



Tonga

**WHALE WATCHING AND SWIMMING
REGULATIONS 2013**



WHALE WATCHING AND SWIMMING REGULATIONS 2013

Arrangement of Sections

Regulation

1	Short Title	5
2	Interpretation.....	5
3	Application.....	6
4	Purpose.....	7
5	Application for Licence	7
6	Duration of Licence	8
7	Renewal of Licences	9
8	Suspension or cancellation of a Licence	9
9	Conditions governing all interaction around any whale	10
10	Special conditions applying to whales	11
11	Special conditions applying to swimming with whales	12
12	Offences and penalties	12
13	Special interaction permit	13
14	Exemption for rendering assistance	13
15	Transitional	13
SCHEDULE 1		15

APPLICATION FOR A WHALE WATCHING LICENCE OR WHALE SWIMMING LICENCE	15
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SCHEDULE 2 **18**

APPLICATION FOR RENEWAL OF WHALE WATCHING LICENCE OR WHALE SWIMMING LICENCE	18
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WHALE WATCHING AND SWIMMING REGULATIONS 2013

WHALE WATCHING AND SWIMMING ACT 2008

IN EXERCISE of the powers conferred by section 11 of the Whale Watching and Swimming Act 2008, the Minister responsible for tourism with the consent of Cabinet, makes the following Regulations –

1 Short Title

These Regulations may be cited as the Whale Watching and Swimming Regulations 2013.

2 Interpretation

In these Regulations, unless the context otherwise requires —

“**commercial fishing**” means taking fish for sale within Tonga or Tongan fisheries waters;

“**commercial services**” or “**services**” means any services carried on for any form of hire or reward in which persons are transported, conveyed, conducted, or guided where either the purpose or a significant purpose is to watch or swim with any whale within Tongan fisheries waters;

“**calf**” means a young whale, approximately half the size or less, of adult individuals of its species;

“**Minister**” means the Minister responsible for tourism;

“fisheries waters” means the territorial waters of the Kingdom, internal waters including lagoons, and such other waters over which the Kingdom from time to time claims sovereign rights or jurisdiction with respect to the marine living resources;

“harass” includes any act that —

- (a) causes or is likely to cause injury or distress to any whale; or
- (b) disrupts significantly or is likely to disrupt significantly the normal behavioural patterns of any whale;

“leap-frogging” means the manoeuvre of moving past a vessel or vessels that may be engaged in whale-watching or whale-swimming in order to place a vessel or swimmers in the path of a whale so as to achieve the closest approach to it;

“licence” means a whale watching licence or whale watching and swimming licence granted and issued under the Act and in the form prescribed in these Regulations;

“pod” means an individual or a group of more than one whale;

“prohibited activity” means any activity contrary to a condition specified in regulations 9, 10 or 11 of these Regulations;

“service provider” means a whale watching provider or a whale watching and swimming provider;

“Special Interaction Permit” means a permit issued by the Minister in consultation with the Ministry of Agriculture, Foods, Forests and Fisheries and the Ministry responsible for environment and climate change for interacting with whales for the purpose of scientific research, education, photography (still and film) including by aircraft;

“whale swimming provider” means a person or company who has been granted a Whale Watching and Swimming licence; and

“whale watching provider” means a person or company who has been granted a Whale Watching licence.

3 Application

- (1) These Regulations shall apply throughout the Kingdom and Tongan fisheries waters.
- (2) Nothing in these Regulations applies to any fishing vessel engaged in commercial fishing, unless —
 - (a) the vessel is also engaged in commercial services; or
 - (b) the vessel deviates off course to engage in recreational viewing of or swimming with whales.

- (3) Nothing in these Regulations applies to any locals travelling to other islands, unless –
 - (a) they are also engaged in commercial services; or
 - (b) they deviate off course to engage in recreational viewing of or swimming with whales.

