



Fiji Trades Union Congress

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PRESIDENT: Daniel Urai

YOUR REF:

NATIONAL SECRETARY: Felix Anthony

OUR REF: MISC/04

Date: 11/10/12

The Chairperson
Constitution Review Commission
Admin Block 1
Parliament Complex
Battery Road
Suva.

Dear Sir,

FTUC Submission on Fiji Constitution Review

Please find enclosed the submission of the Fiji Trades Union Congress.

We thank the Commission for giving us an opportunity to present our submission to the Committee.

We wish the Commission success in this crucial task.

Yours sincerely

Felix Anthony
National Secretary



FIJI TRADES UNION CONGRESS

SUBMISSION

TO

THE CONSTITUTION COMMISSION

Presented at 0930 hours on the 12th of October 2012

Senate House, Parliament Complex,

Suva,

Fiji Islands

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1.0 Preamble

We have taken note of the Commission's guideline to be brief and to the point.

1.1 The Fiji Trades Union Congress issued a press release when the Government announced the Constitution Review Process. Our reservations stated in the statement remains and forms part of this submission.

(Copy attached: Annex 1: FTUC Press Release)

2.0 Decree 57 States:

"The **purpose** of this Decree is to draft a Constitution for Fiji that –

- (a) Results from full, inclusive and fair participation of Fijians;*
- (b) Meets the needs of Fiji and the aspirations of its people;*
- (c) Unites the people of Fiji;*
- (d) Includes provisions appropriately designed to achieve, among others,-*
 - (i) True democracy; and*
 - (ii) Respect for, and protection and promotion of, human rights; and*
- (e) Includes provisions that achieve the following non-negotiable principles and values". Here, there are (i)-(xi) matters listed.*

2.1 We do not believe that there is a need to rewrite the Constitution except to make amendments to the existing Constitution. (which the regime insist is abrogated contrary to the Courts). The only matters that the FTUC will comment on in sub-clause (e) will be items viii (one person, one vote, one value) and (x) (proportional representation) later in this submission. All other matters, that we do not comment on are already in the 1997 Constitution and we submit that they be included in the Commissions draft Constitution.

2.2 Before we go into the issues, we draw the Commission's attention to sub-clauses above and as part of its report state whether the purpose of Decree 57 has been reasonably met. In doing so, determine and/or comment on the process outlined by the regime and in Decree 58 is consistent with the purpose of the Decree mentioned. We submit that it is appropriate for the Commission to state as part of its Report, the limitations and or any other impediments that it experienced in its work and mandate.

3.0 The Process

- 3.1 The FTUC has serious reservations on the ability of citizens, groups, Trade Unions, NGO's, Religious Organisations, and Political Parties to enter into an open debate on issues concerning the Constitution. In fact there has been no or little debate in the media from different groupings nor has there been any open debate between political parties, trade unions on important issues such as the electoral process, immunity, proportional representation etc. There have been sporadic reports on various submissions made to the Commission, which is not debate. There have also been reports of plain clothe intelligence officers sitting in listening to submissions and identifying people involved. This no doubt would have discouraged many from taking part or speaking their mind. We submit that the level of intimidation, fear or just plain disinterest amongst the citizens is unprecedented as in previous coups and Constitution Reviews.
- 3.2 It is true that the Public Emergency Regulations were suspended until such time the Commission hands over its report to the President. In its place the Regime has imposed the Public Order Amendment Decree which is more restrictive in areas of Freedom of Speech and Assembly. This is the very fundamental requirement for an open debate. The question that lingers is, Is the PER going to be re-imposed after the Commission's Report is handed to the President.
- 3.3 There have also been reports of disagreement or a difference of opinion between the Regime and the Chairperson of the Commission on how the review is conducted or on how the Commission conducts itself.
- 3.4 So has the process satisfied sub clause 3(a)?
- 3.5 The process requires the Commission to present its Report to the President and thereafter have no effective role. The "Constituent Assembly" then takes over the responsibility to debate the Report and make amendments as it sees necessary. This "Assembly" is not elected but appointed by the Prime Minister who shall have the power to replace any member if his nominees in the "Assembly" vote to remove a member. The PM therefore has absolute control of the "Constituent Assembly". How do we measure the needs and aspirations of the

people as in sub clause 3(b) above and ensure that the final Constitution is truly reflecting of the aspirations of the people?

- 3.6 This is further complicated by the immunity provisions in Decree No. 57, Section 4 and Decree 58, Section 3. The needs of the current occupiers of office may not be the needs and aspirations of the people of Fiji, and we seriously consider that to be the case.
- 3.7 The FTUC has very serious reservations on the establishment of the Constituent Assembly, its role, function, mandate and its independence.
- 3.8 All this defeats the “**purpose**” stated in sub section (c) of Decree 57 above and indeed (d) as well. How do we unite the people when the process to do so is flawed? How do we ensure true democracy when the people are not free to determine their own Constitution by a referendum? How do we ensure respect for human rights when the human rights of all people who suffered at the hands of this Regime will forever be wronged for not being able to get justice and reconciliation?

These questions need answers from the powers that be.

We shall now deal with specific issues where we seek amendment to the 1997 Constitution.

4.0 The Supremacy of the Constitution

- 4.1 The supremacy of the Constitution must be valued and respected. There is no point stating that the Constitution is the supreme law of the land and then having the military abrogate the Constitution.
- 4.2 The Constitution must clearly state that there shall be no reserved powers bestowed on any office under this Constitution.
- 4.3 The Constitution must state that this constitution cannot be amended, removed or abrogated by illegal means or any other means. The only amendment allowed would have to be under the provisions provided for under the constitution.

5.0 The Bill of Rights

5.1 The Bill of Rights in the 1997 Fiji Constitution should be maintained. The provisions provided for under the Bill of Rights are important to a free and democratic society. We put forward that every citizen should be given an equal standing before the law and that every citizen be allowed all protections under the Bill of Rights. The right to:

- (i) Life
- (ii) Personal liberty
- (iii) Freedom from service and forced labour
- (iv) Freedom from cruel or degrading treatment
- (v) Freedom from unreasonable searches and seizure
- (vi) Arrested or detained persons
- (vii) Rights of charged persons
- (viii) Access to courts or tribunals
- (ix) Freedom of expression
- (x) Freedom of assembly
- (xi) Freedom of association
- (xii) Labour Relations :
 - It must be mandated under the new constitution that labour relations and workers rights are in compliance with the Core International Labour Organisation Conventions and Principles At Work;
 - That the Courts when making a finding must also refer to the International Labour Conventions and Principles.
- (xiii) Freedom of movement
- (xiv) Religion and belief
- (xv) Secret ballot
- (xvi) Privacy
- (xvii) Equality
- (xviii) Protection against compulsory acquisition of property
- (xix) Enforcement

5.2 In all the above matters, the Commission is reminded to review all Decrees that have been imposed by the Regime in accordance with Section 7 (j) of Decree 57 of 2012. The FTUC in particular brings to the attention of the Commission the Following Decrees:

- i. Decree 6 of 2009 (State Services Decree)
- ii. Decree 9 of 2009 (Administration of Justice Decree)
- iii. Decree 10 of 2009 (Administration of Justice (amendment) Decree)
- iv. Decree 14 of 2009 (Administration of Justice (amendment) Decree)
- v. Decree 29 of 2010 (Media Industry Development Decree)
- vi. Decree 21 of 2011 (Employment Relations (amendment) Decree)
- vii. Decree 35 of 2011 (Essential National Industries Decree) (*Refer Annex 2, (3 & 4)*)
- viii. Decree 36 of 2011 (Public Service Act (amendment) Decree)
- ix. Public Emergency Regulation (suspended until Report is Handed)
- x. Decree 1 of 2012 (Public Order (Amendment) Decree)
- xi. Decree 14 of 2012 (State Proceedings (amendment) Decree) (*Refer Annex 5*)

5.3 The FTUC submits that the Constitution specifically states that any law that is inconsistent or in contravention of the Principles stated in the Constitution shall be in effect to be invalid and repealed within six months of the effective date of the first sitting in Parliament.

6.0 House of Representatives

6.1 The FTUC submits that the House comprise of 41 members averaging about 14,600 voters per member. (assuming there are approximately 600,000 eligible voters).
The 41 seats shall all be open seats based on the principle of one man one vote.

We base our justifications on an analysis of similar/neighbouring countries as noted below:

- (1) **New Zealand:**
3.3m registered voters with 120 MPs: 27, 500 eligible voters per MP
- (2) **Australia :**

14 million registered voters with 150 MPs: 93,333 eligible voters per MP

(3) **Mauritius :**

1.313 million population with 60 MPs : 16,700 eligible voters per MP.

