



Bill Summary

Foreign Investment (Budget Amendment) Bill 2016

Bill No. 48 of 2016

Introduction

In Fiji, foreign investment is governed by the *Foreign Investment Act 1999* ('Act'). The Act came into force on 29 October 1999 and since its inception it has helped Fiji attract and properly manage investors from all over the world.

The Act, together with the *Foreign Investment Regulations 2009*, sets out the guidelines by which a foreign investor can invest in Fiji and this is administered by Investment Fiji.

Under the Act, a foreign investor must not carry on business in Fiji unless the Chief Executive of Investment Fiji has granted the foreign investor a Foreign Investment Registration Certificate ('FIRC').

Section 7(4) of the Act provides that a FIRC must be granted to a foreign investor by the Chief Executive except where the—

- (a) foreign investor proposes to carry on a business listed in a reserved activity or prohibited activity;
- (b) foreign investor proposes to carry on a business listed in a restricted activity and the Chief Executive has reasonable grounds to believe that the investor does not or will not satisfy a condition stipulated in the FIRC;
- (c) the foreign investor is an undischarged bankrupt, is under management or is in receivership or liquidation;
- (d) Chief Executive has reasonable grounds to believe that the application for the FIRC is not genuine.

The exceptions to granting a FIRC set out under section 7(4) of the Act safeguard and regulate foreign investment in Fiji. There are however, prevailing issues with respect to the procedures dealing with the granting of FIRCs and the procedure dealing with the change in ownership and shareholding particulars.

The Act currently provides under section 11(1) that if a FIRC has been granted and a foreign investor changes its ownership or shareholding particulars, the foreign investor must only notify the Chief Executive of the change within 15 working days of the date of the change. The Chief Executive has no power under the Act to approve this change and to ensure that the new owner or shareholder complies with section 7(4).

Moreover, there is no empowering provision to enable the Chief Executive to refuse applications by foreign investors or the business that the foreign investor proposes to carry on which are contrary to Fiji's national interest. For that reason, it is prudent to amend the Act by virtue of the amendments provided in the *Foreign Investment (Budget Amendment) Bill 2016* ('Bill').

The Bill proposes that a Foreign Investment Policy ('Policy') is prepared to cater for applications that are contrary to Fiji's national interest. The Bill also proposes amendments to safeguard and regulate the procedures dealing with the granting of FIRCs and to strengthen the enforcement provision for investors who engage in activities or businesses outside of which the FIRC permits.

In this Act, the *Foreign Investment Act 1999* is referred to as the "Principal Act".

This act comes into force on **a date or dates appointed by the Minister by notice in the Gazette.**



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Objectives, scope and intent of the Bill

The purpose of the Bill is to amend the *Foreign Investment Act 1999*.¹

Bill Summary of provisions

Short title and commencement

Clause 1 (1) – this Act may be cited as the *Foreign Investment (Budget Amendment) Act 2016*

Clause 1 (2) – the Act comes into force on a date or dates appointed by the Minister by notice in the Gazette.

Clause 1 (3) – in this Act, the Foreign Investment Act 1999 is referred to as the “Principal Act”.

Section 3 amended

Clause 2 - Section 3 of the Principal Act is amended by inserting the following new definitions—

“Board” means the Investment Fiji Board established under section 3 of the Investment Fiji Act (Cap. 221);

“Foreign Investment Policy” means the policy made in accordance with section 7A;”

Section 7 amended

Clause 3 – Section 7 of the Principal Act is amended by—

(a) in subsection (4) —

(i) inserting “for a certificate” after “The Chief Executive must grant an application”;

(ii) paragraph (d), inserting “has a criminal record, or” after “associated with the foreign investor”;

(iii) paragraph (e), deleting “.” and substituting “;”;

(iv) inserting the following new paragraphs after paragraph (e) —

“(f) the foreign investor or the business that the foreign investor proposes to directly or indirectly carry on is contrary to the national interest of the Republic of Fiji; or

(g) the foreign investor or the business that the foreign investor proposes to directly or indirectly carry on does not comply with the Foreign Investment Policy.”;

(b) inserting the following new subsections after subsection (4)—

“(4A) If an application made under subsection (1) falls within one of the exceptions provided in subsection (4) (a) to (f) but the foreign investor or the business that the foreign investor proposes to carry on may be an acceptable foreign investment under the Foreign Investment Policy, the Chief Executive must refer the application for a certificate to the Board for recommendation to the Minister.

(4B) The Board must, upon receipt of a referral under subsection (4A), make a recommendation to the Minister to approve or deny the application for a certificate within 15 working days and the Minister must make a decision to approve or deny the application for a certificate within 15 working days from the receipt of the Board’s recommendation, or at a later date as the Minister may deem necessary.