4 Purpose

The purpose of these Regulations is to provide for:

- (a) the management and licensing of commercial services; and
- (b) the protection, conservation, and management of whales by:
 - (i) regulating human contact or behaviour with whales either by service providers or other persons, in order to prevent adverse effects on and interference with whales; and
 - (ii) prescribing appropriate behaviour by service providers and other persons seeking to come into contact with whales.

5 Application for Licence

- (1) An application for a licence shall be made in writing to the Minister in the form prescribed in Schedule 1.
- (2) The Minister upon granting an application under sub-regulation (1) shall issue the licence in the form set out in Schedule 3 and may impose such conditions as he considers proper.
- (3) The fees payable for an application for a licence are those set out in Schedule 4.
- (4) In considering any application for a licence, the Minister shall have regard to the following:
 - (a) that the commercial services should not be contrary to the purposes and provisions of the Act and these Regulations;
 - (b) whether the commercial services is likely to have any significant adverse effect on the behavioural patterns of the whales to which the application refers, having regard to, among other things, the number and effect of existing commercial services and the applicant's proposed plan of operation;
 - (c) that it should be in the interest of the conservation, management, or protection of the whales that a licence be issued;
 - (d) whether the applicant, and such of the applicant's staff who may come into contact with whales, have sufficient experience with whales;

- (e) whether the applicant, and such of the applicant's staff who may come into contact with whales have sufficient knowledge of the local area and of sea and weather conditions;
 - (f) whether the applicant and such of the applicant's staff who may come into contact with whales have convictions for offences involving mistreatment of animals;
 - (g) whether the applicant and such of the applicant's staff who may come into contact with whales have the required skills and knowledge to provide valued services to customers; and
 - (h) that the commercial services should not be contrary to the provisions of relevant legislation which may include but is not limited the Business Licence Act, Foreign Investment Act and Shipping Act.
- (5) An application for a licence shall be accompanied by the following required documentation:
- (a) a third party public liability insurance and a copy of insurance policy;
 - (b) approved seaworthiness certification from the Marine Division of the Ministry responsible for transport for all vessels used for commercial services;
 - (c) valid Master's certificate; and
 - (d) Certificate of a Coasting Trading licence issued by the Marine Division of the Ministry responsible for transport.
- (6) The Minister shall issue, where appropriate, to every service provider a certificate identifying each vessel operating under a licence and such certificate shall be affixed at all times to the vessel.
- (7) The Minister may, by notice published in the gazette, limit the number of licences, and the number of vessels certified under each licence, granted and issued for a specified period of time where the Minister believes on reasonable grounds that:
- (a) it is necessary for the management, protection or conservation of whales; and
 - (b) there is a need to sustain the economic viability of the whale watching and whale swimming industry in the Kingdom.

6 Duration of Licence

- (1) A Licence granted and issued under these Regulations shall be valid for 3 years, as of the date of issuance, and may be renewed upon application under these Regulations.
- (2) A service provider shall throughout the duration of the validity of a licence, whether it be the initial licence or a renewed licence under these Regulations, submit before 31 December of each year to the Ministry a notice of continued

activity as prescribed in Schedule 7 and accompanied by the prescribed annual notification fees.

7 Renewal of Licences

- (1) A licence issued by the Minister may be renewed for the duration of 3 years upon expiry of the initial or renewed licence.
- (2) A licence renewal application shall be:
 - (a) made in the form prescribed in Schedule 2;
 - (b) accompanied by the renewal application fee as prescribed in Schedule 4; and
 - (c) accompanied with copies of required documents provided in regulation 5(5).

