

Explanatory Memorandum Investment Promotion (Amendment) Bill 2019

1. Outline

1.1 Papua New Guinea remains open to responsible foreign investment

Papua New Guinea recognises the contributions that foreign investment makes to improving the human and economic development of the country. Additionally, the Government has committed to an ambitious agenda to promote the growth of Micro-, Small-, and Medium-Sized Enterprises (MSMEs) to become the backbone of the economy. These policy objectives are not in conflict. Rather, it requires improvements to the foreign investment system to encourage beneficial, responsible foreign investment while allowing space for MSMEs to grow.

PNG will remain open to all foreign investment, except activities:

- a) reserved for citizens, i.e. 'reserved activities', and
- b) open for foreign participation on standard, pre-determined conditions, i.e. 'restricted activities'.

These activities will be identified under the Regulations.

The Bill also incorporates improved review mechanisms to determine activities included under these lists. Reviews will be more frequent, open, and accountable. Grandfathering provisions have been included to provide certainty for existing businesses.

1.2 Improved clarity of IPA functions and responsibilities

The Investment Promotion Authority is the first point of contact for foreign investors in PNG. In order to improve IPA's ability to manage the foreign certification system, governance improvements are being incorporated into the Bill.

These changes include:

- refocussing the IPA Board's role to primarily address policy issues and advice to the Executive
- clarifying the role of the IPA Managing Director to be primarily responsible for investment promotion and facilitation, as well as the day-to-day running of the IPA, and
- introducing a Registrar of Foreign Investment to have more responsive oversight and management of the foreign certification process.

1.3 Improved compliance and monitoring powers

The Bill introduces a number of provisions which will enable better compliance and monitoring of both individual certificate holders and the foreign investment system more generally. This information is valuable to ensure that responsible foreign investment is promoted in PNG, as well as providing information for system improvements over time.

A key change is the introduction of the position of the Registrar of Foreign Investment. A dedicated position responsible for the administration of the foreign investment system will improve compliance and monitoring. Supporting amendments include:

- the introduction of annual reporting requirements for certificate holders

- mandatory annual reports from the Registrar to the Minister on the administration of the Act and the conduct of foreign investors
- strengthened inspection powers and powers to obtain information, and
- strengthened offence provisions.

1.4 Simpler, quicker foreign certification

The Bill reforms the current certification system by adopting a system similar to registration under the Companies Act. Registration will be approved by the Registrar unless defined disqualifying criteria are triggered. This will create additional certainty for foreign investors to know what types of foreign investment are permissible. It will also enable faster certification as the Registrar is empowered to approve applications on a rolling basis.

Where an application is refused, the applicant can appeal first to the IPA Board, and subsequently to the Minister.

2. Notes on individual clauses

2.1 Section 3 – definitions

The definition of “activity” has been amended to incorporate the introduction of restricted activities in s 27A.

The definition of “beneficial owner” is included to provide further certainty.

The definition of “carrying on business” is clarified in (aa) to include activities for profit or gain. This removes the requirement for religious, charitable, educational, other socially useful purpose, and non-profit entities and to seek exemptions under the Act in s 26. The definition is further amended in (oa) to enable short-term professional services to operate in PNG without foreign certification.

The definitions of “register” and “Registrar” are included to account for changes to the foreign certification process.

The definitions of “sign” and “writing” are included to better facilitate online registry operations.

2.2 Section 6A – Functions of the Investment Promotion Authority

Original section 6 has been deleted to better arrange functions of the IPA.

Section 6A is amended to better clarify the functions of IPA, as well as assign responsibility for functions to the IPA Board, Managing Director, and Registrar.

2.3 Section 8 – Board for the Investment Promotion Authority

Section 8(2A) is amended to better highlight the Board’s management and oversight role.

2.4 Section 15 – Meetings of the Board

Section 15(3A) is inserted to clarify that the IPA Board can meet in person and by other means, including electronic means.

