



Tonga

FOREIGN INVESTMENT BILL 2020



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FOREIGN INVESTMENT BILL 2020

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:

PART 1 - PRELIMINARY

1 Short title and commencement

- (1) This Act may be cited as the Foreign Investment Act 2020.
- (2) This Act shall come into force on a day proclaimed by Cabinet.

2 Interpretation

In this Act, unless the context otherwise requires -

“**board**” in relation to a body corporate, means its board of directors or equivalent governing body;

“**business activity**” means any activity in trade, commerce, or industry that is carried on for profit or gain, and includes any trade, profession, or calling that is established in Tonga by a person on a long-term or permanent basis;

“**certificate**” or “**foreign investment registration certificate**” -

- (a) means a certificate issued under section 15(3)(a); and
- (b) includes a replacement certificate issued under section 18(3)(a) or 21(3);

“Chief Executive Officer” means the Chief Executive Officer responsible for commerce;

“Convention on the Settlement of Investment Disputes” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States adopted at Washington D.C., United States of America on 18 March 1965 and ratified by the Kingdom of Tonga on 21 March 1990;

“domestic investor” means an investor who is not an overseas person;

“file” means to file, give, deliver, provide, submit, deposit, apply, or otherwise make available, and includes to file electronically;

“Minister” means the Minister responsible for commerce;

“Ministry” means the Ministry responsible for commerce;

“overseas person” has the meaning given to it in section 6;

“prescribed” means prescribed by Regulations made under this Act;

“prescribed form” -

(a) means the form prescribed by Regulations made under this Act; and

(b) includes, if no form is prescribed, a form approved by the Registrar;

“prohibited activity” has the meaning given to it in section 7(1);

“register” means the foreign investment register established under section 30;

“Registrar” means the Registrar of Foreign Investment appointed under section 33(1);

“Regulations” means Regulations made under this Act;

“reserved activity” has the meaning given to it in section 7(2);

“Reserved List” means the list that is established under section 8(1);

“restricted activity” has the meaning given to it in section 7(3);

“Restricted List” means the list that is established under section 8(2);

“securities” in relation to a body corporate, means the shares issued by the body corporate, or the units into which the equity or proprietary interests in the body corporate are divided, or their equivalent;

“sign” in relation to information that is filed electronically, includes an electronic signature if -

(a) the signature identifies the person signing;

(b) the signature indicates that person’s approval of the information; and

(c) the method of signing is approved by the Registrar;

“Tongan subject” means a person who is a Tongan subject under the provisions of the Nationality Act (Cap. 59);

“writing” includes -

(a) the recording of words in a permanent and legible form;

- (b) the recording of words by electronic means that can be retrieved and read; and
- (c) the display of words by any form of electronic or other means of communication that is subsequently recorded by electronic means that can, by any means, be retrieved and read;

“**working day**” means a day that is not -

- (a) a Saturday or Sunday; or
- (b) a public holiday.

3 Act binds the Crown

This Act binds the Crown.

PART 2 – SCOPE OF FOREIGN INVESTMENT IN TONGA

4 General rule for foreign investment

An overseas person may carry on any business activity in Tonga subject to -

- (a) compliance with the laws of Tonga; and
- (b) the exceptions or restrictions set out in section 5.

5 Specific exceptions or restrictions that apply to foreign investment in Tonga

- (1) An overseas person shall not carry on a business activity in Tonga that is -
 - (a) a prohibited activity; or
 - (b) a reserved activity.
- (2) An overseas person shall not carry on a business activity in Tonga that is a restricted activity unless the overseas person satisfies the conditions prescribed by the Regulations for carrying on that activity.
- (3) Nothing in subsection (1) prevents a person carrying on a reserved activity from employing a non-Tongan subject whose employment is not prohibited under the Immigration Act (Cap. 62) or any other law.

6 Meaning of overseas person

In this Act, “**overseas person**” means -

- (a) an individual who is not a Tongan subject;
- (b) a body corporate that is incorporated outside Tonga;

- (c) a body corporate, if an overseas person or persons -
 - (i) have a beneficial interest in one or more of any class of such body corporate's securities;
 - (ii) have the power to control the composition of such body corporate's board; or
 - (iii) have the right to exercise or control the exercise of one or more votes at a meeting of such body corporate;
- (d) a partnership, unincorporated joint venture or other unincorporated body of persons (other than a trust), if -
 - (i) one or more of such partnership, unincorporated joint venture or other unincorporated body of persons, partners or members are overseas persons;
 - (ii) an overseas person or persons have a beneficial interest in or entitlement to the profits or assets or any proportion of them (including on winding up) of such partnership, unincorporated joint venture or other unincorporated body of persons; or
 - (iii) an overseas person or persons have the right to exercise or control the exercise of one or more votes at a meeting of such partnership, unincorporated joint venture or other unincorporated body of persons; or
- (e) a trust if -
 - (i) one or more of the trustees are overseas persons;
 - (ii) an overseas person or persons have a beneficial entitlement to the trust property or any proportion of it;
 - (iii) one or more of the persons having the right to amend or control the amendment of the trust deed are overseas persons; or
 - (iv) one or more of the persons having the right to control the composition of the trustees are overseas persons.

7 Meaning of prohibited activity, reserved activity and restricted activity

- (1) A prohibited activity is an activity that is specified in Schedule 1 to the Business Licences Act 2002, as a prohibited activity.
- (2) A reserved activity is an activity that is listed in the Reserved List and is accordingly a business activity that is reserved exclusively for domestic investors.
- (3) A restricted activity is an activity that is listed in the Restricted List and accordingly may be carried on by an overseas person provided that the overseas person satisfies the conditions prescribed by the Regulations for carrying on that activity.

