

CONSTITUTION COMMISSION
ANALYSIS OF DECREES - SHORT VERSION

Introduction

1. The Commission has had to consider whether any action should be taken to remove or amend provisions of the Decrees made since the abrogation of the Constitution on 10 April 2009. A full Analysis of all the Decrees was done in October 2012 and has informed several of the decisions about the contents of the new Constitution. This is a shortened version of that Analysis. It highlights the main features of the Decrees, and the problems with some of them. As before, the main focus of the analysis is provisions which offend human rights, by denying access to the courts, or breaching natural justice in executive decision-making.
2. It is appropriate also to look at provisions which change nomenclature of institutions under the 1997 Constitution, or which change the age of majority, or remove functions from Constitutional bodies such as the Great Council of Chiefs. These will need to be amended or repealed if the new Constitution makes different provisions.
3. This Analysis notes any provisions which appear to require consideration for any of these reasons. It also notes the transitional and saving provisions that might be required upon the taking office of a Government under a new Constitution.
4. The Analysis notes that some Decrees reflect policy decisions which a future government might wish to review. That review would presumably not take place until after the government is in place, so existing policies will continue for some time after 2014. The focus of this analysis therefore is those provisions which are unacceptable as they stand, as being in breach of rights of review by the courts, etc.
5. Separate Notes have been produced on the repeals that are appropriate as a result of the new Constitution (many of which are noted in this Analysis) and on the consequential amendments that will be needed to other laws. There are also specific Notes on the decrees relating to the media, to trade unions, to the administration of justice and to public order. For proposals on the transitional provisions needed on the repeal of some of the decrees, see Schedule 7 of the draft Constitution.
6. The Decrees cover a wide range of topics, and make significant policy changes, some with far-reaching implications. They alter the status of citizens, age of majority, etc. and create bodies which have issued judgments and orders. The present Government has not accepted the view that it is interim and should only legislate on essential matters. Whether that justifies a challenge to the substance of some of the Decrees can perhaps be considered by a court in future. This Analysis assumes that Decrees made since the abrogation of the Constitution will continue to apply as 'existing

laws' after the coming into force of the new Constitution, except for provisions which are unacceptable i.e. unconstitutional). A separate paper looks at the continuity of existing laws generally, in the context of constitutional change.

7. Unlike Parliamentary Bills, Decrees do not have Explanatory Notes, and they rarely have long titles. They do occasionally have objects clauses, but these tend to be aspirations rather than summaries of the contents. The Analysis therefore describes the contents of the more important Decrees and then comments on them.

8. This Analysis deals with all the Decrees since 10 April 2009 up to 16 November 2012 (Extraordinary Gazette Vol.13 No.129). It does not deal with subsidiary legislation, or with Decrees from December 2006, when the elected government was ousted by a coup. As the 1997 Constitution was nominally still in place, decrees up to 9 April 2009 were still governed by it.

9. One provision found frequently in the Decrees and that is a cause of concern is the 'ouster clause' which purports to oust the jurisdiction of the courts. This kind of provision is always looked at with suspicion by the courts in common law countries, and will be struck down unless there is justification for it, such as an overriding public interest need for it. However, the courts in Fiji have not been able to challenge these clauses in view of the inclusion of an even wider and more general ouster in the Administration of Justice Decree 2009. This Analysis notes all such clauses and proposes they be repealed or declared of no effect. (See a separate Note on 'ouster clauses'.)

2009 DECREES

1. Fiji Constitution Amendment Act 1997 Revocation Decree 2009

This Decree was made on 10 April 2009 by Ratu J. I. Uluivuda, described as "President and Commander in Chief of the Republic of the Fiji Military Forces [sic]." It declares that "the Fiji Constitution Amendment Act 1997 is with effect from the 10th day of April 2009, wholly removed, revoked, and abrogated." The Decree goes on to say that "all Decrees promulgated under my hand and seal shall be regarded as law and shall be observed and enforced."

Comment

The Decree was made the day following a Court of Appeal decision that the 1997 constitution was still the law (*Qarase v Bainimarama*). It amounts to a usurpation of executive and legislative power by the military authority. It will cease to have effect when a Government constituted under the new Constitution assumes office. Transitional provisions will be needed to provide for the assumption of office of a new Government. It is for consideration whether this Decree needs to be expressly repealed or it just falls away.

2. Executive Authority of Fiji Decree 2009

This Decree follows on from No.1/09 and purports to establish a government for Fiji. The President became the Head of the State, Commander in Chief of the Republic of Fiji Military Forces and Head of any Government appointed under this Decree. The President has powers -

- (a) to appoint a Prime Minister by Decree;
 - (b) to appoint other Ministers on the advice of the Prime Minister;
 - (c) to make laws for the peace, order and good government of Fiji by Decree acting in accordance with the advice of the Prime Minister and Cabinet;
 - (d) to exercise the executive authority of Fiji which is hereby vested in the President.
- Section 5 says that "No question as to the validity of this Decree or any other Decree shall be entertained by any Court of Law in Fiji."
 - Section 7 says there is to be a Cabinet for Fiji consisting of the Prime Minister, the Attorney-General, and all other Ministers. The Attorney-General is the chief legal advisor to Government and must be qualified to practise as a barrister and solicitor in the Fiji Islands.
 - Section 8 says that Ministers have titles, portfolios and responsibilities as the Prime Minister determines from time to time and the President assigns to Ministers responsibilities on the advice of the Prime Minister.
 - Section 9 says that Ministers are entitled to remuneration and allowances applicable before the 10th April 2009 but they can be varied by the President by Decree
 - Before taking office, the Ministers are to take the Oath of Allegiance and Oath of Office set out in the Schedule. The office of a Minister is vacated if the Minister resigns or is dismissed for cause by the President.
 - The President can appoint a Minister to act in the office of another Minister.
 - Any function conferred by any written law on the House of Representatives or the Senate or any Committee of the Parliament is to be performed by the Cabinet.

Comment

An appointment of the PM was made by way of LN 1/09 (instead of by Decree, as required), and thereafter when portfolios change, e.g. 29/09, 119/10, 107/10, 111/11, 21/12. The phrase "Constitution yet to be adopted" used in section 4 is defined to mean "the full written Constitution to be drawn up to replace the Fiji Constitution Amendment Act 1997, to be adopted by the people of Fiji in such manner as the Government of Fiji may in the future determine." This assumes that there will be such a Constitution.

Note that section 5 provides that "No question as to the validity of this Decree or any other Decree shall be entertained by any Court of Law in Fiji." This is no doubt why there have been no challenges to this or any other Decree.

Like Decree No.1/09, this Decree will cease to have effect when a Government constituted under the new Constitution assumes office. Transitional provisions will be needed to provide for the assumption of office of a new Government.

It is for consideration whether this Decree needs to be expressly repealed or it just falls away.

3. Fiji Existing Laws Decree 2009

This provides that the existing laws in force immediately before 10 April 2009 continue in force and "shall be read with such modifications, adaptations, qualifications and exceptions as may be necessary." "Existing laws" are all written laws (other than the 1997 Constitution) in force in the Republic of the Fiji Islands immediately before 10 April, 2009, and include all Promulgations, subsidiary legislation, and other Decrees or Declarations made between 5 December 2006 and 10 April 2009.

Comment

Like Decrees Nos.1/09 and 2/09, this Decree will cease to have effect when a Government constituted under the new Constitution assumes office. It is for consideration whether this Decree needs to be expressly repealed or it just falls away. A provision about the continuity of existing laws will be needed in the new Constitution.

4. Revocation of Judicial Appointments Decree 2009

This dissolved all the courts established before 10 April 2009, terminated all judicial appointments, and declared that no compensation was payable for such termination. It further provided that terminated office holders were not entitled to bring any action for damages for loss of office, whether by way of judicial review or otherwise.

Comment

The ouster clause is a denial of the right to compensation for loss of office. Repealing it would restore those rights, and entitle former judicial appointees to bring action for damages. But that would be the least of our concerns. However, it is for consideration whether this Decree should be repealed (in which case previous judicial appointments arguably would be reinstated) or whether compensation for loss of office under it should be provided for instead, or in addition. The position of existing judicial officers also needs to be considered.

5. Revenue and Expenditure Decree 2009

This Decree was the first of a series of Decrees which in effect replaced the revoked Constitution by similar provisions with regard to the essential organs and functions of the State and Government. It is broadly based on Chapter 12 of the 1997 Constitution. Section 2 provides that "The raising by the Government of revenue or moneys, whether through the imposition of taxation or otherwise, must be authorised by or under an Act." Section 4 provides that "Money must not be withdrawn from the Consolidated Fund or from a fund referred to in subsection 3(2) except under an appropriation made by law, including a Decree made by the President." This makes it clear that a Decree is adequate to appropriate money, and Appropriation Decrees have been subsequently made each year.

Comment

This Decree will fall away on the creation of a duly constituted Government, but the appropriations made under it will need to be saved.

6. State Services Decree 2009

This replaces the provisions of the revoked 1997 Constitution with provisions to establish necessary State Services, i.e. the public service, the Fiji Police Force and the Republic of Fiji Military Forces. The Judiciary is dealt with by a subsequent Decree.

Section 3 establishes a Constituency Boundaries Commission to be appointed by the President, with advice from the Prime Minister. (There has been no appointment of a Constituency Boundaries Commission.) Section 4 establishes an Electoral Commission and section 5 the office of Supervisor of Elections. (These have been appointed.)

Sections 6 to 8 provide for the appointment of the Auditor-General and sets out the functions. The Auditor-General must submit a report annually to the Minister responsible for Finance, and it must be presented to the Cabinet.

Section 9 sets out a recruitment and promotion policy for the public service. Appointments and promotions should be on the basis of merit and equal opportunity and men and women should have adequate and equal opportunities for training and advancement. Under section 10, public officeholders must be citizens except as agreed by the Prime Minister.

Sections 11 and 12 establish the Public Service Commission and set out its functions, including disciplinary action. They are essentially the same as those of the previous PSC. They do not include the judiciary or the RFMF or Gazetted posts. Under section 14, the PSC may delegate its functions to a member of the Commission, except in relation to an agricultural tribunal established under the ALTA, a Secretary of a department or the Secretary to the Cabinet, or any equivalent person.

Section 13 provides for the appointment of ambassadors, etc. There is to be a written law about the pensions of persons removed from a state service to serve as an ambassador. (There is no such law so far.)

Section 15 sets the retirement age for public servants at 55. Anyone over that age is to retire on 30 April 2009.

Section 16 provides for appointments of new recruits in the public service to be on fixed term contracts only.

Section 17 abolishes the Public Service Appeal Board and terminates all pending appeals.

Section 18 provides for Secretaries of departments (presumably to be appointed by the PSC.)