¹ *Foreign Investment Act 1999* Available at: www.paclii.org/cji-bin/sinodisp/fj/legis/num_act/fia1999219/fia1999219.html?stem=&synonyms=&query=foreign%20investment%20act%201999
[Accessed 5 July 2016]



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(4C) The decision made by the Minister under subsection (4B) must be submitted to the Chief Executive and the Chief Executive must—

- (a) grant the application for a certificate, if the application is approved by the Minister; or
- (b) refuse the application for a certificate, if the application is denied by the Minister.”; and

(c) by deleting subsection (6) and substituting the following—

“(6) Written notice of the grant or refusal of an application for a certificate under this section must be given by the Chief Executive to the foreign investor within 5 working days of the making of an application for a certificate except in the case where an application for a certificate is referred to the Board for recommendation to the Minister under subsection (4A) in which case the Chief Executive must—

- (a) notify the foreign investor in writing within 5 working days of the making of an application for a certificate that the application has been referred to the Board for recommendation to the Minister; and
- (b) upon receipt of the decision made by the Minister under subsection (4B), notify the foreign investor in writing within 5 working days of the grant or refusal of the application for a certificate.”

New section 7A inserted

Clause 4 – the Principal Act is amended by inserting the following new section after section 7—

7A.—(1) The Foreign Investment Policy must be prepared by the Ministry responsible for this Act, and approved by Cabinet.

(2) The Foreign Investment Policy must detail—

- (a) the framework for foreign investments in the Republic of Fiji; and
- (c) foreign investments that are acceptable and unacceptable in the Republic of Fiji.

(3) The Ministry responsible for this Act may, from time to time and with the approval of Cabinet, amend the Foreign Investment Policy.”

Section 11 amended

Clause 5 – Section 11 of the Principal Act is amended by deleting subsection (1) and substituting the following new subsections—

“(1) If a foreign investor that has been granted a certificate (other than a foreign investor that is a public company and is listed on a securities exchange) proposes to change its ownership or shareholding particulars, the foreign investor must make an application to the Chief Executive seeking an approval for a change in its ownership or shareholding particulars before the change is effected.

(1A) An application under subsection (1) must—

- (a) be in the prescribed form;
- (b) contain the prescribed particulars;
- (c) notify the Chief Executive of an address in Fiji for the receipt of notices by the foreign investor; and



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(d) be accompanied by such documents including statutory declarations (if any), and any fee as prescribed.

(1B) If, at any time after the making of an application under subsection (1), there is a change in the address notified under subsection (1A) (c) or in any other information supplied to the Chief Executive under subsection (1A), the foreign investor must notify the Chief Executive in writing of the change within 20 working days of the date of the change.

(1C) The Chief Executive must approve an application made under subsection (1) except where—

- (a) 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;
- (b) the foreign investor or any person associated with the foreign investor has a criminal record or is an undischarged bankrupt, is under management or is in receivership or liquidation under the laws of the Republic of Fiji or of another country;
- (c) the Chief Executive has reasonable grounds for believing that the application is not genuine;
- (d) the foreign investor or the business that the foreign investor proposes to directly or indirectly carry on is contrary to the national interest of the Republic of Fiji; or
- (e) the foreign investor or the business that the foreign investor proposes to directly or indirectly carry on does not comply with the Foreign Investment Policy.

(1D) If an application made under subsection (1) falls within one of the exceptions provided in subsection (1C) (a) to (d) but the foreign investor or the business that the foreign investor proposes to carry on may be an acceptable foreign investment under the Foreign Investment Policy, the Chief Executive must refer the application to the Board for recommendation to the Minister.

(1E) The Board must, upon receipt of a referral under subsection (1D), make a recommendation to the Minister to approve or deny the application within 15 working days and the Minister must make a decision to approve or deny the application within 15 working days from the receipt of the Board's recommendation, or at a later date as the Minister may deem necessary.

(1F) The decision made by the Minister under subsection (1E) must be submitted to the Chief Executive and the Chief Executive must—

- (a) approve the application, if the application is approved by the Minister; or
- (b) refuse the application, if the application is denied by the Minister.

(1G) Written notice of the approval or refusal of an application under this section must be given by the Chief Executive to the foreign investor within 5 working days of the making of an application except in the case where an application is referred to the Board for recommendation to the Minister under subsection (1D) in which case the Chief Executive must—

- (a) notify the foreign investor in writing within 5 working days of the making of an application that the application has been referred to the Board for recommendation to the Minister; and
- (b) upon receipt of the decision made by the Minister under subsection (1E), notify the foreign investor in writing within 5 working days of the approval or refusal of the application.