PART 3 – ADMINISTRATION OF FOREIGN INVESTMENT REGIME IN TONGA

DIVISION 1 – BUSINESS ACTIVITIES THAT ARE RESERVED OR RESTRICTED

8 Reserved List and Restricted List

- (1) The Minister may by Regulations specify a list of business activities as the Reserved List and the activities so listed are reserved exclusively for domestic investors.
- (2) The Minister may by Regulations specify a list of business activities as the Restricted List and the activities so listed may be carried on by an overseas person provided that the overseas person satisfies the prescribed conditions for carrying on those activities.
- (3) The Minister may from time to time by Regulations amend the Reserved List or the Restricted List by adding, amending, clarifying or removing an activity, but in doing so shall have regard to, but is not limited to, the principles set out in section 9.
- (4) An amendment of the Restricted List shall not affect the holder of an existing foreign investment certificate who may carry on the activity in question as if the amendment had not been made.

9 Principles for specifying reserved and restricted activities

In specifying an activity as a reserved activity or a restricted activity for the purpose of the Reserved List and the Restricted List, the Minister shall have regard to the following principles -

- (a) keeping the lists as short as possible;
- (b) reduction or addition over time of the number of activities contained in the lists to encourage competition within the economy of Tonga;
- (c) clear definition of each activity to enable effective monitoring and enforcement of conditions;
- (d) no inclusion of an activity unless there are already several Tongan businesses that undertake it;
- (e) no inclusion of an activity producing goods or services that are important inputs into the operations of other Tongan businesses, particularly those that are export-oriented;
- (f) inclusion of an activity only if consistent with Tonga's commitments and obligations under international, regional, multilateral and bilateral trade and investment agreements; and

- (g) no inclusion of an activity without appropriate provision for existing foreign investors who have been issued with a valid foreign investment certificate in relation to that activity to continue carrying on that activity.

10 Review of Reserved List and Restricted List

- (1) The Registrar shall review the Reserved List and the Restricted List, including the prescribed conditions applicable to the Restricted List, at intervals of not more than 3 years.
- (2) In undertaking the review, the Registrar shall have regard to, but is not limited to, the principles set out in section 9.
- (3) In undertaking the review, the Registrar shall consult with -
 - (a) relevant stakeholders, including stakeholders at national and local levels of government, stakeholders in the private sector, and non-government organisations; and
 - (b) the general public.
- (4) On completion of the review, the Registrar shall -
 - (a) prepare a written report of the review;
 - (b) provide on such report any recommendations based on the outcome of the review;
 - (c) submit the report to the Minister for his consideration; and
 - (d) ensure the report is published on an Internet site maintained by the Ministry to which members of the public have access.

11 Minister's consideration of review report

- (1) The Minister shall, within 20 working days after receiving a report submitted under section 10(4), in respect of each recommendation -
 - (a) accept the recommendation; or
 - (b) reject it.
- (2) If the Minister accepts a recommendation for an amendment to the lists, the Minister shall by Regulations amend the lists in accordance with the recommendation.
- (3) If the Minister rejects a recommendation, whether for an amendment to the lists or not, the Minister shall -
 - (a) make public a statement of the Minister's reasons for rejecting the recommendation; and
 - (b) ensure that the statement is published on an Internet site maintained by the Ministry to which members of the public have access.

DIVISION 2 – FOREIGN INVESTMENT REGISTRATION**12 Foreign investment registration certificate**

- (1) An overseas person shall not commence carrying on a business activity in Tonga without first obtaining a valid foreign investment registration certificate.
- (2) Notwithstanding anything to the contrary, an overseas person is not required to obtain a foreign investment registration certificate when -
 - (a) engaging in a business activity exclusively to fulfill the terms of a contract or agreement, either as a party or as a subcontractor, with the Government of Tonga or a public corporation. Such business activity or foreign investment shall be governed and regulated by the contract or agreement notwithstanding any provisions of this Act;
 - (b) maintaining or defending any action or suit, or participating in administrative proceedings, arbitration or mediation, as an actual party to such action;
 - (c) maintaining an account or accounts in a financial institution in Tonga;
 - (d) a manufacturer or distributor is performing services auxiliary to an existing contract of sale to which they are a party, such as installing machinery which has been manufactured and exported to Tonga by such manufacturer or distributor, servicing the same, and training personnel located in Tonga to operate it;
 - (e) conducting an isolated transaction that is completed within a period of thirty (30) calendar days and which is not in the course of a series of repeated transactions of like nature;
 - (f) being a person engaged in the practice of accounting, architecture, engineering, law, dentistry, medicine or veterinary medicine, and who is present in Tonga temporarily, from time to time, to provide professional services.

13 Application for issue of certificate

An application for the issue of a certificate shall -

- (a) be in writing;
- (b) be in the prescribed form;
- (c) contain the information set out in section 14 and any other prescribed information;
- (d) be signed by or on behalf of the applicant;
- (e) be accompanied by the prescribed fee; and
- (f) be filed with the Registrar.