Section 19 establishes the office of Solicitor-General. The Solicitor-General must be a person who is qualified to be appointed as a judge (a higher qualification than for the Attorney-General, in fact.)

Section 20 establishes the office of the Director of Public Prosecutions, with a similar qualification.

Section 21 establishes the office of Commissioner of Police, with power to appoint and dismiss and discipline police officers without reference to any other body. The Minister may issue general policy directions with respect to the maintenance of public safety and public order.

Section 22 establishes the Office of the Commissioner of Prisons, with power to appoint and dismiss and discipline police officers without reference to any other body. The Minister may issue general policy directions with respect to the Fiji Prisons Service.

Section 23 establishes the military force called the Republic of Fiji Military Forces. The President, on the advice of the Minister, appoints a Commander of the RFMF who has power to appoint and dismiss and discipline members of the Force without reference to any other body.

Section 24 establishes the office of the Governor of the Reserve Bank of Fiji. The President makes the appointment on the advice of the Prime Minister, and it is not a public office.

Section 25 to 28 are general provisions relating to the public offices expressly provided for. Appointments are for a term of 5 years but can be renewed up to age 65 (except members of the Electoral Commission, who serve for 2 years.)

In the performance of functions an officer not subject to direction or control by any person or authority, except that the Supervisor of Elections must act in accordance with directions of the Electoral Commission and the Commissioner of Police must act in accordance with general policy directions of the Minister. (Nothing is said here about directions to the Commissioner of Prisons.)

Section 27 provides for remuneration of such officers, and section 28 enables such officers to be dismissed by the President for inability to perform the functions of the office or for misbehaviour, or to resign.

Section 29 requires decisions of Commissions and tribunals to be by a majority, but otherwise allows Commissions to regulate their own procedure, and to make regulations about their functions generally.

Section 30 gives the President power to grant pardons, etc. to convicted persons and establishes the Commission on the Prerogative of Mercy to advise the President on the exercise of the prerogative.

Section 31 contains interpretative, repeal and transitional provisions

Comment

The Decree is broadly based on Chapter 10 of the 1997 Constitution and amounts to a 'mini-constitution'. However, there are changes from the 1997 provisions which should be reversed.

Section 15 is a denial of the reasonable expectation as to how long a public servant might expect to serve and how notice will be given. Consideration should be given to compensating public officers prematurely retired under this provision. Section 16 displaces any other law on the subject and should be reviewed. Section 17 is a denial of the right of appeal and needs to be reviewed.

There is no power of direction given to the A-G or a Minister, but nothing is expressly said about the independence of the DPP.

The power of dismissal in section 21 should be reviewed as should the unfettered powers of the Commander RFMF.

Like previous Decrees noted above, this Decree will cease to have effect when a new Constitution comes into force. However, transitional provisions will be needed to provide for the continuity of office of existing office holders or for their compensation if they are terminated.

It is for consideration whether this Decree needs to be expressly repealed or it just falls away.

7. Citizenship Decree 2009

This re-enacted the provisions of Chapter 3 of the 1997 Constitution as to acquisition of citizenship by status, though there is no prohibition on enacting a law for acquisition of citizenship in some other way, and dual nationality (multiple citizenship) is not prohibited. The Decree has been replaced by No.23/09.

Comment

Decree No.23/09 will be replaced by provisions in the new Constitution, at which point it will cease to have effect. However, transitional provisions are needed to ensure that no-one loses citizenship because of the new Constitution.

8. Office of the Vice-President and Succession Decree 2009

This establishes the Office of the Vice-President and provides for succession in office. It replaces Part 2 of Chapter 7 of the 1997 Constitution.

The Decree provides that the Vice-President is appointed by the President for up to 5 years but can be re-appointed and sets out the rules for succession in the absence of the president or VP. The office of VP has not been filled.

This Decree was amended by Decree No.29/09 to add the words "or if the Office of President becomes vacant for any reason."

Comment

This Decree will be replaced by provisions in the new Constitution, at which point it will cease to have effect. However, transitional provisions are needed to ensure that there is continuity in the office of President.

9. Administration of Justice Decree 2009

This establishes a system of courts to replace the one dissolved by the revocation of the 1997 Constitution. The system broadly similar to that in Chapter 9 of the 1997 Constitution, but there are significant differences as to appointments.

Section 3 provides that all initial appointments to judicial offices are made by the President in his discretion. The Judicial Service Commission, established by section 16 of the Decree, only commences its functions when the President so directs by order. (This has not yet been done and there is no JSC at present.

Section 4 says that the courts and judges are "independent of the executive branch of Government or any other authority", but subsection (3) says that -
 "Notwithstanding anything contained in this Decree or any other law, no Court shall have the jurisdiction to accept, hear and determine any challenges whatsoever (including any application for judicial review) by any person to the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) and such other Decrees made or as may be made by the President."

Subsection (4) goes on to say -

"(4) Notwithstanding anything contained in this Decree or any other law, no Court shall have the jurisdiction to accept, hear and determine, or in any other way entertain, any challenges whatsoever (including any application for judicial review) by any person to the validity or legality of any Decrees made by the President from 10 April 2009 and any Decrees as may be made by the President.

And they have not done so.

Section 16 provides for the appointment of a Judicial Services Commission, but it does not have the independent status of the one provided for in the 1997 Constitution, and has not been appointed.

Section 17 provides that the Chief Justice and the President of the Court of Appeal are appointed by the President following consultation with the Prime Minister and the Attorney-General. Other judges are appointed by the President on the recommendation of the Judicial Service Commission following consultation by it with the Attorney-General. Magistrates and members of the ALTA agricultural tribunal are appointed by the JSC after consulting the PM and the A-G.

A Schedule contains the Oath of Office which requires the taker to "uphold the Administration of Justice Decree 2009 and such other laws made or as may be made by the President." This needs to be replaced by an oath to uphold the Constitution.

Section 23 contains transitional provisions. It declares that all existing judicial appointments have been revoked but preserve s any proceedings commenced before the revocation of the 1997 Constitution, except challenges to the validity of decrees and promulgations.

All such proceedings terminate immediately upon the commencement of this Decree.

However, any other proceeding commenced in the existing Courts before 10 April 2009, including proceedings for constitutional redress, continue as if commenced after that date, and are to be determined in accordance with the new Decrees, unless they challenge any Promulgation or Decree made after 5 December 2006.

Comment

This Decree will presumably be replaced by provisions in the new Constitution, at which point it will cease to have effect. However, transitional provisions are needed to ensure that there is continuity in judicial offices (and to compensate the holders for loss of office?)

Continuity of the effect of judgements etc. will also need to be provided for.

Note: There is nothing in this Decree to limit appointments of judges to 2 years, although that could be a term of the contract (and apparently commonly is so.)

10. Administration of Justice (Amendment) Decree 2009

This amends Decree No.9/12 to add further provisions ousting the jurisdiction of the courts. The main change seems to be that the ouster extends to tribunals, and there is a reference to the public service. This is presumably because there were challenges in the Employment Tribunal to the legality of terminating all public service employment by the State Service Decree noted above.

See also Decree No.25/09 for a further amendment on the same lines.

Comment

The same comment as to Decree No.9/09.

11. Human Rights Commission Decree 2009

This repeals the Human Rights Commission Act of 1999 and replaces it with a watered-down version of the legislation. It purports to replace Chapter 4 of the 1997 Constitution - the Bill of Rights - but it does not set out the rights in the same way.

Instead, it defines "human rights" as the rights embodied in those United Nations Covenants and Conventions on Human Rights which are ratified by the State of Fiji, and the rights and freedoms "as may be prescribed by the President by Decree". (No such rights have been prescribed, except indirectly in such Decrees as HIV/AIDS Decree and the Fiji National University Decree, see below.)

The Decree lists the prohibited grounds of discrimination as -

"(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or diminution of the rights or freedoms of others"

which reflects the terminology of section 38(2) the 1997 Constitution.

The definition adopts the exemption in section 38(7) of the 1997 Constitution about laws, but omitting the phrase about being "reasonable and justifiable in a free and democratic society."

Part 3 of the Decree deals with unfair discrimination in employment practices.

Section 52 of the Decree allows proceedings that were before the previous Commission to continue in accordance with the Decree. But any proceeding etc. contrary to this Decree or which challenges any Promulgation made between 5 December 2006 and 10 April 2009, or any Decrees made by the President, terminates and the Commission must inform the parties and submit to the Minister a list of all proceedings etc. under this section. implications.)

Comment

The Bill of Rights in the 1997 Constitution will be replaced and strengthened in the new Constitution. The Human Rights Commission will then need to be re-constituted by legislation by reference to that Chapter, at which point this Decree will cease to have effect. However, transitional provisions are needed to ensure that decisions of the current HRC are implemented, or that they are re-stated by the new HRC, or similar.

The possibility of allowing human rights complaints in respect of Decrees and Government action from 10 April 2009 (or 5 December 2006) needs to be considered.

12. Local Government Act (Amendment) Decree 2009

Amends the Local Government Act (Cap.125) to provide that local government employees are to retire at age 60, but can be re-employed.

Comment

This is a social policy matter and not objectionable in law.

No action needed now; it is for a future legislature to review.

13. Liquor Act (Amendment) Decree 2009

Amends the Liquor Act 2006 to lower the legal age for drinking in public from 21 to 18.

Comment

This is a social policy matter and not objectionable in law.

No action needed now; for a future legislature to review.

14. Employment Relations Promulgation (Amendment) Decree 2009

This amends section 77 of the Employment Relations Promulgation (No. 36 of 2007) to enable persons employed in the public service or by a municipal council to be retired on account of age.

Comment

This is a social policy matter and not objectionable in law, although it is on the FICTU list of problem Decrees. No action needed now; for a future legislature to review.

15. Customs Tariff (Amendment) Decree 2009

Amends the Customs Tariff Act 1986 to vary the rate of duty payable on diesel oil.

Comment

This is a fiscal policy matter and not objectionable in law. No action needed now; for a future legislature to review.

16. Legal Practitioners Decree 2009

This reorganised the professional training and discipline of the legal profession in Fiji. It repealed the Legal Practitioners Act 1997 and established a Legal Education Board. The function of the Board is to set standards and establish qualifications for admission and practice as a legal practitioner, including mandatory continuing legal education.

Part 3 of the Decree continues in being the Fiji Law Society to maintain and improve the standards of conduct of its members, promote the welfare and preserve and maintain the integrity and status of its members and assist the Government in relation to legislation and law reform.

Part 5 requires all legal practitioners to have an annual practising certificate issued by the Chief Registrar.

Part 6 deals with rights and duties of legal practitioners, and Part 7 provides for receivership.

