

## **Foreign Investment Bill**

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## A BILL

for

### AN ACT RELATING TO FOREIGN INVESTMENT

**BE IT ENACTED** by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

- |                                     |           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|-------------------------------------|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Short title and commencement</b> | <b>1.</b> | (1) This Act may be cited as the Foreign Investment Act 2002.<br><br>(2) This Act shall come into force on a day proclaimed by His Majesty in Council                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>Interpretation.</b>              | <b>2.</b> | In this Act, unless the context otherwise requires -<br><br>" <b>certificate</b> " means a foreign investment registration certificate issued by the Secretary under section 8;<br><br>" <b>Convention on Settlement of Investment Disputes</b> " means the Convention signed in Washington DC, United States of America on 3 <sup>rd</sup> February 1978 and ratified by the Kingdom of Tonga on 21 <sup>st</sup> March 1990.<br><br>" <b>foreign citizen</b> " means an individual person who is not a Tongan subject;<br><br>" <b>foreign investment business</b> " means a foreign investor which carries on any activity for the purpose of generating revenue in trade, commerce or industry, and includes any trade, profession or calling;<br><br>" <b>foreign investment register</b> " means the register of certificates established and maintained by the Secretary under section 6;<br><br>" <b>foreign investor</b> " means -<br><br>(a) in the case of an individual - a person who is not a Tongan subject;<br><br>(b) in the case of a partnership or unincorporated joint venture - a partnership or unincorporated joint venture where foreign investment business controls more than 25% of the investment. |

- (c) in the case of company -
  - (i) a company incorporated in a country outside Tonga; or
  - (ii) a company incorporated in Tonga where foreign investment business controls more than 25% of the company's voting shares.
- (d) and in every other case - a person which is not incorporated or not constituted under the Laws of Tonga;

**"Minister"** means the Minister of Labour, Commerce and Industries;

**"Ministry"** means the Ministry of Labour, Commerce and Industries;

**"prohibited activity"** means a business activity specified in the Schedule 1 to the Business Licenses Act 2003;

**"Regulations"** means regulations made by the Minister under section 17;

**"reserved activity"** means a business activity included in the Reserved List;

**"reserved List"** means the list of business activities prescribed as such in the Regulations;

**"restricted activity"** means a business activity included in the Restricted List;

**"restricted List"** means the list of business activities prescribed as such in the Regulations;

**"Secretary"** means the Secretary for Labour, Commerce & Industries;

**"Tongan investor"** means -

- (a) in the case of an individual person - a person who is a Tongan subject; and
- (b) in any other case - a person which is incorporated or constituted under the Laws of Tonga and which is not a foreign investor;

**"Tongan subject"** means a person who is a Tongan subject by birth or naturalization.

**Investment  
by foreign investment  
businesses**

3. (1) Subject to this Act, and any other Laws of Tonga, a foreign investment business may carry on any business activity in the Kingdom that is not -
- (a) a reserved activity; or
  - (b) a prohibited activity.
- (2) A foreign citizen may be employed by a person carrying on a reserved activity if the foreign citizen is entitled to carry on that employment in the Kingdom under the Immigration Act and any other Laws of Tonga.
- (3) A foreign investment business may carry on a restricted activity if the foreign investment business satisfies the conditions prescribed in the Regulations.

**Reserved and  
restricted lists**

4. (1) The Minister must establish and maintain a Reserved List setting out the business activities which are reserved only for Tongan investors to carry on.
- (2) The Minister must establish and maintain a Restricted List setting out the business activities which a foreign investment business may carry on only if the foreign investment business satisfies the conditions prescribed in the Regulations.
- (3) The Minister may prescribe in the Regulations, after consulting with the Secretary, any or all of the following conditions which may apply generally or to a particular business activity -
- (a) a foreign investment business may carry on a business activity only by entering into a joint venture with a Tongan investor;
  - (b) the minimum or maximum amount that must be invested by a foreign investment business;
  - (c) the target number of employees of a foreign investment business who are Tongan subjects; and
  - (d) the amount, if any, of investment capital of a foreign investment business to be sourced from outside Tonga.



(iv) is a restricted activity and which meets the conditions applicable to the business activity; or

(b) inform the applicant in writing that the application has been refused on the grounds that it is for a business activity which is -

(i) a prohibited activity;

(ii) a reserved activity; or

(iii) a restricted activity and the business activity fails to comply with the prescribed conditions.

(2) A certificate issued under section 8(1)(a)(iv) must be endorsed with a list of the prescribed conditions.

(3) The Secretary may delegate, by written notice, any or all of the Secretary's powers under this Act to one or more officers in the Ministry.

**Referral to  
Minister**

**9.** If the Secretary, when considering an application under section 8, is unable to determine whether a business activity is -

(a) a prohibited activity;

(b) a reserved activity; or

(c) a restricted activity;

the Secretary must refer the application to the Minister who must determine in writing, and within 7 calendar days of the reference to him, whether the business activity is a prohibited activity, a reserved activity or a restricted activity.