14 Information required for application for issue of certificate

- (1) The application for the issue of a certificate shall contain the following information -
 - (a) the name of the applicant;
 - (b) the applicant's physical address in Tonga and a physical address for service in Tonga;
 - (c) the applicant's contact details, including email address;
 - (d) the name, address, and contact details, including email address, of the applicant's representative in Tonga;
 - (e) if the applicant is an individual, the individual's address in his country of residence;
 - (f) if the applicant is a trust, partnership, joint venture, or unincorporated body, -
 - (i) the name and residential address of each of the trustees, partners, or members who are individuals; and
 - (ii) the name, address in the country of incorporation, and registration number in that country for each trustee, partner, or member that is an incorporated body;
 - (g) if the applicant is an incorporated body, -
 - (i) its address in its country of incorporation and registration number in that country; and
 - (ii) the names and residential addresses of each of its directors or equivalent;
 - (h) in respect of each proposed business activity -
 - (i) the nature of the activity;
 - (ii) a description of the investment and business operations relating to the activity, including proposed capital investment and creation of employment; and
 - (iii) the proposed location or locations of the activity; and
 - (i) any other prescribed information.
- (2) The application shall state that –
 - (a) the applicant is not an undischarged bankrupt in any jurisdiction, in the case of an individual;
 - (b) no trustee, partner, or member of the applicant is an undischarged bankrupt in any jurisdiction or in liquidation, receivership, or voluntary administration in any jurisdiction, in the case of an applicant that is a trust, partnership, joint venture, or unincorporated body; or
 - (c) the applicant is not in liquidation, receivership, or voluntary administration in any jurisdiction, in the case of an applicant that is an incorporated body.

15 Determination of application for issue of certificate

- (1) The Registrar shall determine an application for the issue of a certificate within 5 working days after receiving the application.
- (2) The Registrar is not required to determine an application that does not comply with sections 13 and 14 or that is in any other respect incomplete.
- (3) Within 3 working days after making the determination, the Registrar shall, according to his decision, -
 - (a) issue a certificate in the prescribed form; or
 - (b) give the applicant a written notice stating that the application is refused and giving the reasons for the refusal.
- (4) The Registrar shall determine that a certificate be issued if he is satisfied -
 - (a) as to the veracity and completeness of the information required under section 14;
 - (b) that the proposed business activity is not a prohibited or reserved activity; and
 - (c) in the case of a proposed business activity that is a restricted activity, that the proposed business activity satisfies the relevant conditions prescribed in the Regulations.

16 Transfer of certificate

- (1) The Registrar may, on the application of the holder, approve the transfer of a certificate by the holder to another overseas person.
- (2) The application for the transfer of a certificate shall -
 - (a) be in writing;
 - (b) be in the prescribed form;
 - (c) contain the information set out in section 17;
 - (d) be signed by or on behalf of both the applicant and the transferee;
 - (e) be accompanied by the prescribed fee; and
 - (f) be filed with the Registrar.

17 Information required for application for transfer of certificate

- (1) The application for the transfer of a certificate shall contain the following information -
 - (a) the name of the transferee;
 - (b) the transferee's address in Tonga and physical address for service in Tonga;
 - (c) the transferee's contact details, including email address;

- (d) the name, address, and contact details, including email address of the transferee's representative in Tonga;
 - (e) the reason for the transfer;
 - (f) if the transferee is a trust, partnership, joint venture, or unincorporated body, -
 - (i) the name and residential address of each of the trustees, partners, or members who are individuals; and
 - (ii) the name, address in the country of incorporation, and registration number in that country for each trustee, partner, or member that is an incorporated body;
 - (g) if the transferee is an incorporated body, -
 - (i) its address in its country of incorporation and registration number in that country; and
 - (ii) the names and residential addresses of each of its directors or equivalent;
 - (h) the business activity to which the certificate relates; and
 - (i) any other prescribed information.
- (2) The application shall state that –
- (a) the transferee is not an undischarged bankrupt in any jurisdiction, in the case of an individual;
 - (b) no trustee, partner, or member of the transferee is an undischarged bankrupt in any jurisdiction or in liquidation, receivership, or voluntary administration in any jurisdiction, in the case of a transferee that is a trust, partnership, joint venture, or unincorporated body; or
 - (c) the transferee is not in liquidation, receivership, or voluntary administration in any jurisdiction, in the case of a transferee that is an incorporated body.

18 Determination of application for transfer of certificate

- (1) The Registrar shall determine an application for the transfer of a certificate within 5 working days after receiving the application.
- (2) The Registrar is not required to determine an application that does not comply with sections 16 and 17 or that is in any other respect incomplete.
- (3) Within 3 working days after making the determination, the Registrar shall, according to his decision, -
 - (a) issue a replacement certificate in the prescribed form naming the transferee as the holder; or
 - (b) give the applicant a written notice stating that the application is refused and giving the reasons for the refusal.

- (4) The Registrar shall determine that a replacement certificate naming the transferee as the holder be issued if the Registrar is satisfied –
 - (a) as to the veracity and completeness of the information required under section 17; and
 - (b) that the business activity continues to meet the criteria set out in section 15(4)(b) and (c).

19 Appeal against refusal of application for issue or transfer of certificate

- (1) An applicant who has been refused a certificate may appeal in writing to the Minister within 10 working days from the date of the decision.
- (2) Upon receipt of the appeal, the Minister shall appoint an Arbitrator within 5 working days to determine the appeal.
- (3) The Arbitrator shall give a written decision within 20 working days and that decision shall be final.
- (4) The Minister shall inform the applicant of the Arbitrator's decision within 5 working days of receiving the decision.
- (5) A foreign investment business whose certificate is cancelled by the Registrar under section 26 may appeal to the Supreme Court against the decision and any such cancellation shall be suspended pending the outcome of the appeal.