Part 8 establishes a Costs Review Committee to review claims for legal costs.

Section 78 allows for fees to be based on the outcome of a case, but not contingency fees as such. (But see now Decree No.53/12 which allows contingency fee agreements.)

Part 9 provides for disciplinary matters to be dealt with by a new Independent Legal Services Commission. It regulates proceedings before the Commission. Appeals from the ILSC lie to the Court of Appeal.

Part 10 enables the Minister to make rules requiring legal practitioners to have professional indemnity insurance.

Part 11 provides for the appointment of notaries public, and Part 12 provides for the appointment of Commissioners of Oaths.

Section 148 deems any person who was a legal practitioner before the Decree to continue as a such under the Decree. So no person is deprived if a livelihood as a result of this Decree, and although it has been objected to on a number of grounds, there are no human rights issues and no action needs to be taken on this Decree.

(Amended by Decree 30/12 as to commissioners for oaths and by Decree 53/12 as to contingency fees.)

Comment

The Commissioner is a single judge of the High Court, and the opportunities for abuse, based on personal prejudice, are obvious. The Commission should have at least 2 lay persons sitting with the judge.

17. Land Transport Authority (Amendment) Decree 2009

This amends the Land Transport Act 1998 by requiring learner drivers and drivers who have committed road traffic offences to attend a course in defensive driving.

Comment

A social policy matter. It is not discriminatory and not objectionable in law.
No action needed now; for a future legislature to review.

18. Copyright (Amendment) Decree 2009

This amends the Copyright Act 1999 by adding a presumption of ownership arising from a label or mark or from a foreign certificate. It gives express power of adjudication to the courts.

Comment

This is an intellectual property policy matter. It is not discriminatory and not objectionable in law.
No action needed now; for a future legislature to review.

19. Legal Aid (Amendment) Decree 2009

This amends the Legal Aid Act 1996 in respect of the composition of the Legal Aid Commission and the remuneration of the Commissioners.

Comment

This is a legal and social policy matter. It is not discriminatory and not objectionable in law.
No action needed now; for a future legislature to review.

20. Trust Accounts (Amendment) Decree 2009

Amends the Trust Accounts Act by removing administration of trust funds from the Secretary of the Law Society to the Registrar of the High Court; by creating a new Fidelity Fund; by closing the Law Society Fund and the Stabilisation Fund (administered by the Law Society) and by requiring all trust moneys to be transferred to the Judiciary Fund, the Fidelity Fund or the Independent Legal Services Commission Fund in given proportions.

Comment

This was a controversial measure, aimed at supposed corruption and inefficiency in the Law Society. But it is not discriminatory as such and would be a matter for a future legislature to review. By taking away resources from the Fiji Law Society, this Decree could cripple the organisation. It channels money into the Judiciary Fund to be used as the Chief Justice allows, but does not specify the purposes.

See also the Trust Accounts (Amendment) Decree 2011 (No.10/11 [below.](#))

No action needed now.

21. Income Tax Act (Amendment) Decree 2009

Amends the Income Tax Act (Cap.201) by reducing the threshold under section 21(1)(zj).

Comment

A fiscal policy matter, which is not obviously discriminatory and not objectionable in law.

Note however that if, for example, the Hibiscus Committee is a charitable organisation, its activities should come under section 21(1)(n) for which only 100% rebate would be allowed, not 200%!

No action needed now; for a future legislature to review.

22. Income Tax Act (Amendment) (No. 2) Decree 2009

Amends section 21(1) of the Income Tax Act by adding -

"(zm) fifty five per cent of capital expenditure (excluding motor vehicles, furniture and fittings) incurred in Fiji by Tropic Health Incorporated (Fiji) Limited trading as Suva Bayview Medical Hospital from profits earned in or derived from Fiji..."

Comment

This would appear to favour a particular company, but is in line with other express concessions granted under the Act. It is preferable to non-transparent exemptions etc. and is not objectionable.

No action needed.

23. Citizenship of Fiji Decree 2009

This Decree repeals Decree No.7/09 above, and makes new laws about the acquisition of citizenship.

The Decree repeals the Citizenship Act 2009 which implemented the citizenship provisions of the 1997 Constitution with procedural rules. This Decree in effect combines the constitutional and the procedural rules. It also acknowledges the right to multiple citizenship (dual nationality) and declares who has a right of entry to Fiji.

Comment

This Decree will be replaced by provisions in the new Constitution, at which point it will cease to have effect. However, depending on the nature of the Constitution provisions, a Citizenship Bill might be needed to supplement them.

Transitional/savings provisions will also be needed to ensure that no-one loses citizenship because of the new Constitution.

24. High Court Act (Amendment) Decree 2009

This Decree amends the High Court Act (Cap.13) by providing for the appointment of additional Masters of the High Court (previously there was only one Master.)

Comment

This is an administrative matter which does not impinge on human rights, as a Master has to be legally qualified and can appropriately exercise minor judicial functions.

No action needed (though a future government might wish to review the policy.)

25. Administration of Justice (Amendment) Decree 2009

This decree further amends the Administration of Justice Decree 2009 (No.9/09 above) in respect of jurisdiction. It provides that -

"(1) A certificate issued by the Chief Registrar or a Tribunal under section 5(5) or section 23(3) or (5) is, for the purposes of any proceedings in a Court or Tribunal, conclusive of the matters stated in the certificate.

(2) A decision of the Chief Registrar or a Tribunal to issue a certificate under section 5(5) or section 23(3) or (5) is not subject to challenge in any Court or Tribunal."

Comment

This is the third limb of the 'Fiji triple' ouster mentioned in the notes to this Analysis. It adds to the ouster effect of Decree No.10/09.

See also Decree No.14 of 2010 for another ouster provision.

These 4 Decrees will all be replaced by provisions in the new Constitution, and legislation under it, at which point they will cease to have effect.

However, transitional provisions are needed to ensure that there is continuity in judicial offices.

Continuity of the effect of judgements etc. will also need to be provided for.

26. Marriage Act (Amendment) Decree 2009

Amends the Marriage Act (Cap.50) by increasing the age for lawful marriage of girls from 16 to 18, to make it the same for both sexes.

Defines a minor to mean a person under 18, rather than under 21, so does away with need for consent in the case of minors.

Increases the penalties for marrying a minor.

Comment

This is a social policy matter. It is not discriminatory, although there might be religious and cultural objections to the policy.
No need for action now.

27. State Services (Amendment) Decree 2009

Amends the State Services Decree 2009 (No.6/09) to enable a Commission established under that Decree to establish a disciplinary tribunal for the purposes of hearing disciplinary charges against an employee of the Commission.

Comment

See the comments on the principal Decree above.

28. Executive Authority of Fiji (Amendment) Decree 2009

Amends the Executive Authority of Fiji Decree 2009 (No.2/09) by providing that if the office of President becomes vacant, the Chief Justice, acting on the advice and nomination of the Cabinet, appoints another person to become President.

Comment

The same comments apply as to the principal Decree, as above.

The Decree blurs the line between executive and judicial functions as the CJ is allowed to, and indeed has, and the actingCJ in the CJ's absence, signed decrees and notices.

29. Office of the Vice-President and Succession (Amendment) Decree 2009

Amends the Office of the Vice-President and Succession Decree 2009 (No.8/09) to provide that the Vice President performs the functions of the President if the President is absent from duty or from Fiji or is, for any other reason, unable to perform the functions of his or her office, or if the Office of President becomes vacant for any reason.

Comment

The same comments apply as to the principal Decree, as above. Since there is no substantive appointment of VP, the CJ then takes over.

30. Real Estate Agents Act (Amendment) Decree 2009

Amends the real estate Agents Act 2006 (No.13 of 2006) to provide that every person who is a member of the Real Estate Licensing Board immediately before the Decree comes into force ceases to hold office but is eligible for re-appointment.

Comment

The reason for this is not readily apparent, but it does not appear to be discriminatory or otherwise legally objectionable and no action is required now. However, the effect of the Decree is to arbitrarily remove persons who were in office and as it does not allow for continuity of office it results in some knowledge gap.

31. Native Land Trust Act (Amendment) Decree 2009

Amends section 3 of the Native Land Trust Act (Cap. 134) by deleting "Great Council of Chiefs" and substituting "Minister for Indigenous Affairs".

Comment

This was the first of a series of measures to remove the power of the GCC.

It is a policy matter and not inherently discriminatory towards individuals, but it does discriminate against the GCC as a group recognized by the 1997 Constitution, It might well need to be reviewed by a future Government if the GCC is reinstated.

32. Fijians Trust Fund (Amendment) Decree 2009

Amends the Fijians Trust Fund Act (not identified by year or number) by deleting 'including', presumably in the composition of a board or other body.

Comment

This amendment was only to deal with anomalies in grammar and syntax, so no comment can be made, but all Fijian affairs laws will no doubt be reviewed by a future Government.

33. Domestic Violence Decree 2009

The objects of the Decree are -

- (a) to eliminate, reduce and prevent domestic violence;
- (b) to ensure the protection, safety and wellbeing of victims of domestic violence;
- (c) to implement the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and related conventions.

Comment

This is a social policy matter, implementing Fiji's international obligations, and there are no discriminatory provisions, except those inherent in a law to protect a particular section of society.

Rules of court and regulations can be made under the Decree, but none are listed in the Index.

There are consequential amendments to other laws which need to be noted in any version of those laws, but which fell away following the repeal of the Penal Code and the Criminal Procedure Code.

A future government might wish to review aspects of the Decree, but no action is needed now.

34. Gaming Decree 2009

This Decree established a licensing regime for games of chance.

Comment

The decision to criminalise gambling in Fiji is one of social policy, and a future government might wish to review it.

Technical objections can be taken to the Decree on the ground that the licensing authority is, in the case of a Class 1 gaming licence, the appropriate Divisional Commissioner or the Solicitor General, and in the case of a Class 2 gaming licence, the Attorney General. There is no independent board or body and although the authority must give reasons for revoking a licence, there is a lack of transparency in the whole process of licensing.

Financial records must be audited by an accountant registered under the Fiji Institute of Accountants Act, but the Attorney General is also the Minister, with power to make regulations.

There is also a presumption against an occupier if gambling instruments are found in a house, which could well offend against the presumption of innocence.

These objections do not justify striking the Decree down, but they should be noted by a future Government.

35. Gambling Turnover Tax (Amendment) Decree 2009

This amends the Gambling Turnover Tax Decree 1991 by relating it to the provisions of the Gaming Decree (No.34/09).

Comment

It is a consequential measure and no action is needed, unless the Gaming Decree were to be repealed.

36. Income Tax Act (Amendment) (No. 3) Decree 2009

The Sixth Schedule to the Income Tax Act (Cap. 201) is amended in paragraph 45(6) by deleting "5" and substituting "10".

