



Tonga

INDUSTRIAL PROPERTY ACT

Chapter 40.16

2016 Revised Edition



INDUSTRIAL PROPERTY ACT

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INDUSTRIAL PROPERTY ACT

AN ACT TO PROVIDE FOR THE REGISTRATION AND PROTECTION OF PATENTS, UTILITY MODEL CERTIFICATES, INDUSTRIAL DESIGNS AND TRADE MARKS¹

Commencement [²]

PART I - PRELIMINARY

1 Short title and commencement

This Act may be cited as the Industrial Property Act, and shall come into operation on a date to be fixed by His Majesty in Council.

2 Interpretation³

In this Act, unless the context otherwise requires, —

“**agent**” means a law practitioner with a valid practicing licence resident or having a place of business in Tonga representing the applicant;

“**collective mark**” means any visible sign designated as such in the application for registration and capable of distinguishing the origin or any other common characteristic, including the quality, of goods or service of different enterprises which use the sign under the control of the registered owner of the collective mark;

“**Court**” means the Supreme Court of Tonga;

“**industrial design**” means any composition of lines or colours or any three-dimensional form, whether or not associated with lines or colours, where such composition or form gives a special appearance to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft but does not include anything in an industrial design which serves solely to obtain a technical result;

“**International Bureau**” means the International Bureau of World Intellectual Property Organisation as described in the Madrid Protocol;

“**International Classification**” means the classification according to the Nice Agreement;

“**invention**” means an idea of an inventor which permits in practice the solution of a specific problem in the field of technology;

“**Madrid Protocol**” means the Protocol relating to the Madrid Agreement concerning the International Registration of Marks, adopted in Madrid on 27 June 1989;

“**marks**” means any visible sign capable of distinguishing the goods or services of an enterprise;

“**Minister**” means the Minister responsible for commerce;⁴

“**Nice Agreement**” means the Nice Agreement of June 15, 1957, Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks as last revised;

“**Paris Convention**” means the Paris Convention for the Protection of Industrial Property of March 20, 1883, as last revised;

“**patent**” means the title granted to protect an invention;

“**Patent Cooperation Treaty**” means the Patent Cooperation Treaty established in Washington on June 1970;

“**patentee**” means a person registered as grantee or proprietor of a patent;

“**priority date**” means the date of the earlier application that serves as the basis for the right of priority provided for in the Paris Convention;

“**registers**” means the registers referred to in section 39(1);

“**Registrar**” means the person holding office in terms of section 37;

“**regulations**” means regulations made under section 45;

“**trade name**” means the name or designation identifying and distinguishing an enterprise;

“**utility model certificate**” means a certificate referred to in sections 17 to 19;

“**World Trade Organization**” means the World Trade Organisation established in Geneva in 1995.

PART II - PATENTS

3 Inventions

Subject to section 4, an invention may be or may relate to a product or a process.

4 Matters excluded from patent protection

The following, even if they are inventions in terms of section 2, shall be excluded from patent protection —

- (a) discoveries, scientific theories and mathematical methods;
- (b) schemes, rules or methods for doing business, performing purely mental acts or playing games;
- (c) methods for treatment of the human or animal body by surgery or therapy, as well as diagnostic methods practised on the human or animal body. This provision shall not apply to products for use in any of those methods.

5 Patentable inventions

- (1) An invention is patentable if it is new, involves an inventive step and is industrially applicable.
- (2) An invention is new if it is not anticipated by prior art.
- (3) Prior art shall consist of everything disclosed to the public —
 - (a) anywhere in the world, by publication in tangible form; or
 - (b) in Tonga, by oral disclosure, by use or in any other way,prior to the filing, or where applicable, the priority date, of the application claiming the invention.
- (4) For the purposes of subsection (3), disclosure to the public of the invention shall not be taken into consideration if it occurred within 12 months preceding the filing date or, where applicable, the priority date, of the application, and if it was by reason or in consequence of acts committed by the applicant or his predecessor in title or of an abuse committed by a third party with regard to the applicant or his predecessor in title.
- (5) An invention shall be considered as involving an inventive step if, having regard to the prior art relevant to the application claiming the invention, it would not have been obvious to a person having ordinary skill in the art.
- (6) An invention shall be considered industrially applicable if it can be made or used in any kind of industry.

- (7) Industry shall be understood in its broadest sense; it shall include handicraft, agriculture, fishery, pharmaceuticals and services.
- (8) Inventions that are contrary to public order or morality shall not be patentable.

6 Right to patent; naming of inventor

- (1) The right to a patent shall belong to the inventor.
- (2) If two or more persons have jointly made an invention, the right to the patent shall belong to them jointly.
- (3) If and to the extent to which two or more persons have made the same invention independently of each other, the person whose application has the earliest filing date or, if priority is claimed, the earliest validly claimed priority date and leads to the grant of a patent shall have the right to the patent, as long as the said application is not withdrawn, abandoned or rejected.⁵
- (4) The right to a patent may be assigned, or may be transferred by succession, and the owner of a patent shall have the right to conclude licencing contracts.⁶
- (5) Where an invention is made in execution of an employment contract, the right to the patent shall belong, in the absence of contractual provisions to the contrary, to the employer.
- (6) When an invention is made in execution of a commission or an employment contract, the right to the patent for that invention shall belong, in the absence of contractual provisions to the contrary, to the person having commissioned the work or the employer, as the case may be.
- (7) When the invention has an economic value much greater than the parties could have reasonably foreseen at the time of concluding the contract, the inventor shall have a right to equitable remuneration, which shall be determined by the Court in the absence of agreement between the parties.
- (8) Notwithstanding subsections (6) and (7), when an employee, whose employment contract does not require him to engage in inventive activity, makes, in the field of activities of his employer, an invention by using data or means available to him through his employment, the right to the patent for that invention shall belong, in the absence of contractual provisions to the contrary, to the employer:

Provided that the employee shall have a right to equitable remuneration taking into account his salary, the economic value of the invention and any benefit derived from the invention by the employer. In the absence of agreement between the parties, the remuneration shall be determined by the Court.

- (9) Any contractual provision which is less favourable to the inventor than the provisions of this section shall be null and void.