20 Duration of validity of certificate

- (1) Subject to subsection (2), a certificate is valid from the date of its issue until the cessation of -
 - (a) the business activity to which it relates; or
 - (b) if it relates to more than one activity, the last remaining activity to which it relates.
- (2) A certificate -
 - (a) expires and ceases to be valid if no business activity to which it relates commences within one year after the date of the issue of the certificate;
 - (b) is not valid for any period for which registration is suspended under section 24; and
 - (c) ceases to be valid on cancellation under Division 4.

DIVISION 3 – DUTIES OF HOLDER OF CERTIFICATE

21 Holder shall notify changes in information

- (1) The holder of a certificate shall give written notice of a change in information if there is a change -

- (a) in the information that was provided in an application for the issue or transfer of a certificate;
 - (b) of the business name under which the holder conducts the business activity;
 - (c) of location of the business activity; or
 - (d) of address for service of documents on the holder.
- (2) The notice shall be -
- (a) in the prescribed form;
 - (b) signed by or on behalf of the holder;
 - (c) accompanied by the prescribed fee;
 - (d) filed with the Registrar for registration on the register; and
 - (e) filed within 20 working days of the change.
- (3) If the change in information includes information recorded on the certificate, the Registrar shall without delay issue a replacement certificate.

22 Holder shall file annual status report

- (1) The holder of a certificate shall prepare an annual status report.
- (2) The holder shall file the report in the month of the year that is the anniversary of the month of issue of the certificate.
- (3) The report shall contain -
- (a) the information that is required to complete the form prescribed for the report; and
 - (b) any other prescribed information.
- (4) The report shall be -
- (a) in the prescribed form;
 - (b) signed by or on behalf of the holder;
 - (c) accompanied by the prescribed fee;
 - (d) filed with the Registrar; and
 - (e) if the report is filed late, accompanied by the prescribed late filing fee.
- (5) An annual status report -
- (a) is not a public document;
 - (b) is not required to be registered on the register; and
 - (c) may be withheld by the Registrar from public disclosure on grounds of commercial confidentiality.

23 Holder shall notify cessation of business activity

- (1) The holder of a certificate shall give written notice of the cessation of any business activity to which the certificate relates.
- (2) The notice shall be -
 - (a) in the prescribed form;
 - (b) signed by or on behalf of the holder;
 - (c) accompanied by the prescribed fee;
 - (d) filed with the Registrar for registration on the register; and
 - (e) filed within 10 working days of cessation.
- (3) On receipt of the notice -
 - (a) the certificate is automatically cancelled if the certificate relates only to the business activity that has ceased; or
 - (b) the Registrar shall without delay issue a replacement certificate for the remaining business activities if the certificate relates also to other business activities that have not ceased.

DIVISION 4 – SUSPENSION OR CANCELLATION OF CERTIFICATE**24 Suspension of certificate**

- (1) The Registrar shall notify in writing all foreign investors of the due date of their annual status report.
- (2) Failure to file an annual status report within one month after the due date shall incur a fine of \$250.
- (3) If after 3 months from the due date the holder still has not filed a report, the Registrar may suspend the certificate at any time thereafter.
- (4) On an application by the holder that complies with sub-section (5), the Registrar shall reinstate a suspended certificate.
- (5) The application for reinstatement shall be -
 - (a) in the prescribed form; and
 - (b) accompanied by -
 - (i) the outstanding annual status report and associated prescribed filing fee; and
 - (ii) the prescribed late filing fee in respect of the outstanding annual status reports; and
 - (c) filed with the Registrar.
- (6) On reinstatement under subsection (4), a certificate that has been suspended shall be treated as having continued in force during the period of suspension.

25 Effect of suspension of certificate

- (1) The holder of a suspended certificate shall not, during the period of suspension, carry on the business activity to which the certificate relates.
- (2) A suspended certificate is automatically cancelled if -
 - (a) the certificate has remained suspended for one year from the date of suspension; and
 - (b) the holder has not filed an application for the reinstatement of the certificate that complies with section 24(4).
- (3) Nothing in sections 26 to 29 applies to the automatic cancellation of a certificate under this section or section 23(3).

26 Registrar may cancel certificate

- (1) The Registrar may cancel a foreign investment registration certificate if –
 - (a) the application for the issue of the certificate or the transfer of the certificate contained any material misrepresentation or false statement;
 - (b) the holder carries on a prohibited activity or a reserved activity;
 - (c) the holder is placed in liquidation, or is declared bankrupt, or ceases to trade as a business in the holder’s home jurisdiction;
 - (d) the holder has breached a condition imposed under this Act or the Regulations; or
 - (e) the holder commits an offence under this Act or the Regulations.
- (2) The Registrar shall follow the procedure for cancellation set out in section 27.

27 Procedure for cancellation

- (1) The Registrar shall give the holder of the certificate a notice in writing that states -
 - (a) the intention to cancel the certificate;
 - (b) the reasons for cancellation; and
 - (c) that the holder may make a written submission to the Registrar within 10 working days after the date of the notice setting out any reasons why the certificate should not be cancelled, including corrective action, if any, that the holder proposes to take to address the reasons for cancellation.
- (2) If the holder makes a written submission within 10 working days after the date of the notice, the Registrar shall not cancel the certificate without fully considering the holder’s submission.
- (3) The Registrar shall give the holder a written notice of his decision within 5 working days after the expiry of the 10 working day period for the holder to make a submission.

- (4) If the decision is to cancel the certificate, the notice of the decision shall -
 - (a) state the reasons for the decision;
 - (b) explain the right of the holder to appeal to the Supreme Court against the decision; and
 - (c) explain the effect of section 29 relating to when cancellation becomes effective.