**Duration of  
certificate**

**10.** (1) A certificate is valid from the date of its issue until the termination of the business activity for which it was issued.

(2) A certificate ceases to be valid if the business activity for which it is issued does not commence within 1 year of the date of the certificate's issue.

**Cancellation of certificate**

- 11.** A certificate may be cancelled by the Secretary if -
- (a) any information given in the application for the certificate was materially incorrect so as to create a false impression of the ownership of the foreign investment business or the nature of its activities;
  - (b) the foreign investment business carries on a prohibited activity or a restricted activity;
  - (c) a condition imposed under section 8(1)(a)(iv) is breached; or
  - (d) a foreign investment business fails to substantially comply with any foreign investment reporting requirements prescribed in the Regulations;

provided always that no certificate shall be cancelled without the certificate holder first having been given an opportunity to be heard by the Secretary.

**Transfer of certificate**

- 12.**
- (1) A foreign investment business which holds a certificate may apply to the Secretary to transfer the certificate to another foreign investment business.
  - (2) An application under subsection (1) must be made and determined in accordance with the method prescribed in the Regulations.
  - (3) The Secretary must not approve an application to transfer a certificate unless the foreign investment business to which it is to be transferred satisfies this Act as if that business were making an application under section 7.
  - (4) A certificate may not be transferred other than in accordance with this section.
  - (5) The Secretary may amend a certificate to correct minor or typographical errors.

**Appeals**

- 13.** (1) A foreign investment business which is -
- (a) refused a certificate by the Secretary under section 8(b)(ii); or
  - (b) refused a certificate by the Secretary under section 8(b)(iii),

may appeal to the Minister who shall nominate and appoint an Arbitrator to determine the appeal.

(2) The Arbitrator must give a written decision determining the appeal and that decision -

- (a) is final binding on the foreign investment business and the Secretary; and
- (b) may not be appealed to or reviewed by any Court.

(3) The Appellant shall be responsible for payment of the Arbitrator's fees and disbursements.

(4) A foreign investment business whose certificate is cancelled by the Secretary under section 11 may appeal to the Supreme Court against the decision to cancel the certificate and any such cancellation shall be suspended pending the outcome of the appeal. .

**Offences and penalties**

- 14.** (1) Any foreign investor who fails to comply with any of the provisions of this Act commits an offence, and is liable upon conviction to a fine not exceeding \$10,000 and in default of payment to imprisonment for a period not exceeding 18 months.

**Investment guarantees**

- 15.** (1) The provisions of the United Kingdom's Arbitration Act shall have full effect in relation to any dispute involving a foreign investment business in Tonga.
- (2) Subject to this Act and any other Laws of Tonga, the Convention on the Settlement of Investment Disputes shall have the force of Laws in Tonga..
- (3) The property of a foreign investment business which holds a certificate shall not be acquired compulsorily without just compensation, other than in accordance with the Laws of Tonga.



(4) A foreign investment business which holds a certificate must be accorded treatment under the Laws of Tonga no less favourable than the treatment accorded to a business owned by Tongan investors.

(5) A foreign investment business which holds a certificate may, subject to any Laws of Tonga relating to taxation or exchange control, transfer capital and income of its business to outside Tonga.

**Transitional  
arrangements**

- 16.** (1) Every foreign investment business carrying on a business in Tonga on the date that this Act commences must apply to the Secretary for a certificate within 12 months of that date provided always that;
- (a) no such application shall be refused unless the applicant's business activity is a prohibited activity, or a reserved activity;
  - (b) no such application shall be made subject to the prescribed conditions unless the applicant's business activity is a restricted activity.
- (2) The Secretary may approve a written application for an extension of the time period under subsection (1) for a further period not exceeding 12 months.

**Regulations**

- 17.** (1) The Minister shall make regulations as are required under this Act or are necessary or expedient for giving full effect to the provisions of this Act and for its proper and efficient administration.
- (2) Without limiting the power in subsection (1), regulations may be made under this subsection for the following purposes -
- (a) the inclusion, deletion, amendment or clarification of any business activity in the Reserved List;
  - (b) the inclusion, deletion, amendment or clarification of any business activity in the Restricted List and the conditions under subsection 4(3);
  - (c) the fees to be paid in relation to an application to issue or amend a certificate;

- (d) the form of the foreign investment register;
- (e) fees for the inspection, and making copies, of the foreign investment register;
- (f) the form of reports to be submitted by foreign investment businesses; and
- (g) the procedures for applying for amendment of certificates and entries in the foreign investment register and the circumstances in which such applications may or must be made.

Pased in the Legislative Assembly this \_\_\_\_\_ day of \_\_\_\_\_ 2002.

1. **RESERVE LIST:** (Sectors or activities not open to foreign investment)

- Taxi
- Passenger vehicle for hire
- Retailing of foodstuff
- Bakery

2. **RESTRICTED LIST:** (Sectors open to foreign investment subject to certain restrictions)

- Commercial Farming (open except squash)
- Tourism (open provided all the requirements are met)
- Commercial Fishing (open except bottom fishing, reef & inshore fishing which are subject to their respective Resource Management Plan).