

PROTECTION AGAINST UNFAIR COMPETITION ACT

Arrangement of Sections

Section

1 Short title and Commencement.....2

2 Act binds the Crown2

3 Interpretation.....2

4 General principles 3

5 Causing confusion with respect to another's enterprise 3

6 Damaging another's goodwill or reputation 3

7 Misleading the public.....4

8 Discrediting another's enterprise.....4

9 Unfair competition in respect of secret information5

PROTECTION AGAINST UNFAIR COMPETITION ACT

AN ACT TO MAKE PROVISION FOR PROTECTION AGAINST UNFAIR COMPETITION AND FOR OTHER MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETOⁱ

Commencement []ⁱⁱ

1 Short title and Commencement

- (1) This Act may be cited as the Protection Against Unfair Competition Act.
- (2) This Act shall come into operation on a date to be proclaimed by His Majesty in Council.

2 Act binds the Crown

This Act binds the Crown.

3 Interpretation

In this Act, unless the context otherwise requires —

“**appearance of a product**” includes the packaging, shape, colour or other non-functional characteristic features of the product in question;

“**business identifier other than a trademark or a trade name**” includes business symbols, emblems, logos and slogans used by an enterprise to convey in the course of industrial or commercial activities, a certain identity with respect to the enterprise and the products produced or the services rendered by that enterprise;

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

“**dilution of goodwill or reputation**” means the lessening of the distinctive character or advertising value of a trademark, trade name or other business identifier, the appearance of a product or the presentation of products or services or of a celebrity or well-known fictional character;

“**enterprise**” includes any business venture, undertaking, project or initiative undertaken by any person or body corporate;

“**industrial or commercial activities**” means activities of enterprises providing products or services, and buying and selling products or services including the activities of professionals and other such persons;

“**practice**” includes behaviour that consists of an omission to act;

“**presentation of products or services**” includes advertising;

“**trade mark**” means marks relating to goods, marks relating to services and marks relating to both goods and services whether registered or not.

4 General principles

- (1) In addition to the acts and practices referred to in sections 5 to 9, any act or practice in the course of industrial or commercial activities that is contrary to honest commercial practices shall constitute an act of unfair competition.
- (2) Any person damaged or likely to be damaged by an act of unfair competition within the meaning of this Act shall be entitled to the remedies obtainable under the law of Tonga.
- (3) This section and sections 5 to 9 shall apply independently of and in addition to, any legislative provisions protecting inventions, industrial designs, trademarks, literary and artistic works and other intellectual property subject matter.

5 Causing confusion with respect to another's enterprise

- (1) Any act or practice, in the course of industrial or commercial activities that causes, or is likely to cause confusion with respect to another's enterprise including the products or services offered by such enterprise, shall constitute an act of unfair competition.
- (2) Confusion may be caused, *inter alia*, with respect to any of the following:
 - (a) a trademark, whether registered or not;
 - (b) a trade name;
 - (c) a business identifier other than a trademark or trade name;
 - (d) the appearance of a product;
 - (e) the presentation of products or services; or
 - (f) a celebrity or a well-known fictional character.

6 Damaging another's goodwill or reputation

- (1) Any act or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion.

- (2) Damaging another's goodwill or reputation may result, *inter alia*, from the dilution of the goodwill or reputation attached to any of the following —
- (a) a trademark, whether registered or not;
 - (b) a trade name;
 - (c) a business identifier other than a trademark or trade name;
 - (d) the appearance of a product;
 - (e) the presentation of products or services; or
 - (f) a celebrity or a well-known fictional character.

7 Misleading the public

- (1) Any act or practice, in the course of industrial or commercial activities that misleads, or is likely to mislead, the public with respect to an enterprise or its activities, including the products or services offered by such enterprise, shall constitute an act of unfair competition.
- (2) An act or practice is likely to mislead if it involves the advertising or promotion, *inter alia*, of any of the following:
- (a) the manufacturing process of a product;
 - (b) the suitability of a product or service for a particular purpose;
 - (c) the quality or quantity or other characteristics of products or services;
 - (d) the geographical origin of products or services;
 - (e) the conditions on which products or services are offered or provided; or
 - (f) the price of products or services or the manner in which they are calculated.

8 Discrediting another's enterprise

- (1) Any false or unjustifiable allegation in the course of industrial or commercial activities that discredits, or is likely to discredit, another's enterprise including the products or services offered by such enterprise, shall constitute an act of unfair competition.
- (2) A false or unjustifiable allegation is likely to discredit an enterprise if it involves the advertising or promotion, *inter alia*, of any of the following –
- (a) the manufacturing process of a product;
 - (b) the suitability of a product or service for a particular purpose;

- (c) the quality or quantity or other characteristics of products or services;
- (d) the geographical origin of products or services;
- (e) the conditions on which products or services are offered or provided;
- (f) the price of products or services or the manner in which it is calculated.

9 Unfair competition in respect of secret information

- (1) Any act or practice, in the course of industrial or commercial activities, that results in the disclosure, acquisition or use of secret information without the consent of the person lawfully in control of that information (hereinafter referred to as “the rightful holder”) and in a manner contrary to honest commercial practices shall constitute an act of unfair competition.
- (2) Disclosure, acquisition or use of secret information by others without the consent of the rightful holder may, *inter alia*, result from —
 - (a) industrial or commercial espionage;
 - (b) breach of contract;
 - (c) breach of confidence;
 - (d) inducement to commit any of the acts referred to in paragraphs (a) to (c);
 - (e) acquisition of secret information by a third party who knew, or was grossly negligent in failing to know, that an act referred to in paragraphs (a) to (d) was involved in the acquisition.
- (3) For the purposes of this section, information shall be considered secret information if —
 - (a) it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
 - (b) it has commercial value because it is secret; and
 - (c) the rightful holder has taken reasonable steps to keep it secret.
- (4) Any act or practice in the course of industrial or commercial activities shall be deemed to be an act of unfair competition if it consists or results in the unfair commercial use or disclosure of secret tests or other data relating to pharmaceutical or agricultural chemical products utilising new chemical substances and which have been submitted to a competent authority for marketing approval.

Provided that disclosure shall be authorised —

- (a) where necessary to protect the public; or
 - (b) where steps are taken to ensure that the data are protected against unfair commercial use.
- (5) Subsection (4) shall not preclude a person other than the person who submitted the secret test or other data from relying on such test data in support of an application for product approval, after the expiration of a reasonable period of time from the date of submission of these tests or data for marketing approval.
- (6) The period of time under subsection (5) shall be determined by the court, upon application, taking into account the nature of the tests or data and the effort and expenditure involved but shall not, except in exceptional circumstances, be less than 5 years.

ENDNOTES

ⁱ Act 19 of 2002

ⁱⁱ Not in force as at the date of preparation of this revised edition