28 Appeal to Supreme Court from Registrar's decision to cancel

- (1) The holder of a certificate that is cancelled by the Registrar under section 26 may appeal to the Supreme Court against the decision of the Registrar.
- (2) The appeal shall be filed with the Court within 20 working days after the date of notice of cancellation given under section 27(3).

29 When cancellation of certificate is effective

- (1) The cancellation of a certificate is effective, -
 - (a) if the holder has not filed an appeal within 20 working days after the date of notice of cancellation given under section 27(3), at the expiry of that period; or
 - (b) if the holder has filed an appeal in accordance with section 27(3) and the appeal fails or is abandoned, at the expiry of 10 working days after the date on which the appeal is finally determined or struck out.
- (2) The cancellation of a certificate does not relieve the holder from, or affect, any liability that the holder incurs in Tonga, whether in contract or otherwise.

DIVISION 5 – FOREIGN INVESTMENT REGISTER

30 Foreign investment register

- (1) The Registrar shall establish and maintain a foreign investment register.
- (2) The register may be kept in the form that the Registrar thinks fit, including, partly or wholly, in electronic form, but in determining the form of the register, the Registrar shall have regard to facilitating the search or inspection of the register by members of the public.
- (3) A person may file a document with the Registrar in any format permitted by the Registrar, including an electronic format, in accordance with the procedures established by the Registrar from time to time.
- (4) Any person may, on payment of the prescribed fee, -
 - (a) search or inspect the register; or
 - (b) on request obtain a copy of an extract from the register.

- (5) A search or an inspection made at the office of the Ministry shall be made during the hours when the office is open to the public for business on a working day.

31 Contents of register

The register shall contain the following information in respect of each certificate issued under section 15(3) -

- (a) the name of the current holder;
- (b) the current holder's address in Tonga and address for service;
- (c) the current holder's contact details, including email address;
- (d) the name, address, and contact details, including email address of the current holder's representative in Tonga;
- (e) if the current holder is a transferee of the certificate, the names of the previous holders of the certificate;
- (f) the registration number and date of issue of the certificate;
- (g) if the certificate is a replacement certificate, its date of issue;
- (h) the business activity or activities to which the certificate relates;
- (i) if the certificate is suspended, the date of suspension;
- (j) if the certificate has been automatically cancelled under section 23(3) or 25(2), the date of cancellation and the reason for cancellation;
- (k) if the certificate has been cancelled under section 26, the effective date of cancellation and the reason or reasons for cancellation;
- (l) documents filed under this Act for registration on the register; and
- (m) any other information prescribed by Regulations for inclusion in the register.

32 Amendment of register

- (1) The Registrar may amend the register as required to -
 - (a) update information;
 - (b) correct or delete information wrongly entered in the register; or
 - (c) include information wrongly omitted from the register.
- (2) The Registrar shall give written notice to the relevant certificate holder of any amendment under subsection (1).

PART 4 – MISCELLANEOUS

33 Registrar of Foreign Investment

- (1) There is appointed a Registrar of Foreign Investment who shall be the person holding the office of Chief Executive Officer.
- (2) The Registrar may, in writing, delegate any or all of the powers or functions of the Registrar under this Act or the Regulations to one or more officers of the Ministry.

34 Functions of Registrar

The Registrar is responsible for -

- (a) the receipt, processing, and determination of applications for certificates and the transfer of certificates;
- (b) issuing certificates and replacement certificates;
- (c) suspending and cancelling certificates;
- (d) establishing and maintaining the foreign investment register;
- (e) monitoring foreign investments in Tonga;
- (f) ensuring compliance by foreign investors with this Act and the Regulations;
- (g) any other functions conferred on the Registrar by or under this Act or the Regulations.

35 Registrar shall prepare annual report

- (1) The Registrar shall, within 4 months after the end of each financial year, -
 - (a) prepare an annual report as to -
 - (i) the administration of this Act during the financial year; and
 - (ii) the conduct of investment activities by foreign investors in Tonga during the financial year;
 - (b) give a copy of the report to the Minister; and
 - (c) ensure that the report is published on an Internet site maintained by the Ministry to which members of the public have access.
- (2) When making the report, the Registrar shall -
 - (a) consider and take into account the annual status reports filed during the financial year; and
 - (b) not specify information in the report in a manner that identifies a foreign investor or discloses the details of the investment or business operations of a foreign investor.

- (3) The Minister shall, as soon as practicable after receiving the report, table a copy of the report before Parliament.

36 Registrar's powers of inspection

- (1) The Registrar may, by written notice, require a person to file with the Registrar such information as the Registrar considers reasonably necessary to enable the Registrar to ascertain whether or not a person is carrying on a business activity in breach of this Act or the Regulations.
- (2) The person named in the notice shall file the information -
 - (a) within the time specified in the notice, which shall be not less than 10 working days after issue of the notice; or
 - (b) on application to the Registrar within the 10 working day period, within the further time that the Registrar may allow.

37 How Registrar may give notices

- (1) The Registrar may give a notice under this Act to a person in the manner that the Registrar considers appropriate.
- (2) Without limiting subsection (1), the Registrar may give a notice to such person by -
 - (a) delivering it to such person;
 - (b) delivering or posting it to such person's address for service in Tonga notified to the Registrar under this Act or the Regulations;
 - (c) posting or delivering it to such person's last known address;
 - (d) sending it by facsimile to a facsimile number used by such person for transmission of documents; or
 - (e) sending it to such person's email address notified to the Registrar under this Act or the Regulations.
- (3) A document admissible in legal proceedings as a copy of a notice given by the Registrar includes a document that -
 - (a) appears to be a copy of a notice given by the Registrar; and
 - (b) is certified by the Registrar, or by a person authorised by the Registrar, as having been derived from a device or facility that records or stores information electronically or by other means.