- (10) The inventor shall be named as such in the patent, unless in a special written declaration addressed to the Registrar he indicates that he wishes not to be named. Any promise or undertaking by the inventor made to any person to the effect that he will make such a declaration shall be without legal effect.

7 Applications

- (1) An application for a patent shall be filed with the Registrar and shall contain a request, a description, one or more claims, one or more drawings, where required, and an abstract. It shall be accompanied by the payment of the prescribed application fee.
- (2) The request shall contain a petition, to the effect that a patent be granted, the name of the applicant and other prescribed data concerning the applicant, the inventor and the agent, if any, and the title of the invention.
- (3) Where the applicant is not the inventor, the request shall be accompanied by a statement justifying the applicant's right to the patent.
- (4) The description shall disclose the invention in a manner sufficiently clear and complete for the invention to be evaluated, and to be carried out by a person having ordinary skill in the art, and shall, in particular, indicate the best mode for carrying out the invention known to the applicant at the filing date, or where priority is claimed, at the priority date of the application.⁷
- (5) The claim or claims shall determine the scope of the protection; the description and the drawings may be used to interpret the claims.
- (6) Claims shall be clear and concise and shall be fully supported by the description.
- (7) Drawings shall be required when they are necessary for the understanding of the invention.
- (8) The abstract shall merely serve the purpose of technical information; in particular, it shall not be taken into account for the purpose of interpreting the scope of the protection.
- (9) The applicant may withdraw the application at any time before grant.

8 Duty of invention; amendment and division of application

- (1) The application shall relate to one invention only or to a group of inventions so linked as to form a single general inventive concept.
- (2) The applicant may at any time before grant, amend the application, but the amendment shall not go beyond the disclosure in the initial application.
- (3) The applicant may, up to the time when the application is in order for grant, divide the application into two or more applications namely, divisional

applications, but each divisional application shall not go beyond the disclosure in the initial application.

- (4) The divisional application shall be entitled to the filing date and, where applicable, the priority date of the initial application.
- (5) The fact that a patent has been granted on an application that did not comply with the requirement of unity of invention under subsection (1) shall not be a ground for the invalidation of the patent.

9 Right of priority under the Paris Convention

- (1) The application may contain a declaration claiming the priority, as provided for in the Paris Convention, of one or more earlier national, regional or international applications filed by the applicant or his predecessor in title in or for any State party to the said Convention, or any member of the World Trade Organisation.⁸
- (2) Where the application contains a declaration under subsection (1), the Registrar may require that the applicant furnish, within the prescribed time limit, a copy of the earlier application certified as correct by the office with which it was filed.
- (3) The effect of the said declaration shall be as provided in the Paris Convention.
- (4) If the Registrar finds that the requirement under this section and the regulations pertaining thereto have not been fulfilled, the said declaration shall be considered not to have been made.

10 Information concerning corresponding foreign applications for patents or other titles of protection

- (1) The applicant shall, at the request of the Registrar, furnish him with the date and number of any application for a patent or other titles of protection filed by him abroad (herein referred to as “foreign applications”), relating to the same or essentially the same invention as that claimed in the application filed with the Registrar.
- (2) The applicant shall, at the request of the Registrar, furnish him with the following documents relating to one of the foreign applications referred to in subsection (1) —
 - (a) a copy of the patent or other title of protection granted on the basis of the foreign application;
 - (b) a copy of any communication received by the applicant concerning the results of any search or examination carried out in respect of the foreign application;
 - (c) a copy of any final decision rejecting the foreign application or refusing the grant requested in the foreign application; and

- (d) a copy of any final decision invalidating the patent or other title of protection granted on the basis of the foreign application referred to in subsection (1).

11 Filing date; examination

- (1) The Registrar shall accord as the filing date, the date of receipt of the application, provided that, at the time of receipt, the application fee is paid and the application contains —
 - (a) the name of the applicant;
 - (b) a part which on the face of it appears to be a description;
 - (c) a part which on the face of it appears to be a claim or claims;
 - (d) an express or implicit indication that the grant of a patent is sought.
- (2) If the Registrar finds that the application did not, at the time of receipt, fulfil the requirements referred to in subsection (1), he shall invite the applicant to file the required correction and shall accord as the filing date the date of receipt of the required correction, but if no correction is made, the application shall be treated as if it had not been filed.
- (3) Where the application refers to drawings which in fact are not included in the application, the Registrar shall invite the applicant to furnish the missing drawings.
- (4) If the applicant complies with the invitation referred to in subsection (3), the Registrar shall accord, as the filing date, the date of receipt of the missing drawings. Otherwise the Registrar shall accord, as the filing date, the date of receipt of the application and shall treat any references to the said drawings as non-existent.
- (5) After according a filing date, the Registrar shall examine whether the application complies with the requirements of section 7(1), (2), (3) and (4), and the Regulations relating thereto and whether information requested under Section 10, if any, has been provided.²
- (6) Where the Registrar is of the opinion that the application complies with the requirements under subsection (5), the Registrar shall make a decision as to whether the requirements of sections 3, 4, 5, 7(4), 7(5), 7(6), 7(7), and 8, and the Regulations, cause the application to be examined.¹⁰
- (7) The Registrar shall take into account, for the purpose of subsection (6) -
 - (a) the result of any international search report and international preliminary examination report established under the Patent Cooperation Treaty in relation to the application;
 - (b) a search and examination report submitted under section 10(2)(c) relating to, or a final decision submitted under section 10(2)(c) on the refusal to grant a patent on a corresponding foreign application; and

- (c) a search and examination report which was carried out upon his request by an external search and examination authority.¹¹
- (8)
- (a) Any international application filed or received by the Registrar in which Tonga is designated for the purposes of obtaining a patent under this Act shall be treated as an application filed under this Act.
 - (b) The registrar shall examine and process all international applications referred to in paragraph (a) and the provisions of the Patent Cooperation Treaty and the Regulations relating thereto.
 - (c) In the event of conflict between the provision of this Act and its Regulations and the provisions of the Patent Cooperation Treaty, the former shall prevail unless the application of these provisions contravene the underlying principles of the latter, in which case the latter shall prevail, according to prescribed procedures.¹²