Comment

This is a matter of fiscal policy. Insofar as it lengthened a tax holiday unnecessarily without consultation it was arbitrary, but it matters not as it has since been repealed. No action is needed.

37. Liquor (Amendment) Decree 2009

This Decree amends the Liquor Act 2006 to make new provision in respect of divisional liquor licensing authorities. The Chief Magistrate is replaced by the Chief Registrar as the person to nominate a magistrate of each board as chairman, to be appointed by the Minister.

Comment

On the face of it, this appears to be for administrative convenience and does not seem legally objectionable. It appears that the reason for the Decree might have been to remove power from the Chief Magistrate because of the occupant of the position at that time. No action needed but a future government might wish to review.

38. Fijians Trust Fund (Amendment) (No. 2) Decree 2009

This amends the Fijians Trust Fund Act 2004 by removing some of the provisions giving a special role to the BLV (Great Council of Chiefs) on the Board.

Comment

It does not remove GCC nominees from the Board, but this Decree might need to be reviewed by a future Government if the role of the BLV/GCC is restored in the Constitution.

39. The Fiji National University Decree 2009

This established the Fiji National University as an institute of tertiary education under its own Council.

The Minister appoints 10 members of the Council, and the PS to the Ministry is an ex officio member. There are 8 elected members.

The Decree combines the assets of the Fiji Institute of Technology, Fiji School of Medicine, Fiji School of Nursing, the Fiji College of Agriculture, the Fiji College of Advanced Education and the Lautoka Teachers College and preserves the contractual rights of employees of those institutions.

Comment

The statutes setting up those institutions are not repealed, and a future government might wish to tidy up the statute book in this regard by having a commencement notice retrospective to 30 September 2010.

There is arguably scope for too much Government interference in the running of the university, but there are also provisions which limit the scope. There are no issues of human rights or other objectionable provisions in this Decree but as the sole purpose of merging the institutions was to be able to tap into the pool of available funds, there might be some need for reconsidering the policy.

No action needed to remedy any human rights breach.

See also Decree No.58/10 for amendments.

40. Medical Imaging Technologists Decree 2009

This Decree regulates the science, technology and practice of medical imaging techniques using either ionising or non-ionising radiation. It establishes a Board, which is the same as the Radiation Health Board under the Radiation Health Decree, 2009. The Board performs the registration functions. The Fiji Society of Radiographers which was registered under the Industrial Associations Act becomes the Fiji Society of Medical Imaging Technologists and runs its own affairs.

Comment

The Minister is involved in appointments to the Disciplinary Appeals Committee but otherwise does not have a very high profile in this Decree. There are no issues of human rights or other objectionable provisions in this Decree and no action is needed now.

41. Radiation Health Decree 2009

The object of this Decree is to regulate sources of ionising radiation and harmful non-ionising radiation. It repeals the Ionising Radiations Act (Cap.102) with appropriate savings. The Decree establishes the Radiation Health Board and provides for its functions and powers, including a licensing function. The Minister appoints the secretary to the Board and two other members, and is also the resort of appeal against decisions of the Board. The Board reports to the Minister and the Minister may establish radiation safety standards and prescribe regulations.

Comment

The functions of the Minister are fairly extensive, but are similar to those in other Fiji legislation, and in a parliamentary system, the Minister would answer to Parliament. The Decree therefore does not have provisions which offend human rights principles and no action is needed now.

42. Sentencing and Penalties Decree 2009

This is "A Decree to make comprehensive provision for the sentencing of persons for criminal offences and to reform processes applicable to the prescription of penalties in the laws of Fiji and the determination and enforcement of a range of sentencing options imposed by the courts, and for related purposes."

It sets out a number of sentencing guidelines. It enables courts to impose higher penalties on habitual offenders.

It enables a court to -

- a) on conviction, impose a custodial sentence;
- b) on conviction, order that the offender serve a term of imprisonment partly in custody and partly in the community;
- c) on conviction, make a drug treatment order in accordance with regulations made under section 30;
- d) on conviction impose a sentence of imprisonment that is wholly or partly suspended;
- e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act (Cap. 22);
- f) with or without recording a conviction, order the offender to pay a fine;

- g) on conviction, order the release of the offender on the adjournment of the hearing, subject to the offender complying with certain conditions;
- h) record a conviction and order the discharge of the offender;
- i) without recording a conviction, order the release of the offender on the adjournment of the hearing, subject to the offender complying with certain conditions;
- j) without recording a conviction, order the dismissal of the charge; or
- k) impose any other sentence or make any other order authorised under this Decree or any other Act.

The court has power to set parole and non-parole periods, to impose concurrent or consecutive sentences.

A magistrate's court can defer sentencing of a person between the ages of 17 and 25 for up to 6 months.

In addition to its sentencing powers, a court can order restitution or compensation and the payment of costs incurred by emergency response agencies.

Part XI of the Decree has provisions intended to enable courts to involve traditional and community leaders in identifying and reviewing appropriate sentences for certain offenders found guilty of certain types of offences, to make certain offenders account to their traditional and community leaders, and to involve those leaders and leadership structures in the supervision of offenders after sentences have been imposed. It is not clear who these procedures would apply to - if only iTaukeis, then they could be regarded as discriminatory.

Part XII of the Decree changes the system of fines by amending all references to fines to become 'penalty units' at the rate of 1 penalty unit per \$100 of fine. The amount of the penalty unit can be varied by Regulations.

Comment

More research is needed as to the possible discriminatory effect of regulations made under Part XI. There is also the problem of uncertainty, which penal legislation should avoid.

Part XII is presumably intended to make it possible to increase fines in future, but it is a rather blunt weapon, as it would apply without considering the nature of the offences etc. Section 56 fetters the right of Courts to impose a minimum penalty of less than \$100 if the circumstances warrant, and could result in penalties for continuing offences at the same level of \$100 so a daily continuing fine of \$1 would automatically read \$100 per day, which is unjust.

A more flexible system is the system of Standard Scales, as used in the UK and elsewhere, and a future government might wish to consider this option.

43. Criminal Procedure Decree 2009

This repeals the Criminal Procedure Code (Cap.21) and makes fresh provision for the powers and procedures of the police and courts in relation to criminal offences. It regulates the arrest, search and questioning of suspects, and the conduct of criminal trials.

Part II specifies the sentences which a court may pass (this is more specific than the general powers under Decree No.42/09 above.)

Part III regulates the police powers of arrest, entry and search. It does not regulate the detention or question of suspects, as provided by the UK Police & Criminal Evidence Act 1984 ('PACE'). However, as Fiji is no longer a British territory there is no obligation to comply with PACE and this Decree does not displace other laws on those subjects. It can be assumed therefore that this Decree does not present a human rights problem on those topics.

Part IV gives the courts power to make orders for keeping the peace and enables the police to take preventive action to avoid the commission of offences. The Part is shorter than the equivalent provisions in Part III of the repealed Criminal Procedure Code, which has the danger that the powers of the courts and police are not defined sufficiently clearly. In particular, the police powers extend to offences under the Public Order Act as amended by Decree No. 1 of 2012 (see below.) Part IV therefore presents potential human rights problems and needs to be looked at.

Part V regulates the place of hearing of criminal cases and the transfer of cases. An accused person is to be sent to the Division where the offence was allegedly committed, and the trial is to be at that place. This is good as it avoids an unreasonable travel burden.

Part VI deals with the powers of the DPP, Commissioner of FICAC, state counsel and public prosecutors, including the power to discontinue cases. Police may prosecute in the Magistrates' Court but all prosecutors are subject to the directions of the DPP. On the face of it, the prosecution process is independent and no issue arises on this part of the Decree.

Part VII provides for the institution of proceedings. They begin with a complaint or charge and continue with a summons or warrant for arrest. The rules about particularity of charges etc. are all standard and no issue arises. The Part also provides for proceedings by Notice to Attend Court and proceedings by Fixed Penalty Notice for certain types of offence.

Part VIII amplifies the rules about summonses and warrants of arrest. There is also a power to take a bond for personal appearance. No human rights issue arises.

Part IX is about search warrants. (It might perhaps be more convenient to have these provisions earlier in the Code, but that is not a human rights issue.)

Part X is about the procedure where a person has a disability i.e. is of unsound mind. These provisions are acceptable, if rather briefly stated. Section 109 applies other mental health laws, which would now mean the Mental Health Decree 2010 (No.54/10 below.)

Part XI regulates the attendance and examination of witnesses in criminal proceedings. The provisions are standard and no issue arises. Two new provisions are that no corroboration is required in sexual offence cases and that no evidence of past sexual history is permissible. The Part includes provisions about taking evidence, but no provisions about hearsay evidence; these are found in the Evidence Act, or left to the common law.

Part XII is about decisions in criminal cases generally - how judgment is delivered, whether previous convictions are relevant etc., costs and compensation orders. Section 154 says the courts may, instead of trying a charge of common assault or assault occasioning actual bodily harm or criminal trespass or damaging property, take steps to achieve a reconciliation between the parties. Note that section 165 says that the accused has a right to be defended.

"Any person accused of an offence before any criminal court, or against whom proceedings are instituted under this Decree in any court, may of right be defended by a lawyer."

(This does not deal with the question of cost, which comes under the legal aid legislation.)

Part XIII provides for the procedure in trials before Magistrates' Courts. If the court convicts, it can transfer a case to the High Court for sentencing. If an accused person has entered a plea of guilty to an indictable offence, pleaded not guilty to an indictable offence and elected trial in the High Court, or been charged with an offence triable only in the High Court, the magistrate must order the transfer of the charges or proceedings to the High Court for sentencing or for trial.

There are no committal proceedings in such cases, and this continues the practice by Act 13/03 in the CPC. It is in line with modern practice in other Commonwealth jurisdictions and does not represent a denial of justice or rights.

Part XIV prescribes the practice and procedure in trials before the High Court. The Chief Justice can make practice directions. Otherwise, section 202 provides -

"Subject to sub-section (1), the practice of the High Court in its criminal jurisdiction shall be as nearly as circumstances will admit to the practice of High Court of Justice in England, and the inherent powers of the High Court of Justice shall be deemed to be the inherent powers exercisable by the judges of the High Court in Fiji."

The Part then sets out the existing system of assessors. Note however that the age for assessors was reduced from 21 to 18 by Decree No.12/10 below.) The Part sets out the existing sequence of arraignment, case for the prosecution, case for the defence and sentencing.

Part XV provides for appeals from Magistrates' Courts on criminal matters. It also maintains the existing power of the High Court to call for records and to revise decisions of the Magistrates' Court. There can also be a Case Stated for the opinion of the High Court.