(4) **Jamaica:**

1.5 million population with 63 MPs: 23,800 per MP.

(5) **Gambia :** 542,000 registered voters with 53 MPs: 10, 226 eligible voters per MP.

(6) **Guyana :** 556,000 registered voters with 65 MPs: 8550 eligible per MP.

7.0 **The Senate**

7.1 The Upper House shall consist of 21 Members. These members shall be nominated by parties eligible on basis of proportional representation on the popular votes received by each of those parties in the General Elections. The threshold for eligibility to nominate members of the Senate shall be 10% of votes cast.

7.2 The powers of the Senate shall be extended to have equal powers to that of the House of Representatives except on Money Bills. (*See S49, 1997 Fiji Constitution*)

8.0 **Registration Of Political Parties**

8.1 The FTUC proposes that all political parties shall be multiracial and that their membership for the purposes of registration shall include at least 30% of registered voters from different ethnic backgrounds. This will ensure that ethnic based parties do not benefit from the proportionate system and enter Parliament through the back door. Parties that cannot secure at least 30% of registered voters from a different ethnic background required for registration should not be allowed registration.

9.0 **Boundaries Commission**

9.1 The Members shall be from constituencies equally divided and with approximately equal number of voters. The one man one vote can only fairly work if the value of the vote is equal as well. Unlike in the

past, some constituencies had 16,000 plus voters while others had merely 5000 voters who both had to elect a member each.

9.2 The Constituency Boundaries Commission must be independent.

10.0 Constitutional Offices: Section 169 of the Fiji Constitution 1997

10.1 The following positions should continue to be appointed under the constitution. The President of Fiji should be the sole appointing authority for these positions and also should be the only person who can terminate these position holders.

- a) the Supervisor of Elections
- b) the Director of Public Prosecutions;
- c) the Secretary-General to Parliament
- d) the members of the Human Rights Commission
- e) the members of the Constituency Boundaries Commission;
- f) the members of the Electoral Commission;
- g) the members of the Parliamentary Emoluments Commission;
- h) the members of the Commission on the Prerogative of Mercy
- i) the members of the Constitutional Offices Commission
- j) Member of the Public Service Commission
- k) the members of the Disciplined Services Commission.
- l) Chief Justice

11.0 Constitutional Offices Accountable to Parliament

11.1 Further to that, the following positions should be only accountable to Parliament and not to the Government of the day. These offices are:

- (a) the Supervisor of Elections;
- (b) the Ombudsman;
- (c) the Auditor-General;
- (d) the Director of Public Prosecutions;
- (e) the Commissioner of the Human Rights Commission

The main reason for this proposal is to minimize and/or eliminate:

- (i) political influence;
- (ii) political control by the government of the day

- (iii) ensure independence;
- (iv) financial dependency on the government of the day
- (v) Proper functioning of these offices.

12.0 Constitutional Officers

The FTUC submits that the following Officers be nominated by the Prime Minister who shall seek the approval of both Houses of Parliament prior to appointment. The Parliament shall have the right to determine its own procedures to make a determination.

- i) President of Fiji
- ii) Ombudsman
- iii) Supervisor of Elections
- iv) Commissioner of Police
- v) Commander of the Military Forces
- vi) Auditor General

Parliament shall ensure adequate budget provisions are made for the effective function of these offices.

13.0 The Constitutional Offices Commission

- The Electoral Commission**
- Constitutional Boundaries Commission**
- Commission on the Prerogative of Mercy**

13.1 The independence of these offices is critical. The members of this office must once again not be political appointments but persons who are independently appointed by the Office of the President.

13.2 We have witnessed in the past that these offices were politicised and some appointments that were made were questionable. If political parties are allowed to nominate and dominate the makeup of this office, then the appointments of persons who will head the key institutions will also be political appointments. This will in turn politicize the very institutions that need to be apolitical, transparent and independent.

14.0 Voting Age:

14.1 The FTUC agrees that the voting age be reduced to 18. At 18, a person is allowed to raise a family and pay taxes. We recognise that any person 18 or above should also have a say in the affairs of his or her nation.

15.0 Registration of Voters

15.1 The registration of voters and the entire electoral process shall remain the responsibility of the Electoral Commission and the Supervisor of Elections. There shall be no political interference in this process.

16.0 The Role of the Great Council of Chiefs (*Bose Levu Vakaturaga*)

16.1 The FTUC proposes that the GCC be retained as we believe that it has an important traditional and customary role to play nationally.

16.2 We however propose that the GCC not have any political role.

16.3 The GCC shall be consulted by the Line Minister on Traditional and Customary matters on a regular basis.

17.0 Indigenous Rights

The FTUC recognizes the rights of Indigenous people and submits that the Commission retain **Section 185(1) (a-j) and (2) (a) & b (i) and S 186 of the 1997 Constitution.**

Alteration of certain Acts

185. (1) A Bill that alters any of the following Acts, namely:

- a) *Fijian Affairs Act;*
- b) *Fijian Development Fund Act*
- c) *Native Lands Act*
- d) *Native Land Trust Act*
- e) *Rotuma Act*
- f) *Rotuma Lands Act*
- g) *Banaban Lands Act*
- h) *Banaban Settlement Act*

Including a Bill prepared in consequence of the enactment of this Constitution:

- i) *Must be expressed as a Bill for an Act to alter the Act concerned,*
 - j) *Must not be presented for the Presidents assent unless it has been read three times in each house and motions for the second and third readings are carried in each house;*
- (2) *A Bill that alters the Agricultural Land Lord and Tenant Act:*
- (a) *Must be expressed as a Bill for an Act to alter that Act; and*
 - (b) *Just not be presented for the President's assent unless:*
 - (i) *It has been read three times in each house and motions for the second and third readings are carried in each House; and*

Customary laws and customary rights

186.-(1) *The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.*

(2) *In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.*

(3) *The Parliament must make provision granting to the owners of land or of registered customary fishing rights an equitable share of royalties or other moneys paid to the State in respect of the grant by the State of rights to extract minerals from the land or the seabed.*

(4) *A law fixing amounts under subsection (3) must require that account be taken of:*

- (a) *any benefits that the owners are likely to receive as a result of the mineral exploitation;*
- (b) *the risk of environmental damage;*
- (c) *any legal obligation of the State to contribute to a fund to meet the cost of preventing, repairing or compensating for any environmental damage;*
- (d) *the cost to the State of administering exploitation rights; and*
- (e) *the appropriate contribution to the general revenue of the State to be made by the person granted exploitation rights.*

18.0 Minority Rights

The Constitution must protect the rights of all minority communities in Fiji. No community must be placed in a subservient role. All communities must enjoy the full benefits to be given by government. Any preferential treatment given to any community must not disadvantage any other community.

19.0 The Role of the Military

19.1 The FTUC submits that the role of the military shall be limited to the defence of the nation by a foreign power, extremist forces and

natural disasters but only on direction of the Parliament and/or the Prime Minister.

- 19.2 The Military shall in all circumstances be subservient to the Government of the day and to Parliament. It shall have absolutely no political role.
- 19.3 The Commander of the Military Forces shall report directly to the line Minister and to any Parliamentary subcommittee on defence or security.
- 19.4 Any promotions or demotions within the military in the staff ranks and above shall be determined by the Disciplined Services Commission on recommendation of the Commander.
- 19.5 The Parliament may make laws relating to the Republic of Fiji Military Forces.

20.0 Electoral Process

20.1 Interim Process

The FTUC submits that the current leadership give up effective control of the government by resigning from their positions at least three months prior to the election date. This is to ensure that free and fair elections are held and that there is no abuse of office within the government.

- 20.2 We propose an interim government be set up with a mandate to ensure free and fair elections and the day to day running of government administration. The interim Government must have no powers to introduce or impose new laws.
- 20.3 We propose that the President invite members of the public who are independent of any political party or have any conflict of interest arising from the elections.
- 20.4 The term of the incumbent President shall end on the date of the first sitting of Parliament.

21.0 Current Military in the Civil Service

The FTUC also submits that all military personnel appointed to civil service positions since 5 December 2006 resign from their positions and offer themselves for reappointment through normal civil service appointment procedures under any new government.

21.1 The purpose of this submission is to ensure that the incoming government must be free to govern in accordance with the Constitution and should not be allowed to be undermined by former military or current military personnel.

22.0 Amendment to the Constitution by Referendum

Any amendment to the Constitution shall be by public referendum called by the Government or by Parliament. A Bill in Parliament to hold a referendum shall require a two third support of the Lower House.