12 Grant of patent

- (1) Where the Registrar finds that the conditions referred to in section 11(5) and (6) are fulfilled, he shall grant the patent. Otherwise, he shall reject the application and notify the applicant of his decision.
- (2) When he grants a patent, the Registrar shall —
 - (a) publish the fact that he has granted the patent;
 - (b) issue to the applicant a certificate of the grant of the patent and a copy of the patent;
 - (c) record the patent; and
 - (d) make available copies of the patent to the public, on payment of the prescribed fee.
- (3) The Registrar shall, whenever possible, make a final decision regarding the application not later than two years after the commencement of the examination referred to in section 11.¹³
- (4) The Registrar shall, upon request of the owner of the patent, make changes in the text or drawings of the patent in order to limit the extent of the protection conferred thereby, provided that the change would not result in the disclosure contained in the patent going beyond the disclosure contained in the initial application on the basis of which the patent was granted.¹⁴

13 Rights conferred by patent; exploitation by Government or person thereby authorized

- (1) Exploitation in respect of a patented invention means any of the following acts —

- (a) when the patent has been granted in respect of a product, the making, importing, exporting, offering for sale, setting and using the products or stocking such products for the purposes of offering for sale;
 - (b) when the patent has been granted in respect of a process, using the process or doing any of the acts referred to in sub-paragraph (a) in respect of a product obtained directly by means of the process.
- (2) Subject to subsections (4) and (5) and section 15, the exploitation of the patented invention in Tonga by persons other than the owner of the patent shall require the patentee's permission.
- (3) The patentee shall, in addition to any other rights, remedies or actions available to him, have the right, subject to subsections (4) and (5) and section 15 and 16A, to institute court proceedings against any person who exploits the patent without his permission, or who performs acts which may likely infringe the patented invention.
- (4)¹⁵ The rights under the patent shall not extend —
- (a) to acts in respect of articles which have been put on the market in Tonga or in any other country by the patentee or with his consent;
 - (b) to the use of articles on aircraft, land vehicles, or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of Tonga;
 - (c) to acts done only for experimental purposes relating to a patented invention;
 - (d) to acts performed by any person who in good faith, before the filing or, where priority is claimed, the priority date of the application on which the patent is granted, was using the invention in Tonga or was making effective and serious preparations in Tonga for such use, to the extent that such acts do not differ in nature or purpose from the actual or envisaged prior use; this right may be transferred or devolve only together with the enterprise or business, or with that part of the enterprise or business, in which the use or preparations for use have been made.
- (5)¹⁶
- (a) It is an infringement of a patent for any person to make, construct, use or sell the patent invention solely for use reasonably related to the development and submission of information required under any law in Tonga that regulates the manufacture, construction, use or sale of any product.
 - (b) The right of prior user referred to in subsection 4(d) may be transferred or devolve only together with the enterprise or business, or with that part of the enterprise or business, in which the use have been made.

14 Duration annual fees

- (1) Subject to subsection (2), a patent shall expire 20 years after the filing date of the application for the patent.
- (2) In order to maintain the patent or patent application, an annual fee shall be paid in advance to the Registrar for each year, starting one year after the filing date of the application for the grant of the patent. A period of grace of 6 months shall be allowed for the late payment of the annual fee on payment of the prescribed surcharge. If an annual fee is not paid in accordance with the provisions of this subsection, the patent application shall be deemed to have been withdrawn or the patent shall lapse.

15 Non-voluntary licences

- (1) On the request of any person who proves his ability to work a patented invention in Tonga made to the Registrar after the expiration of a period of 4 years from the date of filing of the patent application or 3 years from the date of the grant of the patent, whichever period expires last, the Registrar may grant a non-voluntary licence if the patented invention is not worked or is insufficiently worked locally or by importation in Tonga.¹⁷
- (2) Notwithstanding subsection (1), a non-voluntary licence shall not be granted if the patentee satisfies the Registrar that circumstances exist which justify the non-working or insufficient working of the patented invention in Tonga. Importation shall not constitute such a circumstance.
- (3) The beneficiary of the non-voluntary licence shall have the right to exploit, including importation, the patented invention in Tonga according to the terms set down in the decision granting the licence and, shall commence the working of the patented invention in Tonga within the time limit fixed in the said decision and, thereafter, shall work the patented invention sufficiently in Tonga, subject to the payment of an equitable remuneration therefore as determined in the said decision.¹⁸
- (4) The grant of the non-voluntary licence shall fix —
 - (a) the scope and function of the licence;
 - (b) the time limit which the licensee shall begin to exploit the patented invention; and
 - (c) the amount of the adequate remuneration to be paid to the owner of the patent and the conditions of payment.¹⁹
- (5) If the invention claimed in a patent (later patent) cannot be exploited in the country without infringing a patent granted on the basis of an application benefiting from an earlier filing or, where appropriate, priority date, the Registrar upon the request of the owner of the later patent, may issue a non-voluntary licence to the extent necessary to avoid infringement of the earlier patent.²⁰

- (6) Where a non-voluntary licence is issued under subsection (5) the Registrar upon the request of the owner of the earlier patent, shall issue a non-voluntary licence in respect of the later patent.²¹
- (7) In the case for a request for the issuance of a non-voluntary licence under subsections (5) and (6), subsection (3) shall apply mutatis mutandis with the proviso that no time limit needs to be fixed.²²
- (8) In the case of a non-voluntary licence issued under subsection (5), the transfer may be made only with the later patent, or, in the case of non-voluntary licence issued under subsection (6), only with the earlier patent.²³
- (9) The request for the issuance of a non-voluntary licence shall be subject to payment of the prescribed fee.²⁴

16 Invalidation

- (1) Any interested person may request the Court to invalidate a patent.
- (2) The Court shall invalidate the patent if the person requesting the invalidation proves that any of the requirements of sections 3, 4, 5, and 7(4), 7(5), 7(6) and 7(7) are not fulfilled or if the patentee is not the inventor or his successor in title.
- (3) Any invalidated patent, or claim or part of a claim, shall be regarded as null and void *ab initio*.
- (4) The final decision of the Court shall be notified to the Registrar who shall record it and publish the decision as soon as possible.