Part XVI contains supplementary provisions, and section 280 preserves the power to issue 'directions in the nature of *habeas corpus*. Section 281 retains the right of the High Court to issue any writ that the High Court in England can issue. (In fact, these prerogative writs have been done away with in England, and replaced by statutory orders, but the Decree does not need amending on this point at this stage.)

Part XVII contains miscellaneous provisions, including the power of any court to hold a *voir dire* (hearing on a preliminary point.) This was not in the repealed Criminal Procedure Code but does not have human rights implications.

Part XVIII is new, and is about pre-trial orders, hearings and conferences. The object of the Part is to improve case management in criminal courts, clarify the triable issues, confirm the charges that are to proceed to trial, ascertain the intention of the accused person as to plea, determine the length of the trial, seek to facilitate its hearing, and generally enhance the efficiency of the courts in criminal proceedings. This type of case management has been adopted in other Commonwealth countries and no human rights issue arises on it, provided the courts do not pressure defendants to plead guilty, or set unreasonable time limits on preparing a defence.

Part XIX enables the Chief Justice to make rules of criminal procedure and the Chief Magistrate to make rules for the procedures of the Magistrates Courts. This is a new Part, but the power has always existed inherently in the courts. In the absence of regulations or rules, the Chief Justice has made practice directions.

Part XX is also new, but legislates the common law directions made by Judges of the High Court, and is about the protection of vulnerable witnesses. These include children in sexual cases, or any witness where there is a threat of violence. Section 295 enables a judge or magistrate to make an appropriate order, and section 296 sets out the orders that can be made, e.g. use of recordings, witness not being visible, etc. These powers are used in other Commonwealth jurisdictions and provided the order made is proportionate to the risk, they are unobjectionable.

Part XXI is also new, and enables the Minister to make regulations to implement the Decree in any way required to comply with international treaties and conventions applicable to Fiji. The intention is unobjectionable, though it would be preferable for the regulation-making power to require inputs from the Chief Justice.

Part XXII repeals Cap.21 and the Electable Offences Decree 1988. It saves existing proceedings, and forms and fees regulations. Section 302 gives the Minister power to make regulations (see the comment above about the need for a role for the CJ). Section 303 applies the Code to Rotuma, but subject to the Rotuma Act.

Comment

There are a number of minor comments as noted in each Part above. One concern is that the rule-making power is in the hands of the CJ only, rather than a rules committee. And the CJ has been issuing practice directions rather than rules, which is not a desirable practice as it lacks clarity and certainty.

The decree does not mention the role of Fijian/I Taukei courts in enforcing criminal laws under the I Taukei Affairs Act and this will require review by a future Parliament.

Although a new law, it fails to make provision about stay of prosecutions or bias, and these are left to the common law.

The new 'penalty units' wording for penalties has not been adopted in most of the decrees following this one, and a revision of all laws in that regard is needed.

Note that the Criminal Procedure Code was amended by Decrees No.12/10 and No.52/10 below - see the comments on those amendments under those Decrees.

44. Crimes Decree 2009

This Decree repeals the Penal Code (Cap.17) and makes fresh provision for criminal offences in Fiji. It defines the elements of criminal responsibility and prescribes a range of criminal offences.

Part 3 in Chapter I says that the territorial application of the criminal laws extends to the internal waters of Fiji, the archipelagic waters of Fiji and the territorial seas of Fiji. Also to the contiguous zone and the EEZ in accordance with the UN Convention on the Law of the Sea and any law in Fiji implementing it.

Chapter II sets out the general principles of criminal responsibility.

Part 6 sets out principles of criminal responsibility. Children under 10 years do not have the capacity to commit crime. Children over 10 years but under 14 years are only criminally responsible for an offence if the child knows that the conduct is wrong.

Part 6 also takes account of mental impairment, intoxication, mistake and ignorance and external factors. These include duress, emergency, self defence and lawful orders. This issue might become relevant if persons are prosecuted for exceeding lawful orders in connection with the coups of 2000 and 2006. (But note that this Decree does not have retrospective effect.)

Part 7 deals with the extension of criminal responsibility to attempts, complicity, incitement and conspiracy.

Part 8 imposes criminal responsibility on corporate bodies. This has had the (probably unintended) effect of fewer qualified people accepting board memberships, but is a standard provision.

(There is no Part 9)

Chapter III then sets out a range of criminal offences. Details are in the full Analysis of decrees paper.

Comment

There is nothing objectionable in the text of this Decree. However, the way in which offences such as sedition are prosecuted can result in people being afraid to speak up. That offence has been abolished in UK and some other countries and should be reviewed.

45. Reserve Bank of Fiji Act (Amendment) Decree 2009

This Decree amends the Reserve Bank of Fiji Act (Cap.210) so as to extend the purposes of the Reserve Bank to cover regulation of the insurance industry, capital markets and the securities industry.

Comment

This is a financial business policy matter and there are no human rights issues.

However, although a cost-saving and regulating measure, it took away the independence of the CMDA to independently monitor capital markets, in which the Reserve Bank itself is a player on the bond market.

46. Capital Markets Decree 2009

This Decree repeals the Capital Markets Development Authority Act of 1996 and dissolves the Capital Markets Development Authority. It transfers the administration and functions of the Capital Markets Development Authority to the Reserve Bank of Fiji.

The Reserve Bank has no liability if it acts in good faith (a normal provision.)

The Investor Compensation Fund is established to grant compensation to investors who suffer pecuniary loss resulting from the failure of a licensed broker or dealer to meet obligations.

The Bank licenses security industries but cannot revoke, suspend or impose conditions or restrictions on a licence without giving the person an opportunity to be heard.

The Bank may appoint Investigating Officers.

A person aggrieved by a direction given by the Bank or by a decision of Bank refusing to grant a licence; imposing limitations or restrictions on a licence; cancelling or suspending a licence; refusing to admit a security to the official list of a securities exchange; suspending trading of a security on a securities exchange; or requiring the removal of a security from the official list of a securities exchange, may appeal to the Court.

The Minister may appoint a person or a committee to inquire or investigate into any matter under the Decree.

Comment

It seems that this Decree was made to remove the authority of the CMDA because of issues with the holder of the Chair. However, its provisions do not offend against human rights or natural justice and no action is required on this Decree now.

47. Daylight Saving (Amendment) Decree 2009

The Decree amends the Daylight Saving Act 1998 by revising the relevant dates for changing the clocks to dates in October and April rather than November and February.

Comment

This is a social policy matter and although a future government might wish to review the policy, there are no human rights issues involved.

48. Regulation of National Spectrum Decree 2009

This Decree cancels existing spectrum allocations and requires existing holders to disclose their allocations. The Minister will then decide on new allocations, based on new standards. The Minister must ensure that the allocations are fair and non-discriminatory and in the public interest. The Decree contains two 'ouster clauses, at section 3(4) and at section 11(1).

Comment

It is not clear why it was thought necessary to have two ouster provisions, as the second one embraces the first. Both provisions need to be repealed or declared to be of no effect.

See also Decree No.16/2011 which amends the ouster clause.

This Decree would under the 1997 Constitution been declared to have contravened the provisions against compulsory acquisition of property, especially when technical experts say there is another way to allocate spectrum without having to cut broadcasters from existing slots.

49. Trust Accounts (Amendment) (No. 2) Decree 2009

The Decree amends the Trust Accounts Act 1996 by relating the definitions of 'Law Society' and 'legal practitioner' to the changes made by the Legal Practitioners Decree (see above.)

It also requires all law firms to keep trust accounts.

Comment

The organisation and duties of the legal profession have become a political issue since 2009, and a future government might wish to review the relationship between the government and the legal profession, but meanwhile this decree does not have any human rights implications and no action is needed on it.

However, it should be noted that the requirement for all lawyers to keep trust accounts is an onerous one for lawyers who have nil transactions requiring trust accounts, and has resulted in some lawyers closing shop. Also, the requirement for the consent of the Attorney-General introduces an unacceptable degree of personal involvement in the right to run a legal practice.

50. Tax Administration Decree 2009

This introduces a major reform of the tax collection and administration system in Fiji. It enacts the Harmonised Administrative Rules, to be administered by the CEO of the Fiji Islands Revenue & Customs Authority (now known as the Fiji RCA.)

The Decree provides for a Tax Court to function as a division of the High Court. It also provides for the appointment of a Tax Tribunal, to be appointed by the Judicial Services Commission, or in the absence of the JSC, by the President (section 76(2)). This provision will cease to have effect once the JSC is re-established, but it does not need to be repealed.

The Decree enables Departure Prohibition Orders to be imposed on persons who owe tax.

The Decree amends a number of tax-related laws, but does not repeal any.

See later amendment Decrees at Nos. 4/10, 55/10, 69/10 and 9/12

Comment

The DPO power is a restraint on the freedom of travel, but is commonly appears in the laws of other countries. However, in practice this power can be abused and more protection should be built into the legislation.

The role of the Minister is kept to a minimum, and there is no scope for Government interference in the administration of the tax system. However, some provisions seek to overcome certain interpretations of the Court on provisions found in the Income Tax Act. The provision requiring a tax number from everyone wanting to open a bank account extends to minors, who are not even of working age, and is disproportionate. In order to transact any normal business one must have a TIN number, including those who have died apparently, and need funds to be repatriated.

No action is needed, except to keep in view the matters mentioned in these Comments, and section 76(2) as to the appointment of the Tax Tribunal.

51. National Fire Service (Amendment) Decree 2009

This amends the National Fire Service Act, 1994 by enlarging the powers and functions of the National Fire Authority and enhancing the Authority's revenue raising powers. It creates a Structural Fire Safety Department in the Authority and sets out the duties and function of its officers.

The Decree establishes National and Divisional Coordination Committees. They are appointed by the Minister, but include nominated representative of various bodies.

The Decree imposes a levy on fire insurance premiums paid to foreign insurers. This limits freedom of choice to some extent, but is consistent with promoting local business, which can provide the necessary cover.

The Decree also provides for the award of medals for fire fighters.

Comment

There are policy issues in the Decree which a future government might wish to review, but there are no apparent human rights issues which require action now.

52. 2010 Appropriation Decree 2009

This appropriates from the Consolidated Fund a sum of \$1,460,210,281 for the ordinary services of government for the year ending 31st December 2010. It also authorizes government borrowing up to \$496,889,382 for that year.

Comment

Under the 1997 Constitution, appropriations from the Consolidated Fund could only be authorised by the Parliament, but in the circumstances of the coup of 2006 and the abrogation of the Constitution in April 2009, there is no point in seeking to undo this Decree, which has already had effect.

53. Commerce (Amendment) Decree 2009

This amended the Commerce Act 1998 by adding a new section 31A which is an ouster clause. It was repealed by the Commerce Commission decree 2010 (No.49/10).