22.1 A change in the Constitution shall require support of at least 70% of voters in a referendum.

23.0 Immunity:

The FTUC in principle strongly disagrees with any perpetrator of the coup to be granted immunity. This is consistent with the FTUC position after the last two coups as well.

23.1 The reason is simple and our experience has proved our reasoning right. Granting of immunity *carte blanche* also serves to encourage others to do the same for reason they justify for themselves. Fiji cannot afford to have any further coups. These coups have torn the very fabric of our society and democracy. People who consider taking such a destructive path must know the consequences. If they insist they are doing the right thing and in the best interest of their country, they should have no difficulty in having their day in Court and convincing the Court of their "noble" intentions, or for that matter convincing the people to vote in a referendum to grant them immunity.

- 23.2 The FTUC is mindful that the Commission is bound by Decree No. 57 to include immunity provisions in the Report. We however wish the Commission to record our disagreement to the granting of immunity and firmly state that this is an issue for the people of Fiji to decide. Until then this matter remains another imposition on the people of Fiji.
- 23.3 It is noteworthy that the immunity up to the date of the Decree 57 covers all actions of the perpetrators including criminal activity; there can be absolutely **no** justification for criminal activity. We cannot build on human rights in a new Constitution by trampling on the Human Rights of the people to formulate a new Constitution.
- 23.4 The above constitutes the FTUC's submission to the Constitution Review Commission.

*** End***

ANNEX 1



FIJI TRADES UNION CONGRESS

32 DES VOUEX ROAD, P.O. BOX 1418, SUVA, FIJI

PRESIDENT: Daniel Urai

YOUR REF:

NATIONAL SECRETARY: Felix Anthony

OUR REF: PUB/01

DATE: 09/03/12

FTUC MEDIA RELEASE NO: 19-06/12 CONSTITUTIONAL REVIEW PROCESS

The Fiji Trades Union Congress is somewhat concerned at the announcement made by the Prime Minister on the "new constitution" for Fiji. It appears from the announcement that the process is going to be an elaborate one which would be time consuming and costly. We remind ourselves that this is the fourth occasion that this country is going down this path to write up a new constitution which we have shown little respect for in the past let alone uphold it. We admit that no constitution was perfect but we are aware of dealing with the imperfections in a lawful manner to bring about change and not in the manner that we embark on now after five years of military rule.

We believe that there is no need to reinvent the wheel by writing up a new constitution. The 1997 current Constitution which was adopted by an elected Parliament need amendments that could include the values and principles outlined by the Prime Minister, none of which is objectionable. Some of these values are ingrained in the current Constitution like a secular state (Chapter 1)

Social Justice (Chapter 5), Elimination of Discrimination (Bill of Rights Chapter 4), Independent Judiciary (Chapter 9), Transparent and Accountable Governance (Chapter 10 and 11), while others need inclusion. This process need not take one year.

We believe that the phrase "non-negotiable" is inappropriate in the circumstances as there really should not be any negotiations, the values and principles stated need to be put in practice by the regime and now is the time to do it. We have seen no social justice with the PER, the Public Order (Amendment) Decree, The Essential National Industries Decree and all anti Trade Union decrees that have been imposed. We have seen no effort by the regime to ensure good and transparent governance. We have seen no effort to remove discrimination nor have we seen an independent judiciary, due to lack of transparency in appointments and terminations. Freedom of the media and speech is vital and all restrictions must be removed immediately. It is not too late for the regime to put into practice these principles and values it insists are "non-negotiable". Then only will it show the world that it is indeed serious about such values.

Public education, as the Prime Minister states, is important. But we believe this education must start with the military and the "disciplined forces" who are charged to uphold the Constitution and protect all citizens of Fiji. After all, their oath when taking up office is to uphold the Constitution and not thrash it when it does not suit them. The common people of Fiji have had enough education on Constitutions and are probably most educated in the region in that area. We note

that the Prime Minister has omitted the most crucial issue that should be on his "non negotiable" list and that is the role of the military and it should have no powers to usurp the powers of an elected Government. This is also a "universally recognised and aspired to" principle.

The FTUC is concerned that all aspects of the review is not fully covered by the announcement. We believe that the Prime Minister needs to spell out clearly the make up of the "Constituent Assembly" the process and procedure to be adopted by such an Assembly. This is critical to ensure that the process is going to be credible. The PM has also omitted his commitment to the people that no current member of Government will be eligible to stand for elections unless they resign a year prior to elections.

The FTUC calls upon the Regime to expedite the review process and call for elections without delay and well before 2014. There is no justification to prolong this process and have people of Fiji suffer for another 2 years. The Government must be returned to the people without undue delay.

Felix Anthony
National Secretary

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ANNEX 2

EXTRAORDINARY



REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE
PUBLISHED BY AUTHORITY OF THE FIJI GOVERNMENT

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GOVERNMENT OF FIJI

ESSENTIAL NATIONAL INDUSTRIES (EMPLOYMENT) DECREE 2011
 (DECREE NO. 35 OF 2011)

ARRANGEMENT OF SECTIONS

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4. Principles
5. Objectives

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IN exercise of the powers vested in me as President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

A DECREE TO PROVIDE FOR THE GOVERNING OF RELATIONS BETWEEN EMPLOYEES AND EMPLOYERS IN ESSENTIAL NATIONAL INDUSTRIES IN FIJI

PART 1 — PRELIMINARY

Short title, commencement and application

1. — (1) This Decree may be cited as the Essential National Industries (Employment) Decree 2011.
- (2) This Decree shall commence on a date or dates appointed by the Minister by notice in the Gazette.
- (3) This Decree shall bind the State.

Interpretation

2. In this Decree, unless the context otherwise requires—

“Bargaining Unit” means a group of at least 75 workers employed by the same employer who perform similar types of work for the employer;

“collective agreement” means an agreement between an employer and the representative of the workers in the Bargaining Unit;

“collective bargaining” means acting and negotiating in accordance with this Decree with a view to concluding, reviewing or renewing a collective agreement;

“designated corporation” or “designated company” means corporations or companies which operate in an essential national industry, and are so designated by the Minister under Regulations made pursuant to this Decree;

“essential national industry” means those industries:

- (a) which are vital to the present and continued success of the Fiji national economy or gross domestic product or those in which the Fiji Government has a majority and essential interest; and
- (b) which are declared as essential national industry by the Minister under Regulations made pursuant to this Decree.

“employer” means any designated corporation;

“Minister” means the Prime Minister;

“Registrar” means the Registrar of Trade Unions as established by the Employment Relations Promulgation 2007;

“representative” means the representative of workers in a Bargaining Unit registered and or recognized pursuant to this Decree;

“union” means trade union registered pursuant to the Employment Relations Promulgation 2007;

“worker” means any person who is employed by a designated corporation and is subject to a collective agreement, but does not include:

- (a) persons on individual employment contracts with a designated corporation at the date of commencement of this Decree;

- (b) persons in managerial, supervisory, coordinating or other roles in which those persons are authorized to exercise discretion to bind or act on behalf of their employer up to certain pre-delegated authorities; or
- (c) persons with access to financial information, commercially sensitive information, or critical managerial operational information.

Purpose

3. The purpose of this Decree is to ensure the viability and sustainability of certain industries that are vital or essential to the economy and the gross domestic product of Fiji.

Principles

4. In interpreting and implementing the provisions of this Decree, consideration and due regard must be given as far as practicable and subject to available resources to the following principles—

- (a) the need to promote the development, viability and sustainability of designated corporations for the benefit of Fiji;
- (b) the need to provide workers in designated corporations with a framework and process by which they may bargain as a group and enter in collective agreements with designated corporations, or by which they can decide to deal directly with their employer without union representation; and
- (c) the need to provide a means to resolve any disputes that may arise between workers and designated corporations.

Objectives

5. The objectives of this Decree are—

- (a) to ensure the present and continued viability and sustainability of essential national industries for the benefit of Fiji;
- (b) to avoid any interruption to the continued viability and sustainability of designated corporations;
- (c) to provide for the complete independence of employers and workers in the matter of self organization to carry out the purposes of this Decree;
- (d) to provide certain guarantees to workers in essential national industries relating to joining or not joining unions and engaging in the process of collective bargaining subject to the provisions of this Decree; and
- (e) to provide for the prompt and orderly settlement of all disputes including but not limited to those that may concern rates of pay, work rules, working conditions or disciplinary actions.