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(1H) Any person who fails to comply with this section shall be liable upon conviction to a fine not exceeding \$50,000.”

Section 13 amended

Clause 6 - Section 13(1) (a) of the Principal Act is amended by—

- (a) in subparagraph (iii), deleting “or” after “;”;
- (b) in subparagraph (iv), deleting “or”; and
- (c) inserting the following new subparagraphs after subparagraph (iv)—
 - “(v) is engaged in any activity outside of which a certificate is granted; or
 - (vi) has failed to obtain prior approval from the Chief Executive for a change in its ownership or shareholding particulars in accordance with section 11(1); or”

Section 13A amended

Clause 7 - Section 13A of the Principal Act is amended by—

- (a) inserting the following new subsection after subsection (1)—

“(1A) If a foreign investor engages in any activity or business outside of which a certificate is granted, the Attorney-General may apply to the High Court for an order forfeiting to the State any asset, interest, share or property derived from or used for the purpose of engaging in such activity or business.”; and

- (b) in subsection (2), by inserting “or (1A)” after “subsection (1)”.

Ministerial Responsibility - The explanatory notes says that the Act comes under the responsibility of the Minister responsible for Industry and Trade.

International comparisons

Australia

Australia has a foreign investment policy which provides guidance to foreign investors on the Government’s approach to administering the *Foreign Acquisitions and Takeovers Act 1975* (FATA). The policy also identifies a number of specific types of investment proposals that are required to be notified to the Government even if the FATA does not appear to apply.

The Treasurer is ultimately responsible for all decisions relating to foreign investment, and for the administration of Australian foreign investment policy. The *Foreign Acquisitions and Takeovers Act 1975* allows the Treasurer to review investment proposals to decide if they are contrary to the Australian national interest. If this occurs, the Treasurer can block proposals, or apply implementation conditions to ensure that the national interest is protected.

The Treasurer is advised and assisted by the Foreign Investment Review Board (FIRB) which administers the FATA in accordance with the policy. The FIRB is an administrative body with no statutory existence, and FATA makes no reference to it. However, the foreign investment policy



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confirms the FIRB's role. All decisions by the Treasurer relating to a foreign investment proposal are underpinned by analysis and recommendations made by the FIRB.²

New Zealand

Overseas investments in New Zealand assets are screened only if they are defined as sensitive within the Overseas Investment Act 2005 (the Act). Three broad classes of asset are currently defined as sensitive within the Act: acquisition of a 25% or greater ownership interest in business assets valued at over \$100 million, all fishing quota investments, and investment in sensitive land as defined in Schedule 1 of the Act. Examples of sensitive land include rural land over five hectares or land bordering or containing foreshore, seabed, river, or the bed of a lake. Most urban land is not screened unless defined as sensitive for other reasons. A full list of sensitive assets is defined in the Act.

Investors must pass an investor test that considers character, business acumen and level of financial commitment. Overseas investors wishing to purchase sensitive land must either intend to reside permanently in New Zealand or demonstrate that the investment will benefit New Zealand. The criteria for assessing this benefit are set out in the Act and the Overseas Investment Regulations 2005. There are no restrictions on the movement of funds into or out of New Zealand, or on repatriation of profits. No additional performance measures are imposed on foreign-owned enterprises.³

Gender analysis

The Bill does not have any disproportionate impact on women and men.

Further information

- *Foreign Investment (Budget Amendment) Bill 2016* – No. 48 of 2016 Available at: [http://www.parliament.gov.fj/getattachment/Parliament-Business/Bills/2016-Bills/Bill-No-48-Foreign-Investment-\(Budget-Amendment\)-\(1\).pdf](http://www.parliament.gov.fj/getattachment/Parliament-Business/Bills/2016-Bills/Bill-No-48-Foreign-Investment-(Budget-Amendment)-(1).pdf)
- *Foreign Investment Act 1999* Available at: http://www.pacii.org/cgi-bin/sinodisp/fj/legis/num_act/fia1999219/fia1999219.html?stem=&synonyms=&query=foreign%20investment%20act%201999
- *Australia's foreign investment policy* Available at: http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2901256/upload_binary/2901256.pdf;fileType=application/pdf#search=%22Sanyal,%20Kali%22
- *New Zealand Foreign Investment Policy* Available at: <http://www.treasury.govt.nz/economy/overview/2010/18.htm>

Disclaimer

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²Australia's foreign investment policy

http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2901256/upload_binary/2901256.pdf;fileType=application/pdf#search=%22Sanyal,%20Kali%22

³<http://www.treasury.govt.nz/economy/overview/2010/18.htm>