8 Suspension or cancellation of a Licence

- (1) A licence may be suspended or cancelled by the Minister under any of the following conditions, if:
 - (a) the application form or any subsequent submittals to the Minister in relation to the licence contains any material misrepresentation or false statement;
 - (b) any information given in the application or any other submittals to the Minister related to the business licence was materially incorrect so as to create a false impression of the ownership of the business or the nature of its business activity;
 - (c) the service provider carries on a prohibited activity;
 - (d) a condition imposed on the licence is breached or a necessary approval or permit from another government agency is absent or cancelled;
 - (e) the service provider or members of its staff are convicted of an offence under the Act or these Regulations; or
 - (f) the service provider is a foreign national and is found to be operating without a valid business visa.
- (2) Where the Minister suspends or cancels a licence he shall notify the service provider in writing of the reason for suspension or cancellation.
- (3) The Minister may temporarily suspend some or all licences issued under the Act and these Regulations for such period of time as he deems necessary due to:
 - (a) a major disturbance to the whale population in the Kingdom which has been identified;
 - (b) the poor health of any whale population;

- (c) the serious injury or death of a whale watcher, swimmer or whale or a serious accident involving a vessel certified under licence; or
- (d) the failure of a licence holder to comply with the terms of the licence, the Act or these Regulations.

9 Conditions governing all interaction around any whale

Every service provider and every person coming into contact with whales shall comply with the following conditions:

- (a) a service provider shall not have more than one of its certified vessels under licence interact with any pod in one day, unless two certified vessels under licence are required, one solely for whale watching purposes and the other solely for whale swimming purposes;
- (b) a person shall use their best endeavours to operate vessels and aircraft so as not to disrupt the normal movement or behaviour of any whale;
- (c) stop contact with any whale at any sign of the animal becoming disturbed or alarmed;
- (d) no person shall cause any whale to become separated from a group of whales or cause any members of such a group to be scattered;
- (e) no rubbish or food shall be thrown near or around any whale;
- (f) no sudden or repeated change in the speed or direction of any vessel shall be made except in the case of emergency;
- (g) where a vessel stops for the passengers to watch any whale, the engines shall be placed in neutral or be switched off within a minute of the vessel stopping;
- (h) no person shall disturb or harass any whale;
- (i) a vessel shall not chase, encircle, block the direction of travel of, or position itself in the middle of a pod of whales;
- (j) no person shall touch or feed any whale;
- (k) no person shall place a vessel up wind of, or in a position where it will drift into, the direction of travel of any whale;
- (l) any vessel within 10 metres of a whale shall move at a constant slow speed no faster than the slowest whale in the vicinity, or at idle or “no wake” speed; and
- (m) vessels departing from the vicinity of any whale shall proceed slowly at idle or “no wake” speed until the vessel is at least 300 metres from the nearest whale.

10 Special conditions applying to whales

In addition to complying with the conditions set out in regulation 9 every commercial service and every person coming into contact with any whale shall also comply with the following conditions:

- (a) no person shall be in the water with any whale unless he enters the water from the certified vessel of a whale swimming provider;
- (b) no operator of a private vessel may approach closer than 300 metres to any whale unless it complies with regulation 11;
- (c) whale watching providers may approach an adult whale no closer than 10 metres and any pod containing a calf, no closer than 50 metres;
- (d) whale watching and swimming providers may approach only in accordance with regulation 9;
- (e) if a whale approaches a vessel, the master of the vessel shall, wherever practicable:
 - (i) manoeuvre the vessel so as to keep out of the whale's direction of travel; and
 - (ii) maintain a minimum distance of 300 metres from the whale unless the vessel is operated by a service provider;
- (f) a vessel shall approach a whale from a direction that is parallel to the whale and slightly to the rear of the whale and never in the area directly in front or behind a whale;
- (g) a helicopter shall not get closer (in height or distance) than 500 metres to a whale;
- (h) a plane shall not get closer (in height or distance) than 300 metres to a whale;
- (i) no person shall make any loud or disturbing noise near whales;
- (j) no person shall use Self Contained Underwater Breathing Apparatus (SCUBA) for diving or swimming with whales;
- (k) no person shall use artificial light sources around whales;
- (l) no person shall use jet skis or motorized swimming aids for whale watching or swimming;
- (m) no person shall use a jet ski to approach closer than 2,000 metres of any whale; and
- (n) the maximum interaction time of any vessel or vessels with any individual pod of whales including a mother and a calf pairing is one and a half hours unless under a Special Interaction Permit under regulation 13. After any one-and-a-half hour interaction, during which a service provider may leave the pod and another may interact with it, no vessel may attempt to interact with the pod for at least one and a half hours.