PART 2—EFFECT OF DECREE ON EXISTING UNIONS AND COLLECTIVE AGREEMENTS

Re-registration of workers' representatives

6. Upon commencement of this Decree, any union registered under the Employment Relations Promulgation 2007 which represents workers employed by designated corporations must re-register as a representative pursuant to this Decree.

Officers of a union

7.—(1) Any and all officer-bearers, officers, representatives, executives, and members of a union which represent workers employed by designated corporations must, at all times, be employees of the designated corporation which they represent.

(2) In the event any of the persons referred to in sub-clause (1) cease to be an employee of the designated corporation for any reason, their appointment as a union representative shall be nullified with effect from the date that person ceased to be an employee of the designated corporation or from the date pending the final determination by the designated corporation of a grievance, if one is filed, relating to the termination of the former employee (whichever is later).

(3) Any person or body or any union or any representative who fails to comply with this section shall be guilty of an offence, and shall be liable upon conviction in the case of a natural person to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 5 years imprisonment or to both, and in the case of a union or body corporate to a fine not exceeding \$100,000.

Effect of this Decree on existing collective agreements

8.—(1) Upon commencement of this Decree all existing collective agreements will only be valid for a period of sixty (60) days while new or replacement collective agreements are negotiated under Part IV of this Decree.

(2) For the avoidance of doubt, all existing collective agreements shall be null and void and no longer binding between the parties upon expiry of the period of sixty (60) days from the date of commencement of this Decree, and if no new collective agreement is in place, then the designated corporation may implement new terms and conditions of employment through a new collective agreement or individual contracts as called for and applicable in this Decree.

(3) Those workers no longer in a Bargaining Unit and no longer covered by a collective agreement may be provided individual binding contracts with new terms and conditions of employment until such time as a new individual contract is concluded between the parties. However, if no individual contract is provided then the worker(s) shall continue to be employed on the same terms and conditions as they are currently employed.

(4) A worker or representative may appeal to the Minister after implementation of a new collective agreement for a review of the same. However, for the avoidance of doubt, this right of appeal does not restrict the designated corporation's ability to implement new terms and conditions of employment.

**PART 3—REGISTRATION OF NEW BARGAINING UNITS AND
RE-REGISTRATION AND DETERMINATION OF A BARGAINING UNIT**

Registration and re-registration

9.—(1) The Registrar will register a representative of eligible workers in a Bargaining Unit for a term of two (2) years subject to this Decree only after an election conducted pursuant to this Part or after receipt by Registrar of a formal written statement from an employer that it wishes to recognize the representative without an election.

(2) Subject to sections 15 and 16, elections of representatives of eligible workers in a Bargaining Unit shall be held every two (2) years in accordance with the terms of this Decree.

(3) If at the end of the two (2) year period, no representative has been elected or re-elected, then those workers previously represented will be unrepresented until an election occurs and a new representative is registered pursuant to this Part; and if no representative had been elected or re-elected then pursuant to Section 17, any existing or current collective agreement will become null and void and the employer may provide new terms and conditions of employment pursuant to individual contracts or it may continue to employ workers on the same terms and conditions as provided under the collective agreement.

Registration application

10. A prospective or existing representative must apply to the Minister in writing to be elected or re-elected as a representative of a Bargaining Unit and provide the following information with such application:

- (a) the information required by Section 119(3) of the Employment Relations Promulgation 2007; and
- (b) validated and non-coerced written authorization from at least 35% of the workers in a Bargaining Unit that those workers wish to be represented by the collective bargaining representative.

Composition and scope of Bargaining Unit

11.—(1) Upon receipt of any completed application pursuant to section 10, the Minister, following consultation with the Minister responsible for Industry and Trade, shall determine the composition and scope of a Bargaining Unit for the purposes of conducting worker elections for a representative of that Bargaining Unit.

(2) The Minister may, in determining the composition of a Bargaining Unit, obtain from the employer and the current or prospective representative such information as is necessary to determine the proper composition and scope of a Bargaining Unit and to determine which workers comprise that Bargaining Unit.

(3) The Minister will inform the prospective or existing representative of the workers of his determination under this Part of the proper composition and scope of the Bargaining Unit that the applicant seeks to be elected or re-elected to represent.

Registrar to conduct and supervise elections

12. Determination of the appropriate representative and election of representatives of workers in a Bargaining Unit will be conducted and supervised by the Registrar, subject to such directions and determinations as the Minister

may give so that there is a single representative elected to represent workers and such representative must have obtained votes from a majority of the workers (i.e. 50% + 1) in a Bargaining Unit.

Secret ballot

13. Elections for a representative shall be conducted by secret ballot.

Requisite majority

14.—(1) Registration of a union as a representative will only be granted if a majority (i.e. 50% + 1) of the workers in the Bargaining Unit affirmatively vote in favour of a particular union applying to be a representative of workers in a Bargaining Unit.

(2) If such a majority of a Bargaining Unit selects a union as its representative, the Minister shall provide written notice of such registration to the Registrar, the employer, and to the elected representative of the Bargaining Unit.

(3) If a majority of the workers in a Bargaining Unit do not affirmatively vote in favour of representation, the Minister shall provide written notice to the representative, the employer and to the union that sought representative status and shall not register that union.

(4) Notwithstanding the provisions of subsection (1), the Registrar may refuse to register a union as a representative of workers in a Bargaining Unit on any of the grounds set out in section 125(1) of the Employment Relations Promulgation 2007.

Application for cancellation of registration by employer

15.—(1) Notwithstanding registration of a representative pursuant to this Decree, an employer may, if it has reliable objective information and evidence that at least 35% of workers in a Bargaining Unit no longer support their registered representative, apply to the Registrar for cancellation of representative's registration.

(2) Any employer applying to the Registrar pursuant to subsection (1) must provide simultaneous written notice to the registered representative of such application.

(3) If the registered representative disputes the employer's application under subsection (1), it shall give written notice of such dispute together with the grounds for such dispute to the Registrar within seven (7) days of receipt of notification of such application under subsection (2).

(4) If the Registrar finds there is sufficient information and evidence to support an employer's application, it can cancel the representative's registration and require a new application and election.

Application for cancellation of registration by workers

16. If 35% of the workers in a Bargaining Unit who are represented by a registered representative desire to have that representative's registration cancelled, they may apply for new elections upon application to the Minister in accordance with the provision of this Part.

Effect of non-registration or Cancellation

17. In the event that a representative is not re-elected or representation is cancelled, then the existing or current collective agreement will become null and void and the employer may provide new terms and conditions of employment pursuant to individual contracts or it may continue to employ workers on the same terms and conditions as provided under the collective agreement.

Period before new elections

18. Notwithstanding anything contained in this Part, no worker or group of workers in a Bargaining Unit may apply for new elections for a period of one (1) year from the outcome of any election to register a representative.

PART 4—COLLECTIVE BARGAINING PROCESS

Negotiation of a new collective agreement or amendment

19. Upon receipt of written certification from the Minister that a particular representative has been elected or recognized and registered pursuant to the terms of this Decree, an employer has a duty to recognize and engage with the registered representative for the purposes of bargaining and entering into a collective agreement, continuation of any existing agreement, or amendment of an existing collective agreement.

Good faith

20. The principles of good faith set out in Division I of Part 16 of the Employment Relations Promulgation 2007 shall apply to all negotiations and interactions between the employer and the registered representative under this Decree.

Initiating collective bargaining

21.—(1) Subject to the terms of a collective agreement either agreed upon between the parties or imposed pursuant to the terms of this Decree, and unless negotiations are already being conducted between the parties, the employer and representative shall give at least thirty (30) days' written notice to the other of their intention to initiate collective bargaining in relation to workers in the relevant Bargaining Unit.

(2) Unless negotiations are already being conducted between the parties, the time and place for the beginning of negotiations between the representatives of the parties interested in the collective bargaining process shall be agreed upon no later than ten (10) days after the receipt of said notice, and said time of negotiation shall be within the thirty (30) days provided in the notice.

(3) Upon initiation of collective bargaining, the parties shall have thirty six (36) months in which to reach a new or successor collective agreement; provided however, if new terms and conditions of employment were implemented pursuant to Section 8, then those terms and conditions will be in effect until such time as a new collective agreement is agreed upon by the parties.

(4) In the event the parties cannot agree to the terms of a collective agreement within the period set out in subsection (3), either party may apply to the Minister in writing for a determination of the final terms of the collective agreement.

(5) Any determination of the Minister pursuant to subsection (4) shall be final and binding on all parties for a period of two (2) years.

(6) All collective agreements agreed between the parties and determinations of the Minister pursuant to this section shall be registered with the Registrar.