38 Evidentiary matters

- (1) This section applies to a document that purports to be -
 - (a) a certificate issued under this Act;
 - (b) a copy of or extract from the register;

- (c) a copy of or extract from a document forming part of the register; or
 - (d) a combination of any of two or more of a certificate, copy, or extract referred to in paragraphs (a) to (c).
- (2) A document to which this section applies is prima facie evidence in legal proceedings of any matter contained or set out in the document.

39 Offences and penalties

- (1) A person who carries on a business activity in breach of this Act or the Regulations commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- (2) A person who files an application, report, notice, or document required under this Act or the Regulations knowing that the application, report, notice, or other document is false or misleading in a material particular commits an offence and is liable on conviction to a fine not exceeding \$2,500.
- (3) A person who fails to comply with a requirement of this Act or the Regulations to file an application, report, notice, or other document commits an offence and is liable on conviction to a fine not exceeding \$2,500.
- (4) A person who without reasonable excuse fails to comply with a notice by the Registrar under section 36 to file information commits an offence and is liable on conviction to a fine not exceeding \$2,500.

40 Protections for foreign investors

- (1) Subject to this Act and any other laws, the Convention on the Settlement of Investment Disputes has the force of law in Tonga.
- (2) The property in Tonga of an overseas person shall not be subject to expropriation or other adverse dealing -
 - (a) that is not in accordance with the due process of law;
 - (b) that is discriminatory;
 - (c) for which full and timely compensation is not paid; or
 - (d) that is made without independent, fair, and transparent adjudication.
- (3) An overseas person who holds a valid foreign investment registration certificate is entitled to the protection of clause 4 of the Act of Constitution of Tonga.
- (4) Subject to any laws relating to taxation or exchange control, an overseas person who holds a valid foreign investment registration certificate may transfer any capital and income of its foreign investment business to any place outside Tonga.

41 Re-issue of existing certificate

- (1) In this section and sections 42 and 43, -
 - “**2002 Act**” means the Foreign Investment Act 2002 (Act 22 of 2002);
 - “**existing certificate**” means a current foreign investment registration certificate issued under section 8 of the 2002 Act;
 - “**existing register**” means the foreign investment register maintained under section 6 of the 2002 Act;
 - “**transitional period**” means the period of one year after the commencement of this Act.
- (2) The holder of an existing certificate may apply during the transitional period for the re-issue of the certificate as a foreign investment registration certificate under this Act.
- (3) An application for the re-issue of an existing certificate shall be -
 - (a) in the prescribed form;
 - (b) be accompanied by the existing certificate unless lost;
 - (c) contain the information set out in subsection (5) and any other prescribed information;
 - (d) be signed by or on behalf of the holder;
 - (e) be accompanied by the prescribed fee; and
 - (f) be filed with the Registrar.
- (4) If the existing certificate has been lost and does not appear in the existing register, the holder shall satisfy the Registrar by proof acceptable to the Registrar of the issue of an existing certificate to the holder.
- (5) The application shall contain -
 - (a) the information set out in section 14 as if references to the applicant in that section were references to the holder of the existing certificate; and
 - (b) the information required under section 22(3) for an annual status report.
- (6) On receipt of an application in proper form, the Registrar shall without delay issue a foreign investment registration certificate to the holder of the existing certificate.
- (7) A certificate issued under subsection (6) shall be treated for all purposes of this Act as if it is a certificate issued under section 15(3).

42 Effect of re-issue of existing certificate

- (1) This Act applies, and the Foreign Investment Act 2002 ceases to apply, to the holder on the re-issue of an existing certificate as a foreign investment registration certificate under this Act.

- (2) The re-issue of an existing certificate as a foreign investment registration certificate under this Act does not affect -
 - (a) the legal status of the holder;
 - (b) the property, rights, liabilities, or obligations of the holder (except to the extent that this Act applies to the holder); or
 - (c) proceedings already commenced to which the holder is a party.

43 Repeal and Transitional

- (1) The Foreign Investment Act 2002 and the Foreign Investment Regulations 2006 are hereby repealed on the expiry of one year after the commencement of this Act.
- (2) There shall be no foreign investment registration certificate issued under the Foreign Investment Act 2002 after the commencement of this Act.
- (3) Except if it has earlier ceased to have effect, a foreign investment registration certificate issued under the Foreign Investment Act 2002 ceases to have effect on the repeal of that Act.
- (4) A person who is an overseas person for the purposes of this Act, but was not a foreign investor for the purposes of the Foreign Investment Act 2002, and who immediately before the commencement of this Act was lawfully carrying on an activity that was a reserved activity under the Foreign Investment Act 2002 or has been placed on the Reserved List under this Act, may continue to carry on that activity provided the person becomes the holder of a foreign investment registration certificate under this Act that is issued in relation to that activity within one year of the commencement of this Act.

44 Consequential amendments

- (1) Section 3 of the Business Licences Act 2002 is amended as follows -
 - (a) the definition of the term “**foreign investment registration certificate**” is deleted in its entirety and a new definition is inserted as follows -

““**foreign investment registration certificate**” means a foreign investment registration certificate for the purposes of the Foreign Investment Act 2020 (or, until the repeal of the Foreign Investment Act 2002, for the purposes of that Act);” and
 - (b) the definition of the term “**foreign investor**” is deleted in its entirety.
- (2) Section 5 of the Business Licences Act 2002 is amended by deleting paragraph (d) and in its place the following is inserted -

“(d) a person who is in breach of the requirement to hold a valid foreign investment registration certificate.”