2.5 Section 16 – Disclosure of interest by member of the Board

The definitions of s 16(3) and 16(4) are included to provide better guidance as to when Board members have a direct or indirect interest in a matter and must accordingly withdraw themselves from the matter.

2.6 Part IV – Generally

References to ‘Authority’ have been replaced by ‘Registrar’ to clarify the Registrar’s role and powers in this Part.

2.7 Section 26 – Exemption

This section has been deleted because the definition of ‘carrying on a business’ was amended to exclude not-for-profit activities.

2.8 Section 27 – Reserved Activities

Section 27(1) has been amended to exclude national enterprises as these enterprises can include minority foreign ownership or interests. It is intended that reserved activities be for PNG citizens or wholly PNG-owned enterprises.

Grandfathering provisions in s 27(5) are unchanged; however, 27(5A) clarifies that grandfathered businesses lose this status upon a change of ownership, shareholding or beneficial ownership or control.

2.9 27A – Restricted Activities

This section introduces the new concept of restricted activities. These activities are open for foreign investment based on compliance with conditions specified in the Regulations. Subsection 27A(2) indicates the conditions that could be applied to a restricted activity.

Existing enterprises carrying on business in an activity that later becomes restricted will be grandfathered under s 27A(3). Section 27A(4) is intended to clarify that this grandfathering will not be lost in a future change of ownership, shareholding or beneficial ownership or control.

2.10 27B – Activities not to be reserved or restricted

This section introduces basic exclusion criteria in determining which activities can be reserved or restricted.

2.11 27C – Review of reserved list and restricted list

This section improves on deleted subsections 27(2) and 27(3). The section creates a more regular, transparent process for reviewing reserved and restricted activities.

Sections 27C(1) and 27C(2) clarify that the Board is responsible for reviewing the lists and provides better guidance on considerations that the Board may have regard to.

Section 27C(3) makes open, accountable public consultation mandatory with the findings of the Board made public under 27C(4)(c).

2.12 27D – Minister’s consideration of review

This section is introduced to provide further transparency for changes to reserved or restricted activities at the Ministerial level.

2.13 28 – Application for certification

Section 28(2) is replaced by (2AA) to provide for better mandatory information for registry operations purposes.

Section 28(2AC) requires applicants to disclose certain information to enable the Registrar to better assess the character of foreign certification applicants. This information includes:

- financial information – whether the applicant(s) are undischarged bankrupts, or are in liquidation, receivership or voluntary administration, and
- legal information – whether there are unsatisfied civil judgements registered against the applicant(s) or whether the applicant(s) have been convicted or charged of any criminal offences.

Repealed s 28(4A) required the Authority to verify information and assess a number of factors including *inter alia* whether the proposed activity was likely to achieve some or all of the purposes of the Act, and whether the applicant has sufficient ability to finance, establish or otherwise carry out the proposed activity. Section 27(4A)(d) also incorporated character check requirements.

This approach has proven operationally problematic. It is difficult for the IPA Board to make meaningful assessments of the factors required by the Act and positive vetting of all applications has resulted in approval delays.

Section 27(4AA) implements a substantial change to how foreign certification applications are assessed. The Registrar is required to approve applications unless certain disqualification criteria are present. Where disqualification criteria are present, the Registrar is prohibited from granting the application.

This change enables approval of applications on a rolling basis by the Registrar, leading to faster approvals. Section 28(4AC) requires notice of grant or refusal to be provided within 5 working days of making a complete and correct application. This is an improvement from repealed s 28(5) which required notification within 35 working days.

The disqualification criteria are also clearer and provide better certainty for foreign investors to predict whether their application will be approved. Automatic disqualification for reserved industries further protects MSMEs. Section 28(4AD) requires the Registrar to give written reasons for a refused application or an application granted under terms other than those applied for.

Section 28(4AB) clarifies that applicants approved for restricted activities must comply with the conditions of the certificate.