Amendable date for collective agreements

22.—(1) Collective agreements subject to this Decree shall not have expiry dates but shall instead have dates upon which they become amendable.

(2) The amendable dates of collective agreements shall be as agreed upon by the parties, but if no agreement is reached on an amendable date, it shall be five (5) years following the date of execution of the collective agreement.

Re-negotiation of collective agreements: financial distress

23.—(1) If an employer has suffered operating losses for two (2) consecutive fiscal years, or two (2) years of actual or expected operating losses in a three (3) year period, it shall have the immediate right to re-negotiate all its existing collective agreements notwithstanding any such agreement's moratorium or duration provisions, or any other provisions in this Decree.

(2) The employer shall notify all representatives of its workers, the Minister, and the Registrar of such operating losses and shall meet with all representatives within ten (10) days from the date of such notice in order to confer and agree upon a date to commence good faith negotiations for new or amended collective agreements, which date shall be no later than thirty (30) days after such notice.

(3) If the parties are unable to reach agreement on a new or amended collective agreement within sixty (60) days after their initial date of negotiations pursuant to subsection (2), above, the employer's proposals for a new or amended collective agreement may, at any time thereafter, be submitted to the Minister for review.

(4) Upon receipt of the employer's proposals, the Minister, following consultation with the Minister responsible for Industry and Trade, shall evaluate whether the employer's proposals for a new or amended collective agreement were made in good faith, and whether the proposals will assist the employer in returning to profitability or sustainability in the future.

(5) Upon evaluation of the employer's proposals, and any further information or particulars which the Minister may require from the parties, the Minister, following consultation with the Minister responsible for Industry and

Trade, shall make a decision of the terms and conditions of the new or amended collective agreement, which shall be final and binding on all parties.

(6) The duration of a collective agreement that results from the Minister's decision pursuant to this section shall be for five (5) years unless the parties subsequently agree to an alternative duration or to a different collective agreement.

(7) "Operating losses" in this section means losses before any taxation benefit; exclusive of extraordinary or unusual items or favourable changes in accounting policy.

PART 5—LIMITATIONS AND DISPUTE RESOLUTION

Scope

24.—(1) If in their collective agreement, the agreement provides for terms different than otherwise required or provided by the Employment Relations Promulgation 2007, then the terms of the collective agreement shall prevail.

(2) No person employed in any "designated corporation" that operates on a full-time (7 days per week or 24 hour per day) basis shall, unless otherwise mutually agreed upon by the employer and the representative, be entitled to any overtime pay for work performed on Saturdays, Sundays or public holidays.

(3) Without affecting the generality of subsection (2), given the nature of their employment, flight duty restrictions and duty period scheduling, no pilot, cabin crew, or engineer employed or engaged in any airline industry shall be eligible for overtime pay, unless otherwise agreed by the employer and the representative.

(4) There shall be no requirement for an employer to deduct union fees from a worker's salary or wages unless agreed otherwise by the employer.

(5) The Wages Council shall have no jurisdiction over any "designated corporation" or essential national industry, and any order, determination or regulations of the Wages Council shall not apply to "designated corporation" of essential national industry.

Duty of employers, workers and representatives and to settle disputes

25. It shall be the duty of all employers, their managers, agents, and representatives and workers who are governed by a collective agreement under this Decree to exert every reasonable effort to make and maintain agreements concerning rates of pay, work rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any employer growing out of any dispute between the employer and the representatives and/or workers.

Dispute resolution process

26.—(1) As part of any collective agreement negotiated or imposed under this Decree, there shall be included a process for the resolution of disputes over discipline and discharge, and the interpretation or application of that collective agreement.

(2) The process for resolution of disputes noted in subsection (1) shall provide that all such disputes must be processed and resolved internally or by reference of such disputes to the employer's designated reviewing officer, and no recourse shall be available to any party to any court, tribunal, commission or any other person or body exercising a judicial or quasi-judicial function.

(3) The process for resolution of disputes mentioned in subsection (1) shall provide that any such dispute which remains unresolved internally or by reference to the employer's designated reviewing officer, shall be referred to the Minister for a final and binding determination; provided however, that only disputes involving an issue of over \$5 million in value in one (1) year may be referred to the Minister.

Job actions, strikes, sick outs, slowdowns, and lockouts

27.—(1) No job actions, strikes, sick outs, slowdowns or other financially or operationally harmful activities shall be permitted at any time for any reason; and any such actions are expressly prohibited in connection with—

- (a) a union's efforts to obtain registration as a representative of a Bargaining Unit
- (b) a union's efforts to influence the outcome of collective bargaining, or in the course of any collective agreement negotiations; or
- (c) disputes over the interpretation or application of any collective agreements.

(2) If at the end of the period noted in section 21(3) the parties have not agreed upon a new or successor collective agreement, the Bargaining Unit (through a secret ballot verified by the Minister) may go on strike, or the employer may implement a lockout, provided however, that no strike or a lockout may occur unless—

- (a) a 28 days' prior written notice of the strike or lockout is provided to the Minister and to the employer or the representative of the Bargaining Unit, as the case may be; and
- (b) the prior written approval of the Minister is obtained before any strike or lockout.

(3) If a union or the workers who are members of a union engage in a strike, the employer may, in addition to all other remedies, lock out the striking workers and unilaterally impose terms and conditions of employment different from those set out in the relevant collective agreement.

(4) Any person, body, union, representative or any worker who fails to comply with this section shall be guilty of an offence, and shall be liable upon conviction in the case of a natural person to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 5 years imprisonment or to both, and in the case of a union or a body corporate to a fine not exceeding \$100,000.

(5) The Minister, following consultation with the Minister responsible for Industry and Trade, may, by order, declare any strike or lockout in any essential national industry to be unlawful.

(6) Any person, body, union, representative or any worker who remains on strike, or any employer who continues to impose a lockout, after a declaration by the Minister under subsection (5) that any such strike or lockout is unlawful, shall be guilty of an offence, and shall be liable upon conviction in the case of a natural person to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 10 years imprisonment or to both, and in the case of a union or a body corporate to a fine not exceeding \$250,000.

PART 6—GENERAL

Application of Employment Relations Promulgation 2007, etc

28.—(1) This Decree has effect notwithstanding any provision of the Employment Relations Promulgation 2007 or any other law and, accordingly, to the extent that there is any inconsistency between the Decree and the Employment Relations Promulgation 2007 or any other law, this Decree shall prevail.

(2) Except as otherwise provided in this Decree, the provisions of the Employment Relations Promulgation 2007 shall not apply to any essential national industry, designated corporation or any person employed in any designated corporation or any essential national industry.

Minister can delegate functions

29. The Minister, following consultation with the Minister responsible for Industry and Trade, may, by notice in the Gazette, delegate all or any part of the Minister's functions and powers to the Solicitor-General.

Certain decisions not to be challenged

30.—(1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question—

- (a) the validity, legality or propriety of this Decree;
- (b) any decision of any Minister, the Registrar or any State official or body, made under this Decree; or
- (c) any decision of any designated corporation made under this Decree.

(2) Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, against any designated corporation that had been instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree but had not been determined at that date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree, and all orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal.

(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission or any other adjudicating body, in respect of any of the subject matters in subsection (2), then the presiding judicial officer, without hearing or in any way determining the proceeding or the

application, shall immediately transfer the proceeding or the application to the Chief Registrar or the registrar of the Employment Relations Tribunal for termination of the proceeding or the application and the issuance of a Certificate under subsection (2).

(4) A certificate under subsection (2) is, for the purposes of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function, conclusive of the matters stated in the certificate.

(5) A decision of the Chief Registrar or the registrar of the Employment Relations Tribunal to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.

Regulations

31.—(1) The Minister, following consultation with the Minister responsible for Industry and Trade, may make regulations to give effect to the provisions of this Decree.

- (2) Without affecting the generality of subsection (1), regulations made under this section may—
- (a) declare any industry to be an essential national industry for the purposes of this Decree;
 - (b) designate any corporation or company or employer to be a designated corporation or designated company for the purposes of this Decree;
 - (c) impose conditions, require acts or things to be performed or done to the satisfaction of the Minister or any officer authorized by the Minister; or
 - (d) impose fines and penalties for any action or omission by any person under this Decree.

Given under my hand this 25th day of July 2011.