54. National Employment Centre Decree 2009

This Decree provides a legislative framework for the provision of employment services to the unemployed and the promotion of productivity. It does this by establishing a National Employment Centre under the jurisdiction of the Ministry of Labour. The centre provides skills training and human resources development to enhance the employability of unemployed persons, retirees and volunteers for both the local and overseas employment markets.

The NEC has a Board, appointed by the Minister and including representatives of relevant bodies. It also has a Secretariat and its own Trust Fund.

The Decree establishes a Formal Employment Service, a Self-Employment Service, the Fiji Volunteer Service and the Foreign Employment Service under the oversight of the National Employment Centre.

The Decree prohibits discrimination against any unemployed person, attaché, volunteer or prospective worker on the grounds of actual or supposed personal characteristics or circumstances, including ethnic origin, religion or belief, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age, disability, HIV/AIDS status, social class, marital status, family status, opinion or former criminal conviction.

Section 8 expressly provides that no person shall be required to perform forced labour.

The Decree establishes a system of fixed penalties for some of the offences under it. The Minister can make regulations on this and other matters, but no regulation have been made.

The Decree exempts the PS and other officers from liability for things done in good faith, which is a normal provision.

Comment

The relationship between this Decree and other employment laws is not spelled out and might need working out in practice.

The Decree itself does not present any human rights problem, and indeed expressly protects persons from discrimination and from forced labour, as noted above. However, the penalty for an unemployed to pay a fine up to \$500 for failing to register as being unemployed is too rigid and discriminatory as it fails to take account of ability to pay.

No other action needed (apart from spelling of 'attachee'.)

55. Shop (Regulation of Hours and Employment) (Amendment) Decree 2009

This amends section 10 of the Shop (Regulation of Hours and Employment) Act (Cap.100) by extending the hours during which shops can be open in the evening from 6.0 pm to 9.0 pm under a closing order issued by a local authority.

Comment

This is a social policy matter that a future government might wish to review, but does not involve any human rights issues.

2010 DECREES

1. Marine (Amendment) Decree 2010

This makes amendments to the Marine Act 1986 (No.35/86) consequential on the making of the Maritime Safety Decree 2009 (see below.) That Decree dissolved the Fiji Islands Maritimes Safety Administration and replaced it by the Maritime Safety Authority of Fiji as a commercial statutory authority. The amendments give to the CEO of the Maritime Safety Authority the administrative and operational functions of the former Director of the Maritime Safety and Marine Board.

The Minister's power to appoint officers of the MSAF to be shipping officers is made dependent on the recommendation of the CEO.

Subsidiary legislation made under the amended Act continues in force as if made under this Decree (a normal rule, in fact.)

Comment

There are no human rights issues arising and no action needed.

2. Maritime Safety Authority of Fiji Decree 2009

This Decree establishes the Maritime Safety Authority of Fiji to operate as a commercial statutory authority. This replaces the Fiji Islands Maritime Safety Administration established by the Marine Act 1986 (which is stated to be amended.)

The members of the Authority are to be appointed by the Minister, and must be persons who, in the opinion of the Minister, "have adequate experience in public administration, in financial, in admiralty, commercial, and legal matters."

Before appointing a member, the Minister must "have regard to any potential conflicts of interest the person may have." A member of the Authority or of a committee who is, directly or indirectly, interested in a matter under discussion by the Authority or committee must disclose to the Authority or committee the fact and nature of the interest.

The Minister and the Minister for Public Enterprise may, in writing, give to the Authority directions of a general character not inconsistent with this Decree relating to the performance of the Authority's functions and the Authority shall give effect to such directions.

The Authority must appoint an audit committee.

The Authority must report to the Ministers on a regular basis, and must have a corporate plan.

Comment

The power of direction does present a potential for abuse as it opens the way for a Minister to direct MSAF on non-compliant Government owned vessels. It should be tightened up.

Otherwise, the Decree is consistent with good governance and transparency and accountability and no action is needed on it.

3. Medical and Dental Practitioners Decree 2010

The object of this Decree is to protect the health and safety of the public in relation to the practice of medicine and dentistry. It achieves this by providing for the registration and licensing of medical and dental practitioners and students and regulating the provision of medical and dental treatment and maintenance of high standards of competence and conduct by persons providing it.

The Decree continues in being the Fiji Medical Council and the Fiji Dental Council and requires them both to have committees for setting standards and for disciplinary matters.

It creates the Fiji Medical and Dental Secretariat, with a Board of Management.

It establishes a Medical and Dental Professional Conduct Tribunal.

It continues the Fiji Medical Association and the Fiji Dental Association and establishes a new Fiji College of General Practitioners.

The Minister appoints members of the two Councils on the advice of representative bodies.

The Minister has a power of exemption from registration but it can only be exercised in writing. There is a right of appeal on registration and licensing to the Tribunal.

Comment

The precise balance of power and responsibility between the Ministry and the professionals is something that a future government might wish to adjust.

The criteria for professionals have been raised, but they are capable of being applied to prevent registration of e.g. private dentists who want to hire good government dentists. The Decree has therefore the potential to deprive people of a livelihood, but there is review mechanism and there are no other human rights issue arising.

4. Tax Administration (Budget Amendment) Decree 2010

This amends the Tax Administration Decree 2009 (No.50/09 above.)

After some minor textual corrections, it adds a provision that the CEO must pay a refund of overpaid tax to a taxpayer under a tax law to the taxpayer's bank account in a commercial trading bank in the Fiji Islands; but not by postal mail.

Comment

The policy intention is presumably to increase transparency and thus reduce the opportunity for corruption.

This assumes that everyone has a bank account, and the Decree should be amended in that respect.

Note also that in practice, once refunds reach an allocated quota, a taxpayer has to wait until the next quarter for a refund. The Decree should be amended to prevent this.

See other amendments at Decrees Nos.55/10, 69/10 and 9/12.

5. Wreck & Salvage Act (Budget Amendment) Decree 2010

This amends the Wreck and Salvage Act (Cap.198) to increase the maximum fines for offences under that Act from \$200 to \$10,000. This is a penal policy matter and unobjectionable as the figures were last revised in 1945. There might be implications for venue and mode of trial but they do not affect the right to a trial itself.

The Decree also amends the Act to provide that an applicant for refund of any duty, charge or fee must have a bank account in a commercial trading bank in the Fiji Islands; and that a refund of any duty, charge or fee must not be paid directly to a claimant.

Comment

See the comment on Decree no.4 above on the need for bank accounts.

Another amendment (to add new section35A) appears to put personal responsibility on the directors of a company, but the drafting is defective and needs to be looked at again if it is to have effect.

6. Value Added Tax (Budget Amendment) Decree 2010

This amends the Value Added Tax Decree 1991 -

- a) to clarify the rules about a deposit held as security for the performance of an obligation;
- b) to increase the turnover threshold for VAT liability to \$50,000;
- c) to vary the schedule of exempt supplies.

Comment

The first amendment is probably not strictly a 'budget amendment' but no point arises on that in respect of human rights.

7. Excise (Budget Amendment) Decree 2010

This amends the Excise Act 1986 by increasing the maximum fines for various offences from \$2,000 to \$10,000, in line with the decrease in monetary values. It also adds the requirement already noted under Decrees Nos. 4 and 5 of 2010 as above, that refunds can only be made to a bank account, and not direct to a person. See the comments on those Decrees.

The Decree also adds to the Act a provision that the owner, directors, partners, and shareholders are to be held personally responsible for payment of the correct amount of any duty, charge or fee due and payable under the Act. It also empowers the Comptroller to 'execute' section 143(c) of the Customs Act 1986 (i.e. to order forfeiture of goods) in respect of duty payable under the Excise Act.

Comment

None of these amendments presents any human rights point which requires action to be taken on this Decree.

8. Income Tax (Budget Amendment) Decree 2010

This amends the Income Tax Act (Cap.201) in a number of respects. It amends the definition of "management payments" for the provision of professional or technical advice or services or facilities including consultancy services.

There is an amendment to cover the use of, or the right to use, motion picture films or video tapes or compact discs or digital video discs or video compact discs for use in television broadcasting or tapes for use in radio broadcasting; or visual images or sounds transmitted by satellite or cable, optic fibre or similar technology in connection with television broadcasting or radio broadcasting.

The Eleventh Schedule of the Act is amended in respect of the definitions of "island resort" and "consultant fees".

Comment

Some of these amendments might go beyond 'budget' amendments and they appear not to be announced on budget day. However, none of them is legally objectionable so far as can be ascertained without reference to the consolidated text of the Income Tax Act.

9. Customs Act (Budget Amendment) Decree 2010

This Decree amends the Customs Act 1986 in a number of respects.

- It provides some new definitions.
- It makes the Act gender-neutral.
- It increases some penalties under the Act.
- It amends the Act in respect of the duty to report arrival of a ship or vessel. The requirement will not apply in relation to an aircraft or ship which is compelled by accident, stress of weather or other unavoidable cause to call at a place other than an airport or port, provided the master of the aircraft or

ship reports the circumstances and produces relevant documents. The master must not permit any goods to be unloaded or loaded, or any of the crew or passengers to land from the aircraft or ship except as necessary for reasons of health, safety or the preservation of life or property.

The Decree enables the Comptroller to allow payment of duties in installments, over a period not exceeding 9 months, if the value for duty of a vessel or yacht is at least \$2 million.

No warehouse is to be licensed at any port or place other than a port or place appointed by the Minister in accordance with section 4.

The owner, director, partners, and shareholders are made personally responsible for payment of the correct amount of any duty, charge or fee payable under the Act.

An applicant for refund of any duty, charge or fee must have a bank account in a commercial trading bank in the Fiji Islands and refunds must not be made directly to any person. (See similar provisions in previous Decrees, as above.)

The Decree empowers customs officers, on suspicion of an offence, to detain and search person, vehicles or packages without a warrant and to seize articles. Females are to be searched by females and the person is to be taken forthwith before a Collector. An internal search of a person may be conducted by a medical practitioner on suspicion of unlawful articles being secreted on the person. The person must be taken to the Magistrate's Court within 48 hours or given bail to appear before a magistrate's court at a time and place named in the bond. An officer of no lesser rank than a Collector may release a person arrested on suspicion of committing a Customs offence if the officer is satisfied that no offence is disclosed after due enquiries.

Comment

These provisions are similar to the provisions of the Criminal Procedure Code as regards search and detention of persons, and they are unexceptionable. There are no other human rights issues in the Decree, and no action is required on it.

10. Customs Tariff Act (Budget Amendment) Decree 2010

This Decree amends the Customs Tariff Act 1986 in a number of respects.