2.14 29A – Duration of validity of certificate

This section provides greater clarity regarding when a certificate will be valid and when it will be invalid.

2.15 29B – Holder shall file an annual status report

This section requires holders of certificates to annually report on prescribed information. Requiring certificate holders to report on standardised information will enable better monitoring and compliance by the Registrar.

2.16 29C – Suspension of certificate for failure to file a status report

This section provides the Registrar with powers to suspend certificates three months after when certificate holders have failed to file their annual status report. Reinstatement procedures are also outlined.

2.17 29D – Effect of suspension of certificate for failure to file annual status report

This section requires holders of suspended certificates to not carry on business in activities authorised by the certificate. Certificates are automatically cancelled one year after the suspension date if the certificate holder has not filed appropriately for reinstatement.

2.18 Part IVI – Certification to participate in a national enterprise

The entire part is repealed.

The treatment of foreign investment in Part IVI is inconsistent with amendments to the approval of foreign certification applications in Part IV. In particular, the requirement for the Authority to make subjective judgement under s 36D are operationally difficult.

Protections against undesirable foreign control of citizen and national enterprises remain:

- applications for investment in citizen enterprises or national enterprises to the point that they become foreign controlled are dealt with under s 32(4)
- applications for foreign certification include character assessments under s 28(4AA)
- applications for foreign certification for reserved activities are automatically disallowed under s 28(4AA)
- companies listed on the Port Moresby Stock Exchange are subject to the Takeovers Code
- mergers and acquisitions with market power effects are controlled under the Independent Consumer and Competition Commission Act.

2.19 40 – Appeal from a decision of the Registrar

Section 40 is amended to take account of the newly created role of the Registrar. Appeals from decisions of the Registrar are to be made to the IPA Board. If the IPA Board refuses an appeal, the enterprise may appeal to the Minister.

2.20 Part VII – Miscellaneous generally

Minor consequential amendments are made to reflect the introduction of restricted activities and the repeal of Part IVI changes have been made.

2.21 41C – Carrying on business fraudulently

A new offence has been created for carrying on a business with an intent to defraud creditors of the foreign enterprise or any other person or for a fraudulent purpose.

2.22 42 – Information

This section is repealed and is now covered under Part VIII.

2.23 43 – False statements

This section is repealed and now covered by s 451.

2.24 45A – Registrar of Foreign Investment

This section creates the Registrar of Foreign Investment, specifying that it shall be the same person as the Registrar of Companies.

2.25 45B – General functions of Registrar

This section outlines the specific responsibilities of the Registrar.

2.26 45C – Foreign Investment Register

This section establishes the foreign investment register and enables the register to be kept in electronic form.

2.27 45D – Contents of the register

This section specifies the minimum information required to be kept on the register.

2.28 45E – Inspection of register

This section enables members of the public to inspect the register.

2.29 45F – Registrar shall prepare annual report

This section introduces the requirement that the Registrar report annually to the Minister on the administration of the Act during the financial year and the conduct of foreign investors in PNG during the financial year. The Minister is required to table the report to Parliament.

2.30 45G – Registrar’s powers of inspection

This section empowers the Registrar to, by written notice, require a person to file or otherwise provide the Registrar such information as the Registrar considers reasonably necessary to determine whether or not a person is carrying on a business in breach of the Act or Regulations.

2.31 45H – Registrar may require information

This section grants the Registrar powers to require information to be provided to update or correct the Register, or that should have otherwise ought to have been filed.

2.32 45I – False statements

This section creates an offence to make or authorise false or misleading statements with respect to any information or document required for the purposes of the Act. This also includes omissions.

2.33 45J – Rectification of the register

This section provides powers to the Registrar to rectify the register. Notice provisions are included for when the Registrar wishes to correct information that does not solely relate to the person who provided the information.

2.34 45K – How Registrar may give notices

This section outlines how the Registrar may give notices.

2.35 45L – Evidentiary matters

This section clarifies that documents specified by the section are prima facie evidence in legal proceedings.