EPELI NAILATIKAU
President of the Republic of Fiji

ANNEX 3

Essential National Industries (Employment) Decree 2011 – Fiji Islands

FIJI DECREE No. 035 of 2011

ANALYSIS & CRITIQUE

1. INTRODUCTION

- 1.1 The *Essential National Industries* [ENI] Decree 2011 was gazetted on Friday 29th July 2011 in the FIGG (Vol 12, No.78). The Decree specifically attacks trade union organisations in the Fiji sugar, airline, tourism and aviation sectors. And it offers major weapons to the Employers to utilize against unions. As it has been experienced with previous Decrees, other industry sectors may be brought under its effect in future via new Decrees amending the Regulations.
- 1.2 The ENI Decree prescribes drastic new obstacles to trade unions continuing to represent workers in accordance with the Employment Relations Promulgation [ERP] 2007. It outlaws professional trade unionists, eliminates existing collective agreements, promotes an *biased* system of non-professional bargaining agents to represent workers, severely restricts industrial action, strengthens sanctions against legally striking workers and bans overtime and other allowances for workers in 24-hour operations.
- 1.3 The Trade Union movement in Fiji sees that these measures constitute a concerted and ongoing attack on trade union organisations in Fiji. They follow the recent harassment, abductions and beatings by the regime against effective and legitimate trade union representatives. The ENI Decree transfers absolute powers to the Minister to dictate and impose, or remove, terms and conditions of service of union Members. At the same time, the pendulum has also swung so far right that the Employers can also act with impunity, which invariably will be supported by the Minister.
- 1.4 Fiji has ratified ILO conventions No. C87 Freedom of Association and Protection of the Right to Organise Convention 1948 and No. C98 Right to Organise and Collective Bargaining Convention 1949. Fiji in the past expressed considerable pride in the ERP 2007 comprehensively enshrining these principles. Fiji, as a Member State, is obligated to respect the rights enshrined therein and should do all possible not to undermine or dilute such rights.
- 1.5 But the issue of a series of Decrees, culminating with ENI Decree # 035 of 2011 indicates that the Fiji authorities consider themselves immune to the principles of justice, fair play and accountability. Analysis of the new Decree follows.

GENERAL ANALYSIS *(In brief)*

2.1 Part 1: **Preliminary Provisions**

- Several definitions provide new interpretations, e.g. a "*trade union*" becomes a "*bargaining unit*" with minimum 75 workers employed by the same employer.
- The Minister in charge is now the Prime Minister, not a line or Labour Minister.
- The ENI Decree is now gazetted, but its effective date/s will be notified by the Minister in the near future, perhaps within day or weeks.
- On paper the Principles & Objectives of the Decree look normal. But what follows in other sections are a moon apart.

2.2 Part 2: **Effect on Unions & Agreements**

- All currently existing and registered unions under ERP 2007 in these sectors **must** re-register.
- All new office bearers of these newly registered unions must be employed by that employer/industry.
- When an employee is terminated, he ceases to be a union official.
- Non compliance with above will result in a fine (individuals \$50K, corporate bodies \$100K) or/and 5 years imprisonment.
- When ENI Decree is in effect, the validity of all existing Master Collective Agreements [MCA] will last for next 60 days, **then declared null and void.**
- If no new MCA is agreed upon, then the Company may impose its own MCA or individual contracts at its own pace.
- Aggrieved staff may appeal to Minister, but it will not restrict the Employer.

2.3 Part 3: **Re-Registered Bargaining Units** (Unions)

- ❖ New unions will be registered for 2 years after 1st elections, or when recognized by the Employer. If no officials elected, then workers remain in limbo, and existing MCA will be declared null and void.
- ❖ Workers vying for union elections must apply to and be approved by the Minister.
- ❖ Generally, for registration, ERP 2007 procedures to be followed.
- ❖ Minimum 35% of workers with an employer must approve in writing the formation of not a union but a "*bargaining unit*".
- ❖ The Minister shall determine the composition and scope of the/ a bargaining unit.
- ❖ The Registrar of Trade Unions [RTU] will now supervise elections.
- ❖ The results must comply with the 50% + 1 rule by secret ballots.
- ❖ Lower result will result the Minister intervening and refusing the results.
- ❖ The Employer can obtain evidence from 35% of workers (or 35% of workers themselves) that they do not support their union and apply to the Minister for cancellation of the registration.
- ❖ RTU can cancel the election results and order new application and election.
- ❖ Upon cancellation, existing MCA's become null and void.
- ❖ The Minister must approve the foregoing requirements.
- ❖ The Registrar may refuse the registration of a union.

2.4 *Part 4: Collective Bargaining Process*

- Employers have a “duty” to bargain in “good faith”, but in light of other provisions of the Decree, these appear to be just a window dressing.
- Either party can start talks giving 30 days notice, to start in next 30 days.
- Negotiations on successor MCA to begin within next 36 months.
- If no agreement reached, either party can apply to Minister to determine.
- Minister’s determination and approval of MCA to last next two years.
- MCA’s do not expire, but have dates for changes over next 5 years.
- If Employer suffers business losses before taxes for 2 years, then it can give notice to re-negotiate the MCA’s.
- If no agreement reached as above, then Company to apply to Minister who will make final decision on amended MCA which will last next five years.
- The Minister’s decision cannot be challenged.

2.5 *Part 5: Limitations & Dispute Resolution*

- Any terms in new MCA’s will prevail over ERP conditions.
- In designated corporations, **NO overtime or penal rates** are payable, unless agreed between the parties.
- No overtime payable to pilots, cabin crew and engineers.
- **Check Off** system is not permissible anymore.
- ERP Wages Councils not allowed in these sectors.
- No disruptions allowed. It is “duty” of both parties to settle disputes.
- Disputes must be settled internally, reference to external forums not allowed.
- Unresolved cases (only costing \$5m pa or more) referred to Minister for final determination.
- Unresolved disputes costing less than 5m shall be referred to the employers designated reviewing officer.
- *“No job actions, strikes, sick outs, slowdowns”* or other harmful actions permitted in these sectors, in cases of union registration, collective bargaining etc.
- For MCA bargaining a “STRIKE” is allowed giving 28 days notice, supervised secret vote taken, and *“prior written approval of Minister”* is obtained.
- But, the Employer can still lock out strikers, and make changes to the MCA.
- Non compliance with above results in a fine (\$50K, or \$100K) and/or *5years imprisonment*.

2.6 *Part 6 : GENERAL*

- ❖ ENI Decree #035/2011 prevails over ERP 2007 in all aspects.
- ❖ Exclusion of ERP 2007 from all in these sectors are reinforced.
- ❖ PM may delegate some functions to the Solicitor General.
- ❖ **NO CHALLENGE** to ENI Decree via any other forum.
- ❖ Any pending cases in any forum will **terminate** wholly.
- ❖ All Orders to be vacated by High Court Chief or ERT Registrar.
- ❖ Any new cases brought before an external forum will not be heard, but shall be transferred for immediate cancellation.

- ❖ The cancellations certificates cannot be challenged.
- ❖ The Minister can issue Regulations under the Decree.
- ❖ Any industry, employer or individual can be brought under this Decree.
- ❖ New conditions and fines can be introduced by the Minister.

3. OBSERVATIONS:

- 3.1 The nation has seen a series of decrees enacted since 2006 which have affected the lives and welfare of the workers in Fiji, both in the public and private sector. Currently, those in the Public and Essential Services are targeted with new decrees with the overt objectives of neutralising the trade unions operating therein.
- 3.2 Previously, the Public Emergency Regulations (PER) was enacted in 2006, which defy the principles of accountability, transparency and good governance. The PER allows the regime to operate as an authoritarian government without democratic scrutiny and make a mockery of rule of law; amongst other restrictions under the PER, meetings of more than 5 persons without a PER permit are illegal. Trade unions generally conduct a whole series of meetings as part of their legitimate functions and the PER impinges on them.
- 3.3 Thereafter, a series of Decrees amending the Employment Relations Promulgation[ERP 2007 Decree, #036 of 2007], including: the State Services Decree (#06 of 2009); the Administration of Justice Decree (Decree 9 of 2009) and its amendment Decree 10 of 2009; Decree 25 of 2009; and Decree 14 of 2010 were issued. Collectively these Decrees have eroded unions' rights to challenge in any court any decision of Govt or Govt owned entities to make any employee redundant or change any terms and conditions of employment, despite a collective agreement remaining in force. Furthermore, the re-structuring and reform programmes by the Govt are also beyond challenge.
- 3.4 These Decrees are in violation of ILO core labour standards which Fiji has ratified and is obligated to respect. The Cotonou Agreement which obligates Fiji to respect the core labour standards and Fiji's own labour laws demand the same, but the ERP has also been marginalised.
- 3.5 The sudden promulgation on 16 May 2011 of Decree #21 of 2011 introduced two further amendments to the ERP. This amendment to Sections 3 and 266 of the ERP summarily removed thousands of Public Employees from the protection of the ERP totally (except OHS and workers compensation). It nullified all active and pending claims by workers against the Government and depriving them of their rights to labour laws, collective bargaining and freedom of association.
- 3.6 Now, Decree # 035 of 2011 has further **extended these limitations in a most draconian manner to other public and private sectors, e.g. sugar, airline, airports and tourism industries.** It is obvious that the vast majority of the ENI provisions are directed at trade unions and their collective agreements. In contrast, all such measures are provided to the benefit of the Employers.

