



PARLIAMENT OF FIJI ISLANDS

Legislature - FOREIGN INVESTMENT (AMENDMENT) BILL 2004

BILL NO. 7 OF 2004

A BILL

FOR AN ACT TO AMEND THE FOREIGN INVESTMENT ACT

ENACTED by the Parliament of the Fiji Islands:

Short title and commencement

1. (1) This Act may be cited as the Foreign Investment (Amendment) Act 2004, and comes into force on a date appointed by the Minister by notice in the *Gazette*.

(2) In this Act, the Foreign Investment Act 1999 is referred to as the "principal Act".

Section 3 amended

2. Section 3 of the principal Act is amended:

(a) in subsection (1), in the definition of "national enterprise" by repealing paragraph (b) and substituting the following paragraph:

"(b) an enterprise in which, to the extent that the enterprise is constituted by a corporation, company, trust, partnership or association or body of persons whether corporate or unincorporate or by a natural person or natural persons: the corporation, company, trust, partnership or association or body of persons whether corporate or unincorporate is constituted or operating under the laws of the Fiji Islands and wholly-owned by a Fiji citizen or Fiji citizens or the natural person or each of the natural persons is a Fiji citizen;"

(b) in subsection (2) by repealing paragraphs (a) and (b) and substituting the following:

"the foreign investor is a corporation, company, trust, partnership or association or body of persons whether corporate or unincorporate, and the person, as the case may be:

(a) is one of those persons or a partner or, in the case of a private company, a member; or

(b) is a director, secretary or trustee of the corporation, company, trust, partnership or association or body of persons."

Section 4 amended

3. Section 4 of the principal Act is amended by repealing subsection (3) and substituting the following subsections:

"(3) The grant of a certificate to a foreign investor does not entitle the investor as of right to any licence or assistance for which the investor may be qualified.

(4) The grant of a certificate to a foreign investor does not relieve the foreign investor of the duty to secure any approval from any other relevant authority that may be necessary for the activity proposed."

Section 5 amended

4. Section 5 of the principal Act is amended by repealing subsection (4) and substituting the following subsection:

"(4) A certificate must not be granted to a foreign investor permitting the foreign investor to directly or indirectly carry on any aspect of business in a reserved activity."

Section 7 amended

5. Section 7 of the principal Act is amended:

- (a) in paragraph (d) of subsection (2) by inserting "including statutory declarations" after "documents";
- (b) in subsection (3) by deleting "within one month" and substituting "within 20 working days";
- (c) by repealing subsection (4) and substituting the following subsection:

"(4) The Chief Executive must grant an application made under subsection (1) except where:

- (a) the foreign investor proposes to directly or indirectly carry on any aspect of business in a reserved activity or in a prohibited activity;
- (b) the foreign investor proposes to directly or indirectly carry on any aspect of business in a restricted activity and the Chief Executive has reasonable grounds for believing that the foreign investor does not or will not satisfy a condition imposed under subsection (5);
- (c) the Chief Executive has reasonable grounds for believing that the application is incorrect or misleading or does not otherwise comply with this Act or the regulations;
- (d) the foreign investor or any person associated with the foreign investor is an undischarged bankrupt, is under management or is in receivership or liquidation under the laws of the Fiji Islands or of another country;
- (e) the Chief Executive has reasonable grounds for believing that the application is not genuine."

- (d) in subsection (6) by deleting "15 days" and substituting "5 working days".

Section 8 amended

6. Section 8 of the principal Act is amended:

- (a) in paragraph (b) of subsection (1) by inserting or activities after activity;
- (b) by repealing subsection (5) and substituting the following subsection:

"(5) If:

- (a) a foreign investor has been granted a certificate permitting the foreign investor to carry on business in an activity; and
- (b) the activity subsequently becomes a prohibited activity,

the foreign investor must stop carrying on business in that activity by the date on which the prohibition is effective, and the certificate of the foreign investor in regard to the prohibited activity ceases to be in force on that date except that if the certificate were issued for more than one activity, the certificate remains effective for any activity that is not declared a prohibited activity."

Section 11 amended

7. Section 11 of the principal Act is amended:

- (a) in subsection (1) by deleting "the investor must, within 14 days" and substituting "or in any person associated with the foreign investor, the investor must, within 15 working days";
- (b) in subsection (2) by deleting "it must, within 14 days" and substituting "the foreign investor must, within 25 working days".

Section 13 amended

8. Section 13 of the principal Act is amended by repealing section 13 and substituting the following section:

"Cancellation of certificate

13. If:

(a) the Chief Executive has reasonable grounds for believing that a foreign investor:

- (i) obtained a certificate by fraud or misrepresentation, misstatement or omission of a material particular;
- (ii) is in serious or persistent breach of the terms or conditions of a certificate or of this Act;
- (iii) has ceased to carry on business in the activity or all of the activities in respect of which a certificate was granted; or
- (iv) has not started to carry on business in any activity in respect of which a certificate was granted within 12 months after the grant of the certificate, without genuine reason; or

(b) circumstances arise which would require the Chief Executive not to grant a certificate under section 7(4)(d),

the Chief Executive may cancel a certificate.

(2) Where the Chief Executive intends to cancel a certificate, the Chief Executive must notify the foreign investor stating the grounds for the cancellation and inviting the foreign investor to respond within 15 working days.

(3) The Chief Executive must not cancel the certificate before whichever of the following happens first:

- (a) if the foreign investor responds within the time specified under subsection (2): the Chief Executive considers the response; or
- (b) the time specified under subsection (2) expires without a response from the foreign investor.

