisting the parties to understand their respective perspectives, objectives and constraints;
- (c) guiding the negotiation process and seeking a mutually acceptable resolution to the dispute; and
- (d) if full resolution cannot be achieved, clarifying the remaining unresolved issues.

(7) Sections 8 to 11 only, other than section 8(3) and all other sections, of the Alternative Dispute Resolution Act 2007 apply, with the necessary modifications, to mediations conducted under this section.”.

15. Alternative dispute resolution - In section 73 of the Principal Act:

- (a) in subsection (1), after “mediation or arbitration” insert “or another dispute resolution procedure”; and
- (b) for subsection (2), substitute:

“(2) Service providers submitting a dispute to arbitration shall notify the Regulator by delivering to it a copy of the submission to arbitration at such time as it is entered into by the parties.

(3) The dispute resolution procedure agreed to by service providers shall not exclude the application of or otherwise be inconsistent with the provisions of this Act or any relevant regulation, rule, order, licence or decision or other act of authority under this Act.

(4) The Regulator shall endeavour to perform any reasonable role, if any, assigned to it in a dispute resolution procedure under subsection (1) consistent with its functions, duties and powers under this Act and other laws of Samoa.

(5) The role of the Regulator under subsection (4) may include without limitation:

- (a) mediating between the parties;
- (b) approving a notice provided by one party to another;
- (c) providing an opinion on a matter;
- (d) appointing an expert to decide the matter;
- (e) making an award of costs relating to the procedure; and
- (f) proposing or appointing one (1) or more suitable persons to carry out the required role.

(6) The Regulator may decline to carry out a role provided for it in a dispute resolution procedure under subsection (1) if it considers that the procedure or the role is not appropriate.

(7) A procedure or role is not appropriate for the purposes of subsection (6) if:

- (a) it is inadequate for its purpose or cannot be effectively implemented;
- (b) it places unsustainable demands on the Regulator's resources, including the available time of the Regulator; or
- (c) it is inconsistent with the provisions of this Act or any regulation, rule, order, licence, decision or other act of authority under this Act, or is otherwise unlawful.

(8) The Regulator's costs under this section, including but not limited to any travel or other expenses incurred by or on behalf of the Regulator in connection with the Regulator's assistance or intervention, shall be paid to the Regulator by the parties to the dispute, and the Regulator may request an advance on account against such costs."
