

Tonga

Foreign Investment Act 2002 (2002)

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The year indicated in brackets after the title of the law refers to the year of publication in the Official Gazette or, when this is not available, the year of adoption of the law.

Contents

Foreign Investment Act 2002

Act No. 22 of 2002

Article 1. Short title and commencement

- 1) This Act may be cited as the Foreign Investment Act 2002.
- 2) This Act shall come into force on a day proclaimed by His Majesty in Council.

Article 2. Interpretation

In this Act, unless the context otherwise requires —

“certificate” means a foreign investment registration certificate under section 8 and includes a restricted certificate;

“Convention on Settlement of Investment Disputes” means the Convention signed in Washington DC, United States of America on 3rd February 1978 and ratified by the Kingdom of Tonga on 21st March 1990;

“foreign investment business” means a foreign investor carrying on any activity for the purpose of generating revenue in trade, commerce or industry, and includes any trade, profession or calling;

“foreign investment register” means the register of certificates under section 6;

“foreign investor” means —

a. in the case of an individual - a person who is not a Tongan subject and does not reside in the Kingdom;

b. in the case of a partnership or unincorporated joint venture - a venture where a person who is not a Tongan subject controls more than 25% of the investment;

c. in the case of a company —

i. a company incorporated in a country outside Tonga; or

ii. a company incorporated in Tonga where a person who is not a Tongan subject controls more than 25% of the company's voting shares;

“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 Schedule 1 to the Business Licences Act 2002;

“reserved activity” means a business activity included in the Reserved List;

“Reserved List” means the list of business activities which may be prescribed by the Regulations under this Act from time to time;

“restricted activity” means a business activity included in the Restricted List;

“restricted certificate” means a foreign investment registration certificate under section 8 in respect of a business activity which satisfies the conditions prescribed for restricted activities;

“Restricted List” means the list of business activities which may be prescribed by the Regulations under this Act from time to time;

“Secretary” means the Secretary for Labour, Commerce & Industries;

“Tongan investor” means a Tongan subject or body corporate incorporated in Tonga.

Article 3. Investment by foreign investment businesses

1) Subject to this Act, and any other law, 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 not prohibited from carrying on that employment under the Immigration Act (Cap. 62) and any other law.

3) Subject to section 5, a foreign investment business may carry on a restricted activity if the foreign investment business satisfies the conditions prescribed in the Regulations.

Article 4. Reserved List and Restricted List

1) The Minister shall establish and maintain a Reserved List setting out the business activities which are reserved only for Tongan investors.

2) The Minister shall establish and maintain a Restricted List setting out the business activities which a foreign investment business may carry on provided it satisfies the conditions prescribed in the Regulations.

Article 5. Foreign investment registration certificate

1) Every foreign investment business shall obtain and hold a valid foreign investment registration certificate issued by the Secretary under this Act.

2) A certificate shall be in the form prescribed in the Regulations.

Article 6. Secretary's functions

1) The Secretary shall be responsible for —

a. the co-ordination of the Reserved List and the Restricted List;

b. the receipt and processing of applications for certificates;

c. the issuing of certificates;

d. establishing and maintaining a register of certificates;

e. the monitoring of foreign investments in Tonga; and

f. ensuring compliance by foreign investment businesses with this Act and the Regulations.

Article 7. Application for certificate

An application for a certificate shall be made in the prescribed form.

Article 8. Issue or refusal of certificate

1) Subject to subsection (2), the Secretary shall consider each application and determine as soon as practicable whether to refuse the application or issue a certificate.

2) A certificate shall not be issued in respect of a business activity that is a prohibited activity, a reserved activity, or a restricted activity which does not meet the conditions applicable to such a business activity.

3) The Secretary shall inform an unsuccessful applicant in writing of the grounds upon which his application has been refused.

4) A restricted certificate issued under subsection (1) shall be endorsed with the list of the prescribed conditions.

Article 9. Delegation

The Secretary may, in writing, delegate any or all of his powers under this Act to one or more officers of the Ministry.

Article 10. Duration of certificate

1) Subject to section 11 a certificate shall be valid from the date of its issue until the termination of its business activity.

2) A certificate shall cease 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.

Article 11. Cancellation of certificate

A certificate may be cancelled by the Secretary if —

- a. the application contained any material misrepresentation or false statement;
- b. the foreign investment business carries on a prohibited activity or a restricted activity;
or
- c. any condition imposed under this Act or the Regulations is breached.

Article 12. Holder to be heard

No certificate under this Act shall be cancelled without the certificate holder first having been given an opportunity to be heard by the Secretary.

Article 13. Transfer of certificate

1) A foreign investment business which holds a certificate may apply to the Secretary for approval to transfer the certificate to another foreign investment business.

2) An application under subsection (1) shall be made in accordance with the form and method prescribed in the Regulations.

3) The Secretary shall not approve an application to transfer a certificate unless the foreign investment business to which it is to be transferred satisfies the criteria of this Act.

Article 14. Appeals

1) A foreign investment business which is refused a certificate may appeal to the Minister who shall nominate and appoint an Arbitrator to determine the appeal.

2) The Arbitrator shall give a written decision determining the appeal and that decision shall be final and binding on the foreign investment business and the Secretary.

3) 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.

Article 15. Offences and penalties

Any person who contravenes 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.

Article 16. Investment guarantees

1) The provisions of the Arbitration Act 1996 (UK) shall apply to any arbitration under this Act.

2) Subject to this Act and any other laws, the Convention on the Settlement of Investment Disputes shall have the force of law in Tonga.

3) The property of a foreign investment business which holds a certificate shall not be acquired compulsorily without just compensation.

4) A foreign investment business which holds a certificate shall be entitled to the protection of clause 4 of the Constitution of Tonga.

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

Article 17. Transitional arrangements

1) Every foreign investment business carrying on a business in Tonga on the date that this Act commences may apply to the Secretary for a certificate within 12 months of that date.

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.

Article 18. Regulations

- 1) The Minister may with the consent of Cabinet make regulations for the proper and efficient administration of this Act.
- 2) Without limiting the power in subsection (1), regulations may be made 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;
 - c. prescribing conditions which may apply generally or to a particular business activity;
 - d. prescribing the procedure for making an application for a certificate;
 - e. prescribing the procedure for the transfer of a certificate;
 - f. the fees payable under this Act;
 - g. the forms required under this Act;
 - h. the procedures for applying for amendment of certificates and entries in the foreign investment register and the circumstances in which such applications may or shall be made.

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