(4) Where the Chief Executive cancels a certificate, the Chief Executive must notify the foreign investor of the cancellation, which is to be effective not earlier than 25 days from the date of the notice of cancellation under this subsection."

Section 14 amended

9. Section 14 of the principal Act is amended by adding after subsection (2) the following subsections:

"(3) A foreign investor has the same right as a national enterprise to recourse to the jurisdictions of courts or other tribunals of the Fiji Islands in respect of settlement of disputes.

(4) The court or tribunal may take into account the principles of the International Convention on Settlement of Investment Disputes when settling any disputes involving a foreign investor.

(5) Subject to any bilateral or multilateral investment treaties to which the Fiji Islands may be a party, among like foreign investors there shall be no discrimination on the grounds of nationality in the administration of this Act or regulations."

Section 15 amended

10. Section 15 of the principal Act is amended:

- (a) in subsection (2) by deleting "28 days" and substituting "25 working days";
- (b) in subsection (5) by deleting "14 days" and substituting "10 working days";
- (c) in subsection (6) by deleting "7 days" and substituting "5 working days";
- (d) by adding the following subsection:

"(7) The decision of the Minister under subsection (6) is final."

Section 16 amended

11. Section 16 of the principal Act is amended:

- (a) by renumbering section 16 as subsection (1);
- (b) in paragraph (b) by deleting "carry on" and substituting "directly or indirectly carry on any aspect of";
- (c) in paragraph (c) by deleting "carry on" and substituting "directly or indirectly carry on any aspect of";
- (d) by repealing paragraph (d) and substituting the following paragraphs:

"(d) subject to subsections (3) and (4) of section 8, directly or indirectly carry on any aspect of business in a restricted activity unless the investor meets all conditions of section 6(1); or
(e) fail to comply with the terms or conditions of a Foreign Investment Registration Certificate."

- (e) by adding a new subsection (2):

"(2) A person must not hold out that an enterprise is a foreign investor unless that enterprise holds a current valid certificate under this Act.

Penalty: \$20,000."

New sections 17 and 17A

12. The principal Act is amended by repealing section 17 and substituting the following sections:

"Monitoring of foreign investors

17. (1) A foreign investor must allow the Chief Executive to monitor the business activities of the foreign investor from time to time in order for the Chief Executive to ascertain whether the foreign investor is complying with this Act.

Penalty: \$20,000

(2) A person must not, without reasonable excuse, furnish a statement or provide information for the purposes of this Act that is false or misleading in a material particular.

Penalty: \$20,000

(3) A foreign investor must provide the Chief Executive with information concerning its business activities, as may from time to time be requested by the Chief Executive for statistical purposes provided that the Chief Executive is satisfied that the required information is not commercially sensitive and does not constitute an administrative burden on the foreign investor.

Penalty: \$5,000.

Failure to comply an offence

17A. It is an offence to fail to comply with a provision of this Act in which a penalty is specified."

Consequential amendments

13. (1) The principal Act is amended by deleting "Foreign Investment Certificate" and substituting Foreign Investment Registration Certificate wherever it appears in the principal Act.

(2) A Foreign Investment Certificate duly granted under the principal Act and current immediately before the commencement of the Foreign Investment (Amendment) Act 2004 is deemed to be a Foreign Investment Registration Certificate.

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FOREIGN INVESTMENT (AMENDMENT) BILL 2004

----- EXPLANATORY NOTE

[This note is not part of the Bill and is only intended to indicate its general effect]

1.0 BACKGROUND

1.1 The Bill seeks to amend the Foreign Investment Act 1999. The amendments are designed to clarify parts of the Act that have proven difficult to administer or enforce, and to make clear the meaning and scope of certificates granted under the Act. The amendments provide greater certainty for foreign investors with regards to, among other things, the grant and cancellation of certificates, as well as strengthening guarantees to foreign investors. The amendments enable more effective monitoring and enforcement of the Act. The change in the name of certificates is designed to signal the achievement of the simple, transparent and non-discretionary system for registering foreign investors that the Act sets out.

2.0 CLAUSES

Clause 1 provides for the short title and commencement provisions.

Clause 2 provides more comprehensive definitions of national enterprise and persons associated with a foreign investor in section 3 of the principal Act.

Clause 3 amends section 4 of the principal Act to clarify the grant of a certificate.

Clause 4 amends section 5 of the principal Act to provide that a foreign investor may not engage directly or indirectly in any aspect of a reserved activity.

Clause 5 makes several amendments to section 7 of the principal Act, including to the submission of statutory declarations, to time limits under that section and to the grounds upon which the Chief Executive must refuse to grant a certificate.

Clause 6 provides, among other things, that where an activity becomes a prohibited activity after the grant of a certificate to a foreign investor, that investor must stop carrying on business in that activity when the prohibition becomes effective.

Clause 7 amends, among other things, some time limits in section 11 of the principal Act.

Clause 8 restates the grounds for cancellation of a certificate under the principal Act.

Clause 9 deals with treatment of foreign investors with regard to dispute resolution under section 14 of the principal Act.

Clause 10 amends time limits in section 15 of the principal Act and makes explicit that the Ministers decision under that section is final.

Clause 11 clarifies the prohibitions on foreign investors under the principal Act in amendments to section 16 of that Act.

Clause 12 provides for new prohibitions and maximum penalties and provides that failure to comply with a provision of the Act in which a maximum penalty is specified constitutes an offence.

Clause 13 makes amendments consequential upon the change of name of the certificate under the principal Act.

3.0 MINISTERIAL RESPONSIBILITY

3.1 The Bill comes under the responsibility of the Minister for Commerce, Business Development and Investment.

Q. B. Bale
Attorney General
and Minister for Justice