11 Special conditions applying to swimming with whales

In addition to complying with regulations 9 and 10 every service provider shall also comply with the following conditions:

- (a) only whale swimming providers are permitted to put swimmers in the water with whales;
- (b) each service provider shall enter into and sign a written waiver agreement with each client, in the form set out in Schedule 5;
- (c) no more than four clients plus one trained local guide per certified vessel may be in the water with any one pod of whales at a time;
- (d) only one certified vessel under licence may put swimmers in the water with any one pod of whales;
- (e) each licenced service provider is solely responsible for determining whether the conditions for clients to swim with whales are safe;
- (f) vessels carrying six or more passengers shall carry a minimum of two crew including the master;
- (g) vessels with swimmers in the water shall fly the alpha flag;
- (h) vessels shall carry an approved first aid kit and at least one member of the crew is to have a current First Aid Certificate or has first aid knowledge to the satisfaction of the Minister;
- (i) all vessels shall be sea-worthy in accordance with the Shipping Act;
- (j) all service providers shall have third party liability insurance coverage;
- (k) if a second service provider arrives, the approaching vessel shall make contact by VHF radio (Channel 74 – low power) and stay outside 100 metres;
- (l) the practice of leap-frogging is prohibited;
- (m) no swimmer shall approach any whale closer than 5 metres;
- (n) no vessel shall approach any whale closer than 10 metres for the purposes of dropping off or picking up any swimmer except in an emergency where the safety of a swimmer is at risk;
- (o) any dinghy, small boat, kayak that is launched for the purpose of whale watching and approaches closer than 100 metres to a whale shall carry a handheld VHF radio; and
- (p) two or more kayaks within 100 metres of a whale shall be considered as one provider.

12 Offences and penalties

- (1) Any person who breaches any of the conditions in regulations 9, 10 or 11 commits an offence and is liable upon conviction:

- (a) if it is an individual:
 - (i) in the case of a first time offence to a fine of not less than \$1,000 and not exceeding \$5,000 or to imprisonment for a period not exceeding 18 months or both; and
 - (ii) in the case of a subsequent offence to a fine of not less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding 3 years or both,
 - (b) if it is a company:
 - (i) in the case of a first time offence to a fine of not less than \$10,000 and not exceeding \$20,000; and
 - (ii) in the case of a subsequent offence to a fine of not less than \$10,000 and not exceeding \$ 50,000.
- (2) If a company is convicted of an offence against these regulations, every director and every person concerned in the management of the company shall be guilty of a like offence if it is proved that the act which constituted the offence took place with his authority, permission or consent.

13 Special interaction permit

- (1) An application for a Special Interaction Permit shall be made in writing to the Minister in the form prescribed in Schedule 6.
- (2) Every applicant for a Special Interaction Permit shall name a local guide or observer from a service provider who will be responsible for ensuring compliance with the conditions of the Permit.
- (3) The Minister may grant and issue a permit for any period of time not exceeding one year.
- (4) Fees payable for Special Interaction Permits are those prescribed in Schedule 4.

14 Exemption for rendering assistance

Nothing in these Regulations shall apply to persons or vessels rendering assistance to:

- (a) stranded or injured whales; or
- (b) vessels or passengers in distress.

15 Transitional

All persons or businesses currently operating whale watching or whale swimming services at the commencement of these Regulations and who want to continue that

service, shall within one month from the commencement of these Regulations, apply for a licence under the Act and these Regulations.

Made at Nuku'alofa on this 17th day of May 2013.

Lord Tu'ivakano

Minister responsible for tourism