45 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), the Minister may with the consent of Cabinet make regulations -
 - (a) establishing the Reserved List and specifying the reserved activities;
 - (b) establishing the Restricted List and specifying the restricted activities and the conditions for carrying on those activities;
 - (c) amending the Reserved List or the Restricted List by -
 - (i) adding, amending, clarifying or removing any business activity; or
 - (ii) adding, amending, clarifying or replacing any condition for carrying on a restricted activity;
 - (d) prescribing conditions that may apply to carrying on business activities generally or to a particular business activity;
 - (e) prescribing forms that may be required for an application, certificate, report, notice, or other document under this Act;
 - (f) prescribing information that may be required for an application, report, notice, or other document under this Act;
 - (g) prescribing additional information that shall be included in the register;
 - (h) prescribing the circumstances in which fees are payable under this Act and the amounts of those fees; and
 - (i) prescribing any further process for lodging an appeal.

Passed by the Legislative Assembly this day of 2020.

EXPLANATORY NOTES

(These notes does not form part of the Bill, and are only intended to explain its scope and purpose)

In 2014, the Ministry of Trade and Economic Development undertook a review of the existing Foreign Investment Act 2002 (“**the 2002 Act**”) and the manner in which it had been implemented.

This review identified a number of issues that needed to be addressed if Tonga is to have a foreign investment environment that accomplishes multiple goals: to encourage foreign investment while still protecting legitimate local interests, and to do so in a fair and transparent manner. The review resulted in a policy paper, endorsed by Cabinet, which recognised that it was essential that the framework under which foreign investment occurs must balance welcoming foreign investment in order to grow the economy with the need to ensure that all Tongan citizens benefit from this participation in the local economy. This Bill has been drafted in accordance with the directives contained in the policy paper endorsed by Cabinet.

Section No.	Explanation
1	Section 1 is the Title section. Section (1)(b) provides that the Act comes into force on a day proclaimed by Cabinet.
2	Section 2 is the interpretation section which defines certain key terms that are used in the Bill. The term “ business activity ” is defined to include “any trade, profession, or calling that is established in Tonga by a person on a long-term or permanent basis”. The intention is that the foreign investment regime established by the Act will not catch a one-off service provided in Tonga by an overseas person, such as an overseas lawyer who represents a client in proceedings in Tonga. “ Chief Executive Officer ” means the Chief Executive Officer responsible for commerce, and “ Minister ” means the Minister responsible for commerce. “ Registrar ” means the Registrar of Foreign Investment.
3	Section 3 provides that the Act binds the Crown.
PART 2 - SCOPE OF FOREIGN INVESTMENT IN TONGA	
4	Section 4 states the general rule for foreign investment in Tonga, that is, that an overseas person may carry on any business activity in Tonga subject to compliance with the laws of Tonga and the exceptions or restrictions set out in section 5 .

5	<p>Section 5 sets out the exceptions or restrictions that apply to an overseas person carrying on a business activity in Tonga. First, there is an absolute prohibition on an overseas person carrying on a prohibited activity or a reserved activity. (“Prohibited activity” and “reserved activity” are defined in section 7.) Second, an overseas person must not carry on a restricted activity unless the overseas person complies with the prescribed conditions for that activity.</p>
6	<p>Section 6 sets out the meaning of “overseas person”. This is a key term used in the Bill because the foreign investment regime hinges on whether a person is an overseas person or not. The definition of overseas person is more extensive than the definition of foreign investor used in the 2002 Act and there are significant differences. The most significant is that the threshold for defining a body corporate as an overseas person is set at ownership by an overseas person of one or more of the shares (or equivalent) issued by the body corporate. Under the 2002 Act, the threshold is 25% ownership of shares.</p>
7	<p>Section 7 contains the meaning of the terms “prohibited activity”, “reserved activity”, and “restricted activity”. As mentioned above, a prohibited activity or a reserved activity is out of bounds to an overseas person, while a restricted activity is open to an overseas person, but subject to conditions.</p>
<p>PART 3 - ADMINISTRATION OF FOREIGN INVESTMENT REGIME IN TONGA</p> <p>DIVISION 1 - BUSINESS ACTIVITIES THAT ARE RESERVED OR RESTRICTED</p>	
8	<p>Section 8 relates to the Reserved List and the Restricted List. The designation of a business activity as a reserved activity or a restricted activity is an executive decision ultimately made by the Minister responsible for Commerce.</p> <p>Although the determination of business activities as reserved or restricted is an executive decision, the Minister must, under section 8, have regard to the principles set out in section 9.</p>
9	<p>Section 9 calls for an evidence-based determination be made as to the propriety of including or excluding particular activities upon the reserve or restricted lists.</p>
10 - 11	<p>Sections 10 and 11 provide for establishing and then reviewing the Reserved and Restricted Lists through a new procedure featuring the opportunity for public comment at intervals of not more than 3 years. Importantly, no such activities are to be listed in the Act itself. Instead, the</p>