- It increased some penalties.
- It says the Comptroller may require that an applicant for refund of any duty, charge or fee must have a bank account in a commercial trading bank in Fiji Islands.
- It prohibits the Comptroller from refunding any duty, charge or fee directly to claimants. (See earlier Decrees for a comment on these provisions).
- It amends Part I of Schedule 2 of the Act as regards duty rates for certain tariff items.
- It imposes new conditions about payment of duty on goods missing or damaged.

Comment

None of these amendments have human rights issues and no action is required on this Decree.

11. Crimes (Amendment) Decree 2010

This amends the Crimes Decree 2009 (No. 44/09) in respect of the offence of burglary. Section 312 (6) makes it an offence to enter or remain in a building, as a trespasser, with intent to commit a serious offence in the building that involves causing harm to another person or damage to property. This Decree repeals subsection (6) and the following 2 subsections which are dependent on it.

Comment

The reason for this omission is not readily apparent, but it is a penal policy matter and does not raise any human rights issues. No action needed if the Crimes Decree remains.

12. Criminal Procedure (Amendment) Decree 2010

This amends the Criminal Procedure Decree 2009 (No.43/09) in two respects -

- a) it abolishes the right to make an unsworn statement from the dock; and
- b) it reduces the age at which persons can be assessors from 21 to 18, from 21, and increases the upper age from 60 to 70.

The first change is consistent with modern court practice in some other common law jurisdictions. The second change partly reflects the policy of lowering the voting age and age of minority generally from 21 to 18. It also increases the pool of potential assessors.

Comment

These are matters of judicial policy and do not have human rights implications. However, a future government might wish to review these issues.

13. Value Added Tax (Budget Amendment) Decree 2010

This Decree amends the Value Added Tax Decree, 1991, to create a tourist VAT refund scheme.

Comment

Such schemes are common in other countries and there do not appear to be any unusual features about this one. There are no human rights implications and no action is needed on this Decree.

14. Administration of Justice (Amendment) (No. 3) Decree 2010

This Decree adds yet another layer to the wall off ouster clauses built by Decree Nos. 9, 10 and 25 of 2009. It relates specifically to proceedings in relation to the restructure of the public service and corporatisation of government departments.

Comment

This ouster relates to Government action rather than legislation, but the fact that the Government saw the need to make 4 Decrees in addition to the general ouster in Decree No.2/09 suggests that there is still some uncertainty as to the legal validity of these ouster clauses. See comments on the previous Administration of Justice Decrees.

15. Commerce Act (Amendment) Decree 2010

This amends section 3 of the Commerce Act 1998 by adding a new definition of 'port'.

Comment

A technical issue only; no action needed.

16. Mahogany Industry Development Decree 2010

This Decree restructures the mahogany industry in Fiji in order to facilitate its further development. It establishes the Mahogany Industry Council chaired by the Prime Minister, with the Attorney-General, the Minister responsible for forests, the chair of the Fiji Mahogany Trust and another person, not holding any State office or emolument, appointed by the Prime Minister. The Council meets at times and places the Chair appoints. Three members constitute a quorum; and the person presiding has a casting vote.

The Decree continues the Fiji Mahogany Trust and gives a role to Fiji Hardwood Corporation Limited.

The Council must have regard to the need for the mahogany industry to be operated on a sustainable basis, including the need for reforestation; the desirability of value being added within Fiji to mahogany timber and products; achieving a fair return to landowners for the mahogany timber on their land; and the interests of the people of Fiji as a whole, including opportunities for increased employment and skills training.

The Council must also have regard to the desirability of maintaining a high quality in the mahogany timber and timber products produced in Fiji; establishing a scheme for the certification of felled mahogany timber; and developing a recognised brand for Fiji mahogany timber and timber products. The Council can fix the price at which mahogany timber and products are to be sold by the Corporation; direct the Corporation to enter into an agreement with a specified person for the sale of mahogany timber; and determine how the proceeds of sale of mahogany timber are to be distributed or used, including the amounts that are to be paid to landowners or the State or set aside for reforestation or other purposes.

The Council can direct the Corporation and Fiji Mahogany Trust with regard to the performance of their functions in relation to mahogany leases and mahogany plantation land or native land intended to be used for growing mahogany. The Council can also direct the Native Land Trust Board in the exercise of any rights or obligations it has in respect of mahogany leases and plantation lands.

The Fiji Mahogany Act 2003 (No.15/03) is repealed, and the Forest Decree 1992 (No. 31/92) is disapplied in relation to mahogany land.

Comment

The decree creates clear statutory control over the way in which mahogany is disposed of, and there is no ouster clause to prevent challenge in the courts.

Although the proceedings of the Council are rather sketchily stated, there is no denial of human rights, as the Council does not have a licensing or disciplinary function.

This decree obviously has policy implications, but does not present human rights issues.

17. Employment Relations (Amendment) Decree 2010

Amends section 64 of the Employment Relations Promulgation 1997 (No.36/07) by deleting from the list of public holidays Ratu Sir Lala Sukuna Day and Youth Day.

Comment

A social policy matter which does not require action but which a future government might wish to review. Not inconsistent with the ERP. No action needed.

18. Limitation of Liability for Prescribed Political Events Decree 2010

This Decree confers immunity from prosecution for prescribed persons in respect of prescribed political events. Decrees No.57/12 and 58/12 require the effect of this Decree to be included in the new Constitution, and there is a separate Note on the immunities to be granted.

19. Superyacht Charter Decree 2010

This Decree establishes a charter permit system to allow Superyachts to charter in Fiji waters. The Decree is administered by the Fiji Islands Revenue and Customs Authority (now known as the Fiji RCA.)

A 'superyacht' is a foreign flagged or registered large commercial yacht. If it is intended by the vessel owner to be chartered in Fiji waters, it must have a Vessel Permit.

A Vessel Permit can only be obtained through a Recognised Superyacht Agent, who must be registered with the Authority. There is a Code of Conduct for registered agents. A permit will only be granted for carriage of up to 12 persons under a charter.

Any decision of the CEO under this Decree is appealable to the Minister within 72 hours of the making of the decision. The Minister may within 72 hours confirm or vary the decision of the CEO.

The Decree makes consequential amendments to various customs and excise laws.

Comment

The limited time for appealing might be open to question, but is not a denial of human rights and no action is needed on this Decree.

20. National Ambulance Decree 2010

This Decree establishes the National Ambulance Committee and the National Ambulance Service. The Committee consists of 4 members appointed by the Minister, with the PS as Chair and the CEO of the National Fire Authority as a member.

The Service consists of providers of emergency and medical transport services by any person or organisation offering them, including the Ministry of Health, National Fire Authority, St John Ambulance and Fiji Red Cross.

The staff of the Service includes paramedics and medical and nursing staff employed by the Ministry of Health and deployed on ambulances.

The Committee defines the objectives, strategies, and policies to be followed by the Service, defines operational standards for the Service and ensures that the Service performs its functions in an appropriate, effective and efficient way. It may issue a Code of Conduct for the Service.

The functions of the Service include the provision of ambulance services and transport for persons requiring emergency medical attention; participation with other emergency services in counter-disaster planning; and co-ordination of volunteer first aid groups in major emergencies or disasters.

Ambulance officers may take reasonable measures to protect persons from danger in an emergency situation; protect persons trapped in premises, vehicles, etc; and protect themselves or other officers or persons from danger, potential danger or assault. For those purposes an ambulance officer may enter any premises, vehicle, etc.; open a receptacle, using reasonable force as is reasonably necessary; deploy any apparatus or equipment; remove articles or material in the area; damage premises, vehicles, etc. to the extent necessary to gain access or escape; cut off gas or electricity or any other source of energy within any premises, etc.; request any person to assist the officer; administer life support procedures consistent with the training and qualifications of the officer; require any person not to enter into or remain near the site of the danger to a patient; and take any other action that maybe reasonably necessary.

The Ministry of Health may accept gifts for the Service with or without conditions, but must account for them in a Gift Register.

The Minister can make Regulations and may enter into contracts on behalf of the Ministry.

Comment

The concept of a Service that consists of a group of separate bodies providing services is ingenious, and this Decree gives every sign of having been drafted with expert advice. There is nothing in it that offends human rights standards or is otherwise legally objectionable.

21. Litter (Amendment) Decree 2010

This amends the Litter Promulgation 2008 in some minor ways and one major way. The major amendment is to give litter prevention officers the power to require a person who wilfully or intentionally litters in a public place "to do instant community service in or around that particular area."

The Decree says that the community service must be reasonable and the officer "must not be influenced by extraneous or other matters, including personal matters or differences that he or she has with the offender."

Comment

In the fixed penalty system for litter introduced by this Decree, one aspect of natural justice (impartiality) is preserved, but the other (the right to be heard) is missing, as is any right of review.

This provision, though it has a laudable aim, is problematical and should be removed. However, it is not as offensive as some others noted in this Analysis and does not seem to have attracted criticism to the same extent.

22. Fiji Independent Commission Against Corruption (Amendment) Decree 2010

This amends section 2A of the Fiji Independent Commission Against Corruption Promulgation, 2007, by adding some offences that can be prosecuted by the Commission, and removing others.

Comment

This appears to be a technical amendment that does not have any human rights implications. However, it usurps the power of the DPP to prosecute any crime under the Penal Code as well as the Crimes Decree, and creates two prosecutorial agencies with different heads. From that perspective, it is a cause of some concern. No action is required but a future government might wish to review.

23. Coconut Industry Development Decree 2010

This abolishes the Coconut Industry Development Authority and transfer all its functions, assets and liabilities to the Ministry. The Coconut Industry Development Authority Act 1998 is accordingly repealed.

The Permanent Secretary is given authority to issue licences for the export of coconut products; to prescribe the qualifications, terms, procedure and fees payable for the issue of such licences; and to refuse or cancel a licence.

Refusal or cancellation of a licence can only be for good cause, which must be recorded in a register kept for the purpose.

A person who is dissatisfied with a decision of the PS may appeal to the Minister and the Minister, after having hearing the appeal, may make any decision.

It is an offence for an unlicensed person to export coconut products from Fiji, or for a licences person to fail to keep records, etc. as required by the PS.

The PS must maintain registers of coconut land and plantations; of licences issued or applied for; of processors and other manufacturers of coconut products; of auctioneers and brokers engaged in the purchase and sale of coconut products; and of traders in and shippers of coconut products. Eligible person must apply to the PS for registration, and may appeal to the Minister against a refusal.

It is an offence for a person who is not on the appropriate register to process, manufacture, trade in, ship or engage in the purchase or sale of coconut products.

The PS may by rules require the keeping of records the provision of information and the production of documents, etc. The PS may also in writing authorise a person to enter and inspect land, buildings, etc. to examine and verify record or to inspect stocks of coconut products.