16A Emergency Measures²⁵

- (1) The Minister may decide that, even without the agreement of the owner of the patent, a Government agency or a third person designated by him may exploit a patented invention where the –
 - (a) public interest, in particular, national security, nutrition, health or the development of other vital sectors of the national economy so requires; or
 - (b) court has determined that the manner of exploitation, by the owner of the patent or licensee, is anti-competitive, and the Minister is satisfied that the exploitation of the invention in accordance with this subsection would remedy such practice.
- (2) The exploitation of the patented invention shall be limited to the purpose for which it was authorised and shall be subjected to the payment to the owner of an adequate remuneration taking into account the economic value of the Minister's authorisation, as determined in the said decision, and, where a decision has been taken under subsection 1(b), the need to correct anti-competitive practices.

- (3) The Minister shall make his decision after hearing the owner of the patent and any interested person if they wish to be heard.
- (4) A request for the Minister's authorisation shall be accompanied by evidence that the owner of the patent has received, from the person seeking authorisation, a request for a contractual licence, but that person has been unable to obtain such a licence on reasonable commercial terms and conditions and within a reasonable time.
- (5) Subsection (4) shall not apply in cases of –
 - (a) national emergency or other circumstances of extreme urgency provided, that in such cases the owner of the patent shall be notified by the Minister's decision as soon as reasonably practicable;
 - (b) public non-commercial use; and
 - (c) anti-competitive practices determined as such by the Minister.
- (6) The exploitation of a patented invention in the field of semi-conductor technology shall only be authorised either for public non-commercial use or where the Minister has determined that the manner of exploitation of the patented invention, by the owner of the patent or his licensee, is anti-competitive and if the Minister is satisfied that the issuance of the non-voluntary licence would remedy such practice.
- (7) The authorisation shall not exclude the -
 - (a) conclusion of a licence contract by the owner of the patent;
 - (b) continued exercise, by the owner of the patent, of his rights under section 13(1); or
 - (c) issuance of a non-voluntary licence under section 15.
- (8) Where a third person has been designated by the Minister, the authorisation may only be transferred with the enterprise or business of that person or with the part of the enterprise or business within the patented invention that is being exploited.
- (9) Where the exploitation of the invention by the Government agency or third person designated by the Minister is authorised under subsection (1), it shall be predominantly for the supply of the market in Tonga and this authorisation shall not apply where the exploitation is authorized under subsection (1) (b).
- (10) Upon request of the owner of the patent or to the Government agency or of the third person authorised to exploit the patented invention, the Minister may, after hearing the parties vary the terms of the decision authorising the exploitation of the patented invention to the extent that changed circumstances justify such variation.
- (11)
 - (a) Upon the request of the owner of the patent, the Minister shall terminate the authorisation if he is

- (b) satisfied after hearing the parties that the circumstances which led to his decision have ceased to exist and are unlikely to occur or that the Government agency or third person designated by him has failed to comply with the terms of the decision.
- (c) Notwithstanding paragraph (a), the Minister shall not terminate the authorisation if he is satisfied that the need for adequate protection of the legitimate interests of the Government agency or third person designated by him justifies the maintenance of the decision.

PART III - UTILITY MODEL CERTIFICATES

17 Applicability of provisions pertaining to patents

- (1) Subject to section 18, the provisions of Part II shall apply, *mutatis mutandis*, to utility model certificates or applications therefore, as the case may be.
- (2) Where the right to a patent conflicts with the right to a utility model certificate in the case referred to in section 6(3), the said provision shall apply as if the word “patent” were replaced by the words “patent or utility model certificate.”

18 Special provisions pertaining to utility model certificates

- (1) An invention qualifies for a utility model certificate if it is new and is industrially applicable.
- (2) Sections 5(1) and 5(5) shall not apply in the case of inventions for which utility model certificates are requested.
- (3) A utility model certificate shall expire, without possibility of renewal, at the end of the seventh year after the date of the filing of the application.
- (4) Section 14 shall not apply in the case of a utility model certificate.
- (5) In proceedings under section 16, the Court shall invalidate the utility model certificates on the following grounds —
 - (a) that the claimed invention did not qualify for a utility model certificate, having regard to subsection (1) and to sections 5(2), 5(3), 5(4), 5(6) and 5(8);
 - (b) that the description and the claims do not comply with the requirements of sections 7(4), 7(5), and 7(6);
 - (c) that any drawing which is necessary for the understanding of the invention has not been furnished;
 - (d) that the owner of the utility model certificate is not the inventor or his successor in title.

- (6) Section 16(2) shall not apply in the case of utility model certificates.

19 Conversion of applications of patent or utility model certificates

- (1) At any time before the grant or rejection of a patent, an applicant for a patent may, upon payment of the prescribed fee, convert his application into an application for a utility model certificate, which shall be accorded the filing date of the initial application.
- (2) At any time before the grant or rejection of a utility model certificate, an applicant for a utility model certificate may, upon payment of the prescribed fee, convert his application into a patent application, which shall be accorded the filing date of the initial application.
- (3) An application may not be converted under subsection (1) more than once.

PART IV - INDUSTRIAL DESIGNS

20 Registrable industrial designs

- (1) An industrial design is registrable if it is new.
- (2) An industrial design shall be new if it has not been disclosed to the public —
 - (a) anywhere in the world by publication in tangible form; or
 - (b) in Tonga, by description or by use or in any other way, prior to the filing date or, where applicable, prior to the priority date of the application for registration.
- (3) For the purposes of subsection (2), disclosure to the public of an industrial design shall not be taken into consideration if it occurred within 12 months preceding the filing date or, where applicable, the priority date of the application, and if it was by reason or in consequence of acts committed by the applicant or his predecessor in title or of an abuse committed by a third party with regard to the applicant or his predecessor in title.
- (4) Industrial designs that are contrary to public order or morality shall not be registrable.

21 Right to registration of industrial designs; naming of creator

- (1) The right to registration of an industrial design shall belong to the creator of that industrial design.
- (2) If two or more persons have jointly created an industrial design, the right to the registration of the industrial design shall belong to them jointly.