- 3.7 The Fiji Media Decree imposes strict controls on print and other media reporting anything against the current regime, in complete defiance of principles of press freedom. All media outlets are censored daily by the authorities thereby creating an atmosphere whereby free expression is denied and suppressed. **This was painfully obvious during the recent events following the imposition of Decree # 21 of 2011.**
- 3.8 The implementation of ENI will effectively abolish all existing Trade Unions in Fiji. The observations in section 2 above collectively demonstrate the range and level of effect the Decree will have on certain trade unions operating in the nominated industries. There is no denying that the model would be extended to cover all unions in all sectors of Fiji economy.

INDEED A VERY SAD DAY FOR FIJI AND ITS WORKERS.

"LONG LIVE SOLIDARITY"

ANNEX 4



Fiji Trades Union Congress

32 DES VOEUX ROAD, P. O. BOX 1418, SUVA, FIJI.

PRESIDENT: Daniel Urai

YOUR REF:

NATIONAL SECRETARY: Felix Anthony

OUR REF: IND/04A

Date: 27/07/12

The Chairman
ERAB
C/ Ministry of Labour, Industrial Relations
& Employment.
SUVA

Dear Sir,

RE: ERAB Sub-Committee Meeting – 23rd July, 2012, Holiday Inn, Suva

We record our appreciation to the Ministry for organizing the ERAB Sub-Committee meeting and the continuation of doing the "hard yards" as the Sub-Committee described the Ministries work in the last meeting. Although the challenge has been in no small measure and admittedly, the current fast pace of changing political landscape at different given times called in question even the composition of the members of the ERAB Board. However that phase is over without any rancour on our side of the divide.

We now turn to the reason and purpose of writing this letter since FTUC as one of the Social Partners wishes to re-iterate and record its views apart from our discussion at the last Sub-Committee meeting. One of the other reason for this submission is that we would like to assist your Policy Unit team in their work in providing legal opinions and technical advice to you and your Minister.

We, therefore, put forward and reiterate the FTUC's position on Decrees although not in sequence since decrees 21/2011 and 35/2011 take precedent as they have been discussed in the Sub Committee.

Our positions on Decrees are as follows;

A. ENI DECREE 35 OF 2011

Our stated position is that Decree No.35/2011 be revoked as it is no doubt an anathema to the whole of the current labour legislation i.e. ERP, which brutally strikes at the very heart of the ILO Constitution and its Charter and stands in total breach of Conventions 87 & 98. The Freedom of Association and Right to Organize and Collectively Bargain are the two (2) Conventions which gives the workers organization the right to exist, organize, bargain and thereby providing protection to its members. While we acknowledge that the Sub Committee has agreed to delete almost most of the offending provisions, we wish to make our position clear.

The latest assault of the ENI Decree brings the point home in a case between FRCA V FPSA in a judgment by the Employment Relations Court last week, Monday 23rd July 2012 in case Nos. ERCA 12/2011 and 15/2011. The Judge, Justice Anjala Wati states that under section 30(2) of the Decree proceedings under ERT and Appeal shall be wholly terminated and it applies retrospectively. To put simply there is nothing in the ENI Decree that would convince the ILO/EU and the international community that the Decree is meant to protect essential industries rather than to decimate the trade unions. Therefore, the FTUC seeks a total revocation of the Decree and that all Collective Agreements be reinstated with Unions and workers resuming normal relations as was prior to the imposition of the Decree. No doubt you understand that these Agreements are a product of decades of struggle and hard work and were negotiated with the very Companies that seek to annul what has been agreed. Not a show of good faith by any measure.

B. DECREE NO.21/2011 PUBLIC SERVICE AMENDMENT DECREE (EXCLUSION OF PUBLIC SERVICE FROM ERP 2007)

By a stroke of pen and a one sentence "this promulgation does not apply to Government, including PSC" the working conditions of over 17,500 Public employees are no longer covered or protected by any labour laws of the Nation. Public Sector Unions are now at the mercy of the Employer whose aims and attitude towards public service unions are already very clear. This is considered to be a major reversal of status by an administration whose avowed, primary and fundamental duty should be to protect, enhance and improve the rights and benefits of its employees, not the other way around. This is directly in contravention of the relevant ILO Conventions which Fiji has ratified. The AFL-CIO report clearly indicates the impact on workers. Similarly we expect that the previous situation will be normalized with all agreements and matters struck out reinstated.

C. DECREE NO.6/2009 STATES SERVICES DECREE

On 14th April 2009, Decree #06 of 2009 titled "State Services Decree" was issued which re-established certain state institutions. However, in the process certain other rights of the workers in the Public Service were curtailed.

The Decree abolished the Public Service Appeal Board [PSAB] which was relied upon by thousands of Public Officers, including Members of FTUC affiliates, for viable, routine or special redress and justice on a host of service benefits. All cases pending before the PSAB were terminated upon the issuance of the Decree #06. A few months later, a new Public Service Disciplinary Tribunal [PSDT] was established but it was restricted to disciplinary cases only. We call on all pending cases to be reinstated. It is simply a case of fairness.

Also under Decree #06/2009, the retirement age in the Public Service was forcibly reduced from 60 to 55 years. As a result some 2000 existing staff (e.g. teachers, nurses, general and unestablished cadre) were forced to retire prematurely, while those at ages 52 to 54 years were to follow in the ensuing years. All new recruitment or advancement in the Public Service was to be on contract basis. Since that time, many critical and senior positions have been unilaterally staffed by Military personnel, and the trend continues to this day.

D. DECREE NOS.9 & 10 – ADMINISTRATION OF JUSTICE DECREE

Decree #09 of 2009 titled “Administration of Justice Decree” was issued on 16th April 2009. While the Judicial Branch was re-established, this Decree also prohibited any lawful challenge to the abrogation of the Fiji Constitution, or any other acts by the Interim Regime from 5th December 2006 to 9th April 2009 incl, and of any new decrees issued thereafter.

On 15th May 2009, Decree #10 of 2009, further amended Section 5 of Decree # 09, by terminating any existing or new challenges and extended its reach to labour tribunals that interpreted or adjudicated on the terms and conditions of service of Public Officers as follows;

Section 23 Amended

3. Section 23 of the Administration of Justice Decree 2009 is amended by inserting the following new subsection after subsection (4):

“(5) Any proceeding, claim, dispute or grievance, of any form whatsoever, in the Courts established by the Constitution Amendment Act 1997 (or any previous Constitutions or written law) or in any tribunal established by written law, which purports to or purported to challenge any decision made by the Government or the Public Service Commission between 5th Dec 2006 and 9th April 2009 in relation to the terms and conditions of employment of public officers, including any changes to the remuneration of public officers, shall wholly terminate immediately upon the commencement of this Decree and all orders made therein shall wholly terminate upon the commencement of this Decree.”

Via this decree, dozens of existing or pending grievances by union members were terminated by issue of certificates without resolution. Nevertheless, as the dispute settlement provisions of ERP 2007 continued to exist, many workers relied on them for relief on individual cases with some success. We call on all the pending cases to be reinstated.

E. DECREE 14/2010

This is the 3rd amendment to the original Decree #09/2009 on Administration of Justice. Other Decrees did not always include the Statutory Bodies and Govt Commercial Companies/Entities, whereas the No. 14 after the amendments extends to all such bodies also. In brief, the State promulgated these Decrees to ensure compliances without any opposition. Under Decree #14/2010, their actions cannot be challenged in any court or tribunal.

Aim of Decree 14/2010: Via this tool, the Govt continued its re-structure programmes on its Ministries and entities, including the terms and conditions of service of the affected staff. This amendment was backdated to 10th April 2009. Thus any subsisting actions on any reforms, which were still alive and pending in any court or tribunal, were terminated by a Registrar's Certificate as it occurred in 2009. Furthermore, these certificates cannot be challenged either. In effect, Govt cleared the way for all reforms in the Public Service, including statutory bodies/entities without any consultation, agreement, appeal or opposition. No individual or body, e.g. trade union, can legally challenge those actions as they will not be entertained in any forum.