	<p>Restricted and Reserve list activities are published in regulations. The Registrar must undertake a review of the activities that are on the reserve and restricted lists that includes public input. Once this review is complete, the Registrar will submit a report of their findings and recommendations to the Minister. The Minister will then make determinations on how to proceed with the recommendations and ensure the report is published. Any recommended changes to the regulations that are accepted by the Minister will become part of the regulations issued under the Act.</p>
DIVISION 2 - FOREIGN INVESTMENT REGISTRATION	
12	Section 12 requires that an overseas person commencing to carry on a business activity in Tonga must first obtain a foreign investment registration certificate (“ a certificate ”).
13-15	Sections 13 to 15 are procedural provisions relating to the application for a certificate, the information that must accompany the application, and the determination of the application by the Registrar. The Bill envisages that a certificate may be transferred, for example, if the business to which it relates is sold to another overseas person.
16-18	Sections 16 to 18 set out the procedure for an application for the transfer of a certificate and the determination of the application by the Registrar.
19	Section 19 provides for appeals against refusal of application for issue or transfer of certificate. An appeal must be made within 10 working days from the date of the decision. Further, it provides for a timeframe for determining an appeal and when the Minister must give notice to the applicant of the Arbitrator’s decision.
20	Section 20 sets out the duration of the validity of a certificate. The general rule is that a certificate, once issued, is valid for as long as the business activity to which it relates continues. If that activity ceases, the certificate becomes invalid. If the certificate relates to more than one activity, it continues in force until the last remaining business activity ceases. However, validity is also affected in three other ways. First, if the business activity in question does commence within one year of issue, the certificate becomes invalid. Second, a certificate may be suspended and is invalid for the period of suspension for the failure to file an annual return under Section 24. Third, a certificate may be cancelled under Section 26 for various failures to comply with law.
DIVISION 3 - DUTIES OF HOLDER OF CERTIFICATE	
21	Section 21 requires the holder of a certificate to notify the Registrar of certain changes in information. These relate to the information provided in

	the application for a certificate, business name, location of business activity, and address for service.
22	Under section 22 , the holder of a certificate is required to file an annual status report with the Registrar. The information that must be provided in order to complete an annual status report is not set out in the Bill but will be specified by Regulations made under the Act.
23	Under section 23 , the holder of a certificate must notify the Registrar of the cessation of any business activity to which the certificate relates.
DIVISION 4 - SUSPENSION OR CANCELLATION OF CERTIFICATE	
24-25	Section 24 provides for the suspension of a certificate if the holder fails to file an annual status report. The certificate must be reinstated if the holder makes good the omission and pays the prescribed fees. On reinstatement, the certificate is treated as if it had not been suspended. However, under section 25 , a suspended certificate is cancelled if it has not been reinstated within one year of suspension.
26	Section 26 lists the circumstances in which the Registrar may cancel a certificate.
27	Section 27 provides a procedure that must be followed if the Registrar cancels a certificate. The procedure requires notice of intention to cancel, and an opportunity for the holder to make representations to the Registrar as to why the certificate should not be cancelled.
28	Under section 28 , an appeal may be made to the Supreme Court against a decision of the Registrar to cancel a certificate.
29	Section 29 sets out when the cancellation of a certificate becomes effective. If the holder has filed an appeal and the appeal is not successful, the cancellation is effective 10 working days after the date on which the appeal is finally disposed of.
DIVISION 5 - FOREIGN INVESTMENT REGISTER	
30-32	Sections 30 to 32 provide for the establishment and maintenance of a foreign investment register. The Registrar is responsible for the register. Under section 30(2) , the register may be kept in electronic form. Section 31 prescribes the contents of the register.
PART 4 - MISCELLANEOUS	
33-37	Sections 33 to 37 relate to the Registrar of Foreign Investment. Section 33 provides for the appointment of the Registrar, who is the person holding the

	office of Chief Executive. Section 34 sets out the functions of the Registrar. Section 35 requires the Registrar to make an annual written report relating to the administration of the Act during the reporting year and the conduct of investment activities by foreign investors in Tonga during that year. Section 36 confers a power of inspection on the Registrar. Section 37 relates to the giving of notices by the Registrar. These provisions are all consistent with powers already granted to the Registrar of Companies.
38	Section 38 provides that a specified document is prima facie evidence of a matter contained or set out in the document.
39	Section 39 creates various offences. The most significant is the offence of carrying on a business activity in breach of the Act or the Regulations, for which the penalty is a fine not exceeding \$10,000.
40	Section 40 sets out various protections for foreign investors, effectively guaranteeing certain property rights and the right to repatriate capital and income.
41-42	Section 41 makes provision for the continuance of registration of holders of foreign investment registration certificates that have been issued under the 2002 Act and are current as at the commencement of the new Act. The Bill provides for an overlap of the 2002 Act and the new Act for a period of one year. This is a transitional period during which an existing certificate holder may apply for the re-issue of the existing certificate. If the application is in proper form, that is, complies with section 41(3) , the Registrar must issue a new certificate. Under section 42(1) , on the re-issue of the new certificate, the 2002 Act ceases to apply to the holder and the new Act applies to the holder from that point on.
43	Under section 43 , the 2002 Act and the Foreign Investment Regulations 2006 are repealed on the expiry of one year after the commencement of the new Act. It is important to note that this transitional period begins on the commencement of the new Act, that is, when it comes into force on the day proclaimed by Cabinet, and not on its enactment. Section 43(4) is intended to preserve the position of a person who was lawfully carrying on a reserved activity immediately before the commencement of the new Act and is caught by the new Act, most likely because of the change in the threshold of ownership of a body corporate for purposes of defining who is an overseas person.
44	Section 44 makes minor consequential changes to the Business Licences Act 2002.
45	Section 45 sets out the power of the Minister to make Regulations under the Act.

Hon. Samiu Kuita Vaipulu
Minister of Trade and Economic Development