- (3) If and to the extent to which two or more persons have created the same industrial design independently of each other, the person whose application has the earliest filing date or, if priority is claimed, the earliest validly claimed priority date and leads to the issue of a certificate of registration of the industrial design shall have the right to the registration of the industrial design.
- (4) The right to the registration of an industrial design may be assigned, or may be transferred by succession.
- (5) Where an industrial design is made in execution of an employment contract, the right to the registration of the industrial design shall belong, in the absence of contractual provisions to the contrary, to the employer.
- (6) When an industrial design is made in execution of a commission or an employment contract, the right to the registration of the industrial design shall belong, in the absence of contractual provisions to the contrary, to the person having commissioned the work or to the employer, as the case may be.
- (7) When the industrial design has an economic value much greater than the parties could have reasonably foreseen at the time of concluding the contract the person who created the industrial design shall have a right to equitable remuneration, which shall be determined by the Court in the absence of agreement between the parties.
- (8) Notwithstanding subsections (6) and (7), when an employee, whose employment contract does not require him to engage in inventive activity, makes, in the field of activities of his employer, an industrial design by using data or means available to him through his employment, the right to registration of that industrial design shall belong, in the absence of contractual provisions to the contrary, to the employer:

Provided that the employee shall have a right to equitable remuneration taking into account his salary, the economic value of the industrial design and any benefit derived from the creation of such industrial design by the employer. In the absence of agreement between the parties, the remuneration shall be determined by the Court.
- (9) Any contractual provision which is less favourable to the creator of the industrial design than the provisions of this section shall be null and void.
- (10) The creator of the industrial design shall be named as such in the registration of the industrial design, unless in a special written declaration addressed to the Registrar, he indicates that he wishes not to be named. Any promise or undertaking by the creator made to any person to the effect that he will make such a declaration shall be without legal effect.

22 Application

- (1) The application for registration of an industrial design shall be filed with the Registrar and shall contain a request, drawings, photographs or other adequate

graphic representations of the article embodying the industrial design and an indication of the kind of products for which the industrial design is to be used. It may be accompanied by a specimen of the article embodying the industrial design and shall be accompanied by the payment of the prescribed fee.

- (2) Where the applicant is not the creator, the request shall be accompanied by a statement justifying the applicant's right to the registration of the industrial design.
- (3) Section 9 shall apply *mutatis mutandis* to applications for registration of industrial designs under this section.
- (4) The applicant may withdraw the application at any time before grant.

23 Examination; registration of industrial design

- (1) The Registrar shall accord as the filing date the date of receipt of the application together with the application fee:

Provided that, at the time of receipt, the application contains the name of the applicant and a pictorial representation of the article embodying the industrial design or a specimen thereof. Section 11(2) shall apply *mutatis mutandis* to the application under this subsection.

- (2) After according a filing date, the Registrar shall examine whether the application complies with the requirements of sections 22(1) and 22(2).
- (3) The Registrar shall examine whether the industrial design complies with the definition as contained in section 2 and whether it meets the requirements of section 20(4).
- (4) Where the Registrar finds that the conditions referred to in subsections (2) and (3) are fulfilled, he shall register the industrial design, publish the fact of the registration and issue to the applicant a certificate of registration of the industrial design. Otherwise, he shall reject the application.

24 Rights conferred by registration; duration and renewal

- (1) Exploitation in respect of an industrial design means the making, selling or importation of articles, incorporating the industrial design.
- (2) The exploitation of a registered industrial design in Tonga by persons other than the registered owner shall require the permission of the owner.
- (3) The rights conferred by registration of an industrial design shall not extend to acts in respect of articles which have been put on the market in Tonga or in any other country by the registered owner of the industrial design or with his consent.²⁶
- (4) The registered owner of an industrial design shall, in addition to any other rights, remedies or actions available to him, have the right to institute court

proceedings against any person who exploits the industrial design or who performs acts which make it likely that infringement will occur.

- (5) The registration of an industrial design shall be for a period of 5 years from the filing date of the application for registration. The registration may be renewed for two further consecutive periods of 5 years through the payment of the prescribed fee. A period of grace of 6 months shall be allowed for the late payment of the renewal fee on payment of the prescribed surcharge.

25 Invalidation

- (1) Any interested person may request the Court to invalidate the registration of an industrial design.
- (2) The Court shall invalidate the registration if —
 - (a) the person requesting the invalidation proves that —
 - (i) the industrial design is not an industrial design as defined in section 2; or
 - (ii) any of the requirements of section 20 are not complied with; or
 - (b) the registered owner of the industrial design is not the creator or his successor in title.
- (3) An invalidated registration of an industrial design shall be regarded as null and void *ab initio*.
- (4) The final decision of the Court shall be notified to the Registrar who shall record it and publish a reference thereto.

PART V - MARKS, COLLECTIVE MARKS AND TRADE NAMES

26 Acquisition of the exclusive right to a mark; registrability

- (1) The exclusive right to a mark shall be acquired by registration in accordance with this Act.
- (2) A mark cannot be validly registered —
 - (a) if it is incapable of distinguishing the goods or services of one enterprise from those of other enterprises;
 - (b) if it is contrary to public order or morality;
 - (c) if it is likely to mislead the public or trade circles, in particular as regards the geographical origin of the goods or services concerned or their nature or characteristics;

- (d) if it is identical with, or is an imitation of, or contains as an element, an armorial bearing, flag and other emblem, a name or abbreviation or initial of the name of, or official sign or hall mark adopted by, a State, inter-governmental organization or organization created by an international convention, unless authorised by the competent authority of that State or organization;
- (e) if it is identical with, or confusingly similar to, or constitutes a translation of, a mark or trade name which is well known in Tonga for identical or similar goods or services of another enterprise, if it is well known and registered in Tonga for goods or services which are not identical or similar to those in respect of which registration is applied for, provided, in the latter case, that use or the mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the well-known mark and that the interests of the owner of the well-known mark are likely to be damaged by such use; or²⁷
- (f) if it is identical with a mark belonging to a different proprietor and already on the Register, or with an earlier filing or priority date, in respect of the same goods or services, or closely related goods or services, or if it so nearly resembles such a mark as to be likely to deceive or cause confusion.