Effects on Members: Under these Decrees the fundamental right of Members to access the judicial process was curtailed. But even under these circumstances all other avenues were explored within the means of unions to assist members. We liaised directly with the Chief Justice, who provided certain directives to seek redress within the overall provisions of the ERP against any wrongful termination of proceedings. Thus where individual grievances were reported they were processed slowly, until new developments overtook them in 2011, which means the unions cannot challenge any grievance through judiciary.

F. DECREE NO.36/2011: PUBLIC SERVICE ACT (AMENDMENT) DECREE

Public Service Act: As stated above, Decree #21 had removed the Public Service staff from the protection of the whole of ERP. This resulted in Part 2 of ERP on "Fundamental Principles and Rights at Work" to be rescinded as well. This important section covered such matters as: fair labour practices, forced labour prohibition, no discrimination of any nature, disadvantaged individuals catered for, gender equality, equal pay and the right to join or not to join unions. On hindsight, and perhaps to cover their tracks in the International Forum on aspects of human rights etc, it appears that the Govt thought it wise to re-adopt Part 2 of ERP under Decree #36 issued on 29th July 2011.

Sections Restored: The Decree restored Part 2 of ERP into Section 10 of the Public Service Act 1999. Also included therein was ERP Part 9 on Equal Employment Opportunities in an abridged form. But the retrospective action does not go far enough. Coupled with the

publication above was a media barrage directed particularly against FPSA, its GS and the Association's achievements over the years and the subject of subs paid to trade unions via the Govt system. They openly declared that the Employer (the Govt) is capable of looking after employees, hence the need for this Decree. In the next breath, they ceased all public sector unions Check Off Facility.

G. DECREE NO.1/2012 PUBLIC ORDER (AMENDMENT) DECREE

This Decree is an impediment to the work of the trade unions and it affects the trade union members as well as the general public. It is in this regard that we believe it is within our domain to comment and seek its removal.

The Regime's new Public Order (Amendment) Decree No.1/2012 (POAD) has put citizens in more dangerous positions than under the Public Emergency Regulations (PER). The removal of PER was just an exercise to camouflage the stringent and draconian Decree in the form of the Public Order (Amendment) Decree.

Under this Decree the definition of terrorism has been widened extensively. The definition of terrorism in Fiji has a very different meaning from the general and global definition and would outlaw the work of Trade Unions and Churches in Fiji.

The above definition of terrorism now criminalises legitimate trade union activities both locally and internationally which is in violation of basic human and trade union rights in Fiji. It strikes at the very heart of legitimate trade union activity.

The deliberations of the Constituent Assembly must be open not only to public scrutiny but also to comment and debate and this must be allowed even after the President's assent and subsequently the Bainimarama Government must take immediate steps to ensure that there is debate in all sectors of the community throughout the entire constitution making process to allow the legislators to hear the views of all Fijians and, hopefully, respond to these opinions by assuaging fears, removing doubts and amending policies.

It is to be noted that this Decree is now amended for a short period to allow gatherings of more than 3 people until the Constitution Review report is handed to the President.

H. DECREE NO.4/2012 STATE PROCEEDINGS (AMENDMENT) DECREE

Again this Decree falls in the ambit of freedom of expression and association, therefore the FTUC has the option to seek its repeal so that trade unions are not shut out from taking issues on behalf of their members publicly.

The provision of the above Decree gives immunity to the Prime Minister and his Ministers from being sued for defamation, libel or slander for any comments they make against anyone, either in their official or personal capacity. It provides that no media organisation can be held liable for publication of statements whether written or verbal from the PM and his Cabinet Ministers.

Carte Blanche: It allows any Govt Minister to make any statement of any nature on any subject against any person, without being liable for a legal challenge or prosecution. These utterances, either in official or personal capacity, can be published in any media without fear of reprisal from any quarter. Once again, no one can mount any challenge in any forum on these subjects, and furthermore any such action taken on any instance, will instantly be terminated.

I. DECREE NO. 29/2010 MEDIA INDUSTRY DEVELOPMENT DECREE

FTUC believes that it has an inherent right to bring this Decree in the ambit of discussion in ERAB Sub-Committee since it impinges on individual freedom.

The Fiji Media Decree imposes strict controls on print and other media reporting anything against the current regime, in complete defiance of principles of press freedom. This was painfully obvious during the imposition of Decree # 21 and Decree 35 of 2011. Some media outlets actually proactively promote the Regime's propaganda thus misinforming and misleading the people.

The Media Decrees have also limited individuals' freedom of speech on essential and critical issues and the fear of intimidation still exists. No views expressed contrary to that of the Regime is published or aired on radio or television.

CONCLUSION

This correspondence deals with the draconian Decrees such as 21 of 2011 and 35 of 2011 which have the sole aim to curtail the rights of trade unions and contain many provisions which is clearly designed to wipe out their existence.

We, have however, chosen to bring into discussions those Decrees that impinges on the citizen's individual right to freedom of speech and also those that impose strict controls on all forms of media in complete defiance of universal principles of human and trade union rights.


The FTUC firmly believes in good faith at all levels and will co-operate with the Social Partners to arrive at Consensus solution as espoused in the PM's letter of 23rd May, 2012.

Thus FTUC acknowledges "good faith" not only that it is extremely special but rather as an extension of the relationship for the ongoing discussions at ERAB and in its Sub-Committee. The discussion, no doubt involves balancing views to consider both the long term and short-term issues, and the interests of a wider range of people.

It is with this in mind that we write this somewhat protracted letter to you in order that we understand each other more thoroughly and work to achieve the results which employers, government and unions aspire to achieve.

We will be pleased to receive your response, if it is feasible in the short time that we have between now and our next Sub-Committee meeting.

Yours Sincerely



Felix Anthony
NATIONAL SECRETARY

ANNEX 5

EXTRAORDINARY



REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE
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GOVERNMENT OF FIJI

STATE PROCEEDINGS (AMENDMENT) DECREE 2012
 (DECREE NO. 14 OF 2012)

IN exercise of the powers vested in me as President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

Short title and commencement

1. This Decree may be cited as the State Proceedings (Amendment) Decree 2012, and shall come into force on the date of its publication in the *Gazette*.

New section inserted

2. The State Proceedings Act [Cap. 24] is amended by inserting the following new section after section 18—

“Defamation and related proceedings

18A.—(1) Notwithstanding anything contained in this Act or any other written law, the Prime Minister of the Republic of Fiji, any Minister of the Government of the Republic of Fiji or the State shall not be liable, in any proceeding of any nature whatsoever, for any statements, whether verbal or written, made by the Prime Minister of the Republic of Fiji, or any Minister of the Government of the Republic of Fiji, whether in their official or personal capacity.

(2) Notwithstanding anything contained in this Act or any other written law, no media organisation shall be liable in any proceedings of any nature whatsoever for broadcasting or publishing any statements, whether verbal or written, made by the Prime Minister of the Republic of Fiji, or any Minister of the Government of the Republic of Fiji, whether in their official or personal capacity.

(3) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any way entertain any challenge at law, in equity or otherwise by any person or body, or to award any compensation or damages or to grant any other remedy to any person or body in relation to—

- (a) any statements (whether verbal or written) made by the Prime Minister of the Republic of Fiji or any Minister of the Government of the Republic of Fiji, whether in their official or personal capacity; and
- (b) the broadcast or publication by any media organisation of any statement made by the Prime Minister of the Republic of Fiji or any Minister of the Government of the Republic of Fiji, whether in their official or personal capacity.

(4) Where any proceeding, claim, challenge, application or dispute or any form whatsoever is brought before any court, tribunal, commission or any other adjudicating body, in respect of the subject matters in subsection (3), then the presiding judicial officer, without hearing or in any way determining the proceeding or the application, shall immediately transfer the proceeding or the application to the Chief Registrar for termination of the proceeding or the application and a certificate to that effect shall be issued by the Chief Registrar.

(5) A certificate under subsection (4) is, for the purposes of any proceeding in a court, tribunal, commission or before any other person exercising a judicial function, conclusive of the matters stated in the certificate.

(6) A decision by the Chief Registrar to issue a certificate under subsection (4) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.

(7) This section shall expire on the date when the Parliament is convened by the President of the Republic of Fiji under a new Constitution of the Republic of Fiji.”

Given under my hand this 19th day of January 2012.

EPELI NAILATIKAU
President of the Republic of Fiji