27 Application for registration

- (1) The application for registration of a mark shall be filed with the Registrar and shall contain a request, a reproduction of the mark and a list of the goods or services for which registration of the mark is requested, listed under the applicable class or classes of the International Classification. It shall be accompanied by the payment of the prescribed application fee.
- (2) The application may contain a declaration claiming the priority, as provided for in the Paris Convention, of an earlier national or regional application filed by the applicant or his predecessor in title, in or for any State Party to the said Convention or any member of the World Trade Organisation in which case, the Registrar may require that the applicant furnish, within the prescribed time limit, a copy of the earlier application, certified as correct by the office with which it was filed.²⁸
- (3) The effect of the said declaration shall be as provided in the Paris Convention.
- (4) If the Registrar finds that the requirements under subsection 3 have not been fulfilled, the said declaration shall be considered not to have been made.
- (5) The applicant may withdraw the application at any time before grant.

28 Examination; opposition; registration of mark

- (1) The Registrar shall examine whether the applications complies with the requirements of section 27(1).
- (2) The Registrar shall examine and determine whether the mark is a mark as defined in section 2 and is registrable under section 26(2)(a) to (f).
- (3) Where the Registrar finds that the conditions referred to in subsections (1) and (2) are fulfilled, he shall forthwith cause the application, as accepted, to be published in the prescribed manner.
- (4) Any interested person may, within the prescribed period and in the prescribed manner, give notice to the Registrar of opposition to the registration of the mark on grounds that one or more of the requirements of section 2, relating to the definition of a mark, or section 26(2) are not fulfilled.
- (5) The Registrar shall send forthwith a copy of a notice under the prescribed subsection to the applicant, and, within the prescribed period and in the prescribed manner, the applicant shall send to the Registrar a counter-statement of the grounds on which he relies for his application. If he does not do so, he shall be deemed to have abandoned the application.
- (6) On receiving a counter-statement from the applicant, the Registrar shall furnish a copy thereof to the person giving notice of opposition and, after hearing the parties, if either or both wish to be heard, and considering the merits of the case, shall decide whether the mark should be registered.
- (7) After the application is published and until the registration of the mark, the applicant has the same privileges and rights as he would have if the mark had been registered:

Provided that it shall be a valid defence to an action brought hereunder in respect of an act done after the application was published, if the defendant establishes that the mark could not validly have been registered at the time the act was done.

- (8) If the Registrar is satisfied that the conditions referred to in subsections (1) and (2) are fulfilled, and —
 - (a) the registration of the mark has not been opposed within the prescribed time limit; or
 - (b) the registration of the mark has been opposed and the opposition has been decided in the applicant's favour,

the Registrar shall register the mark, publish the fact of the registration and issue to the applicant a certificate of registration.

- (9) All applications filed with the International Bureau for international registration of a mark or marks in which Tonga is designated for the purpose of obtaining protection under this Act shall be governed by the provisions of this Act and its Regulations and the provisions of the Madrid Protocol and the Regulations.²⁹

- (10) In the event of conflict between the provisions of this Act and its Regulations and the provision of the Madrid Protocol and the Regulation pertaining thereto, the former shall prevail unless the application of these provisions contravene the underlying principles of the latter, in which case the latter shall prevail, according to prescribed procedures.³⁰

29 Rights conferred by registration; duration; renewal

- (1) The use of a registered mark, in relation to any goods or services for which it has been registered, by any person other than the registered owner shall require the permission of the owner.
- (2) The registered owner of a mark shall, in addition to any other rights, remedies or actions available to him, have the right to institute court proceedings against any person who infringes the mark by using, without his agreement, the mark as referred to in subsection (1) or who performs acts which make it likely that infringement will occur. The right shall extend to the use of a sign similar to the registered mark and to the use in relation to goods and services similar to those for which the mark has been registered, where the effect may mislead the public.
- (3) The rights conferred by registration of a mark shall not extend to acts in respect of articles which have been put on the market in Tonga or in any other country by the registered owner or with his consent.³¹
- (4) The registration of a mark shall be for a period of 10 years from the filing date of the application for registration. The registered mark may be renewed for consecutive periods of 10 years, provided that the registered proprietor pays the prescribed renewal fee. A period of grace of 6 months shall be allowed for the late payment of the renewal fee on payment of the prescribed surcharge.

30 Invalidation; removal on grounds of non-use

- (1) Any interested person may request the Registrar to invalidate the registration of a mark.
- (2) The Registrar shall invalidate the registration if the person requesting the invalidation proves that —
- (a) any of the requirements of a mark as defined in section 2; or
 - (b) any of the requirements of section 26(2) are not fulfilled.
- (3) Any invalidation of a registration of a mark shall be deemed to have been effective as of the date of registration, and it shall be recorded and a reference thereto shall be published as soon as possible.
- (4) Any interested person may request the Registrar to remove a mark from the Register, in respect of any of the goods or services for which it is registered, on the grounds that, up to one month prior to filing the request, the mark had,

after its registration, not been used by the registered owner or a licensee during a continuous period of 3 years or longer:

Provided that a mark shall not be removed if it is shown that special circumstances prevented the use of the mark and that there was no intention not to use or to abandon the same in respect of those goods or service.

31 Collective mark

- (1) Subject to subsections (2) and (3), the provisions of sections 26 to 30 relating to marks shall apply to collective marks.
- (2) An application for registration of a collective mark shall designate the mark as a collective mark and shall be accompanied by a copy of the conditions governing the use of the collective mark.
- (3) The registered owner of a collective mark shall notify the Registrar of any changes made in respect of the condition referred to in subsection (2).
- (4) In addition to the grounds provided in section 30(2), the Registrar shall invalidate the registration of a collective mark if the person requesting the invalidation proves that only the registered owner uses the mark, or that he uses or permits its use in contravention of the conditions referred to in subsection (2) or that he uses or permits its use in a manner liable to mislead trade circles or the public as to the origin or any other common characteristics of the goods or services concerned.

32 Licensing of marks and collective marks

- (1) Any licence contract concerning the registration of a mark, or an application therefore, shall provide for effective control by the licensor of the quality of the goods or services of the licensee in connection with which the mark is used. If the licence contract does not provide for such quality control or if such quality control is not effectively carried out, the licence contract shall not be valid and the exclusive right referred to in section 29(1) and (2) may not be exercised.
- (2) The registration of a collective mark, or an application therefore, may not be the subject of a licence contract.

33 Trade names

- (1) A name or designation may not be used as a trade name if by its nature or the use to which it may be put, it is contrary to public order or morality and if, in particular, it is liable to mislead trade circles or the public as to the nature of the enterprise identified by that name.

- (2) Notwithstanding any laws or regulations providing for any obligation to register trade names, such names shall be protected, even prior to or without registration, against any unlawful act committed by third parties.
- (3) In particular, any subsequent use of the trade name by a third party, whether as a trade name or a mark or collective mark, or any such use of a similar trade name or mark, likely to mislead the public shall be deemed unlawful.

PART VI - ACTS OF UNFAIR COMPETITION

34 Acts of unfair competition

- (1) Any act of competition contrary to honest practices in industrial or commercial matters shall be unlawful.
- (2) The following acts, in particular, shall be deemed to constitute acts of unfair competition —
 - (a) all acts of such nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor;
 - (b) false allegations in the course of trade of such nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (c) indications or allegations the use of which in the course of trade is likely to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of goods.

PART VII - GENERAL PROVISIONS

35 Representation by agent

Where the applicant's ordinary residence or principal place of business is outside Tonga, he shall be represented by an agent.

36 Changes in ownership; licence contracts

- (1) Any change in the ownership of a patent, utility model, industrial design, mark or collective mark shall be in writing and shall, at the request of any interested party to the Registrar, be recorded and, except in the case of an application, be published by the Registrar. Such change shall have no effect against third parties until it is recorded.

- (2) Any change in the ownership of a collective mark, shall require previous approval by the Minister.
- (3) Any change in the ownership of a trade name shall be made with the transfer of the enterprise or the part thereof identified by that name and shall be in writing.
- (4) A change in the ownership of a mark or in the ownership of a collective mark shall, however, be invalid if it is likely to deceive or confuse, particularly in regard to the nature, origin, manufacturing process, characteristics, or suitability for their purpose, of the goods or services in relation to which the mark or collective mark is intended to be used or is being used.
- (5) Any licence contract concerning a patent, a utility model certificate, a registered industrial design or a registered mark, or an application therefore, shall, be submitted to the Registrar who shall keep its contents confidential but record it and publish the fact of having recorded such licence contract. Any such licence contract shall be deemed to be invalid until submitted to the Registrar.
- (6) Where the Registrar, after consultation with the Minister, is of the opinion that any clause in a licence contract or relating to such a contract imposes unjustified restrictions on the licensee with the consequence that the contract, taken as a whole, is harmful to the economic interests of Tonga, the Registrar shall notify the parties to the contract accordingly and invite them to modify the contract so that it does not impose such restrictions and, if they fail to do so, he shall declare the clause to be invalid from the date of notification.
- (7) For the purposes of this Act, “unjustified restrictions” are restrictions which entail for the licensee, in the industrial or commercial field, restrictions not deriving from the rights conferred by the grant of a patent or a utility model certificate or the registration of an industrial design or a mark or restrictions unnecessary for the safeguarding of those rights.
- (8) In the examination of licence contracts relating to patents and utility model certificates under subsection (6), the Registrar shall take into consideration, in particular, any clause contained in a contract the effect of which would be —
 - (a) to import technology from abroad when substantially similar or equivalent technology may be obtained on the same or more favourable conditions without any importation of the technology from abroad;
 - (b) to oblige the licensee to give consideration which is disproportionate to the value of the technology to which the contract relates;
 - (c) to oblige the licensee to acquire any materials from the licensor or from sources designated or approved by the licensor unless it is otherwise impossible, for all practical purposes, to ensure the quality of the products to be produced and provided that the said materials are supplied at a reasonable price;

- (d) to restrict the licensee's freedom to acquire any materials from any source, unless it is otherwise impossible, for all practical purposes, to ensure the quality of the products to be produced;
- (e) to restrict the licensee's freedom to use any materials which are not supplied by the licensor or by sources designated or approved by the licensor, unless it is otherwise impossible, for all practical purposes, to ensure the quality of the products to be produced;
- (f) to oblige the licensee to sell the products produced by him exclusively or principally to persons designated by the licensor;
- (g) to oblige the licensee to make available to the licensor, without appropriate consideration, any improvements made by the licensee with respect to the technology to which the contract relates;
- (h) to limit the quantity of the products produced by the licensee;
- (i) to restrict the licensee's freedom to export or to allow others to export the products produced by him, provided that such restriction may be justified if the licensor owns in a country to which such a restriction applies, a patent which would be infringed in case of importation of the said products into the said country, if the licensor has a contractual obligation not to allow others to export the said products to such a country or if the licensor already supplies the market in such a country with the same products;
- (j) to oblige the licensee to employ persons designated by the licensor not needed for the efficient transfer of the technology to which the contract relates;
- (k) to impose restrictions on research or technological development carried out by the licensee;
- (l) to restrict the licensee's freedom to use any technology other than the technology to which the contract relates;
- (m) to extend the coverage of the contract to technology not required to achieve the objective of the contract and to oblige the licensee to give consideration for such technology;
- (n) to fix prices for the sale or resale of the products produced by the licensee;
- (o) to exempt the licensor from any liability resulting from any defect inherent in the technology to which the contract relates or to restrict such liability unreasonably;
- (p) to restrict the licensee's freedom to use, after the expiration of his contractual obligations, the technology acquired as a result of the contract, subject, however, to any right of the licensor under a patent;
- (q) to establish the duration of the contract for a period which is unreasonably long in relation to the economic function of the contract, provided that any period which does not exceed the duration of the

patent to which the contract relates shall not be regarded as unreasonably long.

37 Registrar

- (1) His Majesty in Privy Council may from time to time appoint some person to be the Registrar of Industrial Property, and may make regulations, consistent with this Act, prescribing the duties and powers of the Registrar.
- (2) The Registrar so appointed may hold his office in conjunction with any other office which His Majesty in Privy Council deems not incompatible therewith.

38 Functions of the Registrar

- (1) The Registrar shall —
 - (a) grant patents and utility model certificates;
 - (b) register industrial designs, marks and collective marks; and
 - (c) perform such other duties and exercise such powers as are conferred by this Act or the regulations made thereunder.
- (2) Decisions of the Registrar shall be signed and sealed by the Registrar or an official designated by him.
- (3) The Minister shall determine the organizational structure and the financial and budgetary systems of the Registry.

39 Registers; Gazette

- (1) The Registrar shall maintain separate registers for patents, utility model certificates, industrial designs and marks. Collective marks shall be registered in a special section of the register of marks.
- (2) The registers may be consulted by any person and extracts therefrom obtained by any person, on payment of the prescribed fee.
- (3) The Registrar shall publish in the Gazette and any other publication approved by him all matters required to be published under this Act.³²
- (4) The Registrar shall keep copies as last revised, of the Paris Convention, the Nice Agreement and any other international agreement referred to in this Act or in any Regulations made thereunder for public inspection at no cost.

40 Correction of errors; extension of time

- (1) The Registrar may, subject to any provisions in the regulations, correct any error of translation or transcription or clerical error in any application or

document filed with the Registrar or in any entry in a register effected pursuant to this Act or the Regulations.

- (2) If the Registrar is satisfied that the circumstances justify it, he may upon receiving a written request, extend the time for doing any act or taking any proceeding under this Act and the regulations made thereunder upon notice to the parties concerned and upon such terms as he may direct. The extension may be granted though the time for doing the act or taking the proceeding has expired.

41 Exercise of discretionary power

The Registrar shall give any party to a proceeding before him an opportunity to be heard before exercising adversely to that party any discretionary power vested in the Registrar by this Act or the regulations.

42 Competence of court

- (1) The Court shall have jurisdiction in cases of dispute relating to the application of this Act and the regulations and in matters which under this Act are to be referred to the Court.
- (2) Any decision taken by the Registrar under this Act, in particular, the grant of a patent or of a utility model certificate or the registration of an industrial design or of a mark or collective mark, or the rejection of an application for such a grant or registration, may be the subject of an appeal by any interested party before the Court and such appeal shall be filed within 2 months of the date of the decision.

43 Infringement; unlawful acts; offences

- (1) Subject to sections 13(4) and (5), 15, 24(3) and 29(3), an infringement shall consist of the performance, in Tonga, by any person other than the owner of the title of protection, without the permission of the owner, of any act referred to in sections 13, 24 and 29.
- (2) On the request of the owner of the title of protection, or of a licensee if he has requested the owner to institute court proceedings for a specific relief and the owner has refused or failed to do so, the Court may grant an injunction to prevent infringement, an imminent infringement, or an unlawful act referred to in sections 33 (2) and (3) and 34, award damages and grant any other remedy provided for in the general law.
- (3) On the request of any competent authority or any interested person, association or syndicate, the Court may grant the same relief in case of an act of unfair competition referred to in section 34.

- (4) Any person who performs an act which constitutes an infringement as defined in subsection (1) or an unlawful act as defined in sections 33(2) and (3), and section 34, commits an offence and is liable upon conviction to a fine of \$5,000 or to imprisonment for a term of 5 years or to both.

44 Regulations

- (1) The Minister may with the consent of Cabinet make regulations for the better carrying into effect of the purposes of this Act.
- (2) Regulations made under subsection (1) may, in particular, prescribe —
 - (a) application fees for the grant of patents, utility model certificates and for the registration of industrial designs, marks and collective marks;
 - (b) the fees for copies of patents for the public;
 - (c) any other fees required under the Act;
 - (d) the surcharge payable in respect of late payment of maintenance or renewal fees;
 - (e) conditions under which a person may obtain extracts from registers in terms of section 39(2); and
 - (f) and any other matter required to be prescribed under this Act.

45 Administrative instructions

The Registrar may issue administrative instructions relating to the procedures under this Act and the regulations as well as to other functions of his office.

46 Savings and transitional provisions

- (1) The Registration of United Kingdom Trade Marks Act³³ is hereby repealed.
- (1A) Notwithstanding subsection (1), the Registration of United Kingdom Trade Marks Act is deemed to be in force as from 31 January 1997 until the Minister notifies in the Gazette a date for regulations under this Act to come into force.³⁴
- (2) A person who is the owner of a trade mark registered under the Registration of United Kingdom Trade Marks Act or has filed an application for registration of a trade mark under the provisions of the United Kingdom Act; may within 12 months of the repeal of the United Kingdom Trade Marks Act, file an application for the registration of a trade mark under this Act. Such application shall be accorded the filing date or priority date accorded to the application or registration in the United Kingdom.³⁵

ENDNOTES

¹ Act 19 of 1994

Amending Acts	Commencement
Act 6 of 1999	11 August 1999
Act 42 of 2002	12 February 2004
Act 5 of 2009	5 November 2009
Act 5 of 2012	30 July 2012

² No commencement proclamation found at the date of the preparation of this revised edition

³ Amended by Act 5 of 2009

⁴ Amended by Act 5 of 2012

⁵ Amended by Act 5 of 2009

⁶ Amended by Act 5 of 2009

⁷ Amended by Act 5 of 2009

⁸ Amended by Act 5 of 2009

⁹ Amended by Act 5 of 2009

¹⁰ Inserted by Act 5 of 2009

¹¹ Inserted by Act 5 of 2009

¹² Inserted by Act 5 of 2009

¹³ Inserted by Act 5 of 2009

¹⁴ Inserted by Act 5 of 2009

¹⁵ Amended by Act 5 of 2009

¹⁶ Inserted by Act 5 of 2009

¹⁷ Amended by Act 5 of 2009

¹⁸ Amended by Act 5 of 2009

¹⁹ Amended by Act 5 of 2009

²⁰ Inserted by Act 5 of 2009

²¹ Inserted by Act 5 of 2009

²² Inserted by Act 5 of 2009

²³ Inserted by Act 5 of 2009

²⁴ Inserted by Act 5 of 2009

²⁵ Inserted by Act 5 of 2009

²⁶ Amended by Act 5 of 2009

²⁷ Amended by Act 5 of 2009

²⁸ Amended by Act 5 of 2009

²⁹ Inserted by Act 5 of 2009

³⁰ Inserted by Act 5 of 2009

³¹ Amended by Act 5 of 2009

³² Amended by Act 5 of 2009

³³ Cap. 120, 1988 Revised Edition

³⁴ Inserted by Act 6 of 1999

³⁵ Amended by Act 6 of 1999