Comment

The Decree vests the Coconut Development Fund in the Ministry and authorises the payment of a levy on all coconut exports for payment into the Fund.

The Decree does not say what the Fund is to be used for, which is perhaps a defect in the legislative scheme that a future government might wish to remedy. However, there are protections for applicants for licences and registration and there are no human rights problems which need to be addressed. No action needed at this time.

24. Natadola Bay Development Decree 2010

The object of this Decree is to protect the members funds invested in the Natadola Bay Development at Natadola by the FNPF. It therefore forfeits the shares held in Natadola Land Holdings Ltd following the cancellation of the Foreign Investment Certificate issued to Hotel Property Pacific Ltd, a foreign shareholder in Natadola Land Holdings Limited. This cancellation was caused by deliberate non-disclosure of bankruptcy and related information of past activities of a director of Hotel Property Pacific Ltd.

The Decree then vests the forfeited shares in Natadola Land Holdings Ltd in FNPF Investments Ltd, for the benefit and protection of the members of the Fiji National Provident Fund and of the investments made by its subsidiaries.

The Decree also transfers all real and personal property within the boundaries depicted in the Schedule in the ownership of Natadola Land Holdings Ltd, Hotel Property Pacific Ltd and FNPF Investments Ltd to Natadola Bay Resort Ltd.

The Registrar of Companies is to effect necessary changes in the register of shareholders. The Minister may in writing exempt any transfer or other document required to carry into effect the provisions of the Decree from stamp duty or registration fees.

Comment

Up to this point the Decree is unobjectionable, as reflecting a commercial decision taken for apparently reasonable grounds (assuming the facts recited are correct.) However, the Decree then goes on to provide exemption not only from stamp duty but from the application of all other laws to any related transactions, and to oust the jurisdiction of the courts in respect of all these matters. Although such provisions should be removed where possible, this particular one might well be water under the bridge; further advice from local lawyers might be needed.

25. Customs Tariff (Amendment) (No. 1) Decree 2010

This amends the Customs Tariff Act 1986 by adding a new concession code in Part III of Schedule 2 to the Act. It relates to Superyachts, and needs to be read with the Superyacht Charter Decree 2009 (No.19/10 above.)

Comment

This concerns fiscal policy. No action needed.

26. Sea Ports Management (Amendment) Decree 2010

This amends section 18 of the Sea Ports Management Act 2005 which provides that a port management company may levy rates and charges for various services, including pilotage services. The decree removes pilotage services from the list, because the charges for those services are to be prescribed by the Minister under the amendment to the Marine Act in Decree 27/10, as below.

Comment

No human rights issue appears, and no action is needed.

27. Marine (Amendment) Decree 2010

This amends the Marine Act 1986 in respect of pilotage services.

All internal waters of Fiji are declared to be a pilotage area.

Charges for pilotage services will be prescribed by regulations to be made by the Minister.

Comment

No human rights issue appears, and no action is needed.

28. Momi Bay Development Decree 2010

The purpose of this Decree was to deal with problems that arose over the development of Momi Bay, for which the Fiji National Provident Fund had provided finance.

The Decree protects the funds advanced to the developer by FNPF under a loan facility and the value of the securities provided by the developer for Stage 1 of the Momi Bay Integrated Resort Development by expediting foreclosure applications made by FNPF against the developer. The Decree also provides for all lands in Stage I of the Momi Bay Integrated Resort Development and all improvements and fixtures to be vested in FNPF for the benefit and protection of the members of FNPF.

Comment

The power to expedite foreclosure and to transfer assets is acceptable, but the Decree goes on to displace all other statutory controls. Worse, in section 8, it purports to oust the jurisdiction of the courts in all respects whatsoever. So neither the developer nor any FNPF shareholder can challenge any of the actions done under the decree, which goes too far in this respect.

It may be that the effect of the Decree is now spent and all the transactions authorised by it have been carried out, in which case there is no point amending it. However, this kind of 'Fiji triple' ouster clause is unacceptable in principle as denying access to the courts, and should be removed if a mechanism can be found.

29. Media Industry Development Decree 2010

This Decree sets out a new regulatory framework for all media organizations i.e. the press, TV and other media in Fiji (but not internet providers.) It repeals the Registration of Newspapers Act (Cap. 106) and the Press Corrections Act (Cap. 107) and establishes a new Media Industry Development Authority. The functions of the Authority are to *inter alia* to encourage the development of media organisations and media services in Fiji, to advise the Minister, to ensure that media services in Fiji are maintained at a high standard and to promote local content in print and broadcast media. The Minister can give directions to the Authority.

The Decree puts into statutory form as Schedules the 4 Media Codes that had been developed by the Press Council (Media Code of Ethics and Practice, General Code of Practice for Advertisements, Code for Advertising to Children, Television Programme Classification Code).

Part 4 makes it an offence to publish material which is against the public interest or order, which is against the national interest, or which creates communal discord. The maximum penalty is a fine of \$100,000. It is also an offence, with similar penalties, to publish an article of more than 50 words without having a by-line (i.e. naming the author.) See also section 28 which requires media organizations to disclose their sources.

Part 5 gives the Authority powers of investigation etc. which go well beyond 'development' of the industry.

Section 33 requires all media organisations to be registered with the Authority, which is an unreasonable imposition on press freedom. (Note however that the Registration of Newspapers Act did impose a requirement to register.)

The Part gives the Authority power to require corrections to be published, not unlike the powers in the Press Corrections Act.

The Decree restricts the right to have cross-ownership of media organisations.

Part 8 establishes a Media Tribunal to hear media disputes i.e. disputes about corrections, and other complaints about action under the Decree.

Section 86 gives the Minister power to exempt charities and other not-for-profit organizations from the provisions of the Decree. (This is acceptable except that it extends to organisations "for any other purpose as may be deemed relevant by the Minister" which is too wide.)

Section 88 is an ouster clause.

Comment

This Decree has several objectionable features and there are several sections that should be amended or repealed. For a full critique, see the separate Note on Media Decrees. The Decree should also be clarified as to the scope of its application e.g. whether it applies to websites maintained by NGOs.

30. 2010 Appropriation (Amendment) Decree 2010

This appropriates to the service of the Government for 2012 the sum of \$1,470,776,009, and authorizes borrowing up to \$497,455,669.

Comment

The decree is called an 'Amendment' decree, rather than a supplementary appropriation, so it would appear to replace Decree No. 52 of 2009 which also appropriated sums for 2010. They have both had effect and no action need be taken on them.

31. Fijian Affairs (Amendment) Decree 2010

This changes the name of the Fijian Affairs Act (Cap.201) to the 'iTaukei Affairs Act'.

All subsidiary legislation made under it is similarly amended. The result is that the Native Affairs Board becomes the 'iTaukei Affairs Board'.

Comment

This reflects a policy decision about the naming of Fijian native affairs, and a future government might wish to review it, but no human rights issue arises. Action might be required to conform the nomenclature to the new Constitution. There is no instruction in the Decree what to do with words "Fijians" or where the word "Fijian" is prefaced by 'indigenous' or 'native', as it would render the prefacing word otiose.

32. Native Land Trust (Amendment) Decree 2010

This amends the Native Land Trust Act (Cap.135) by re-constituting the Native Land Trust Board (to be known as the 'iTaukei Land trust Board.'

The Minister becomes Chair (instead of the president) and other members must represent iTaukei land owning units and the iTaukei Affairs Board.

The functions of the President in respect of native land (iTaukei land) are transferred to the Minister responsible for iTaukei affairs.

Comment

As with Decree No.31/10 above, this reflects a policy decision about the naming of Fijian native affairs, and a future government might wish to review it, but no human rights issue arises. Action might be required to conform the nomenclature to the new Constitution.

33. Telecommunications (Amendment) Decree 2010

This amends the Telecommunications Promulgation 2008 (No.1/08) to remove a limitation on how long a member of the Board of the Telecommunications Authority could serve. Previously a member could only serve for 2 terms of 3 years.

Comment

Although rotation in office is often desirable, it is not a human rights issue, and no action is required on this Decree.

34. Compulsory Registration of Customers for Telephone Services Decree 2010

Under this Decree, all telephone numbers and all SIM cards issued by a service provider to a customer must be registered by the relevant service provider. Customers must be required to provide details for registration (name, address, date of birth etc.) Upon completion of a sale of a SIM card or fixed line telephone, an authorised reseller must make a record of the sale with specified information and sent it to the service provider.

The registration is internal i.e. the details do not need to be sent to any other authority. However, a Magistrate who believes that information required under the Decree is necessary for investigation of 'prank' calls to national emergency telephone numbers, or to investigations under the Crimes Decree 2009 relating to treason and other offences against Government authority; offence against public order; offences against international order (section 13(1).

The High Court may also issue a warrant upon application by a police officer or by a State lawyer authorising one or more police officers named in the warrant to obtain call records relating to registered customer details.

Comment

The power in section 13(1) appears to be proportionate and unobjectionable in human rights terms. However, the power in section 13(2) appears to be open-ended, without any particular justification being shown. It appears to offend against proportionality, as no test is required. It should be considered for repeal. The scope of the Decree is not clear - does it apply to e.g. publishers of telephone directories?

35. Regulation of Surfing Areas Decree 2010

This aims to promote Fiji as a surf travel destination and therefore to liberalise access to all surfing areas in Fiji for the purposes of tourism and recreation. A 'surfing area' is defined as "those reefs or other foreshore or offshore areas in Fiji, together with any surrounding areas, which are used or utilised for surfing or any water sport."

The Decree cancels all existing leases, licences or other interests in surfing areas (other than freehold or native title, presumably) and vests such interests in the Director of Lands, without any compensation. It overrides any other law relating to the transfer of title to land or the need for any other consent, etc. In these respects, the Decree is similar to the Denarau (Nadi River) Development Decree 2011 (No.9/11 below.)

Part 3 of the Decree says that any person can use a surfing area for surfing or water sport, without a permit, and makes obstruction etc. an offence.

Section 7 imposes some conditions in relation to such use and section 8 creates offences relating to use.

The Minister can give directions about surfing and water sports, and may prohibit them in specified areas.

Comment

It is not clear that 'used' and 'utilised' have different meanings, and the terms 'surfing' and 'water sport' are not defined. Does it include e.g. sport fishing? Also, does the definition extend to future use of areas of water? There is no Gazetted list, which leaves the definition very unclear.

This Decree can therefore be challenged for vagueness as to its exact scope. It has also been objected to as overriding indigenous (iTaukei) interests over reefs and foreshore ('Qoliqoli').

The Decree is a rather wide exercise of the power to override existing regulatory rules by statute. It would no doubt be challenged in a Parliamentary system.

The Decree has probably had effect, but the absence of any provision for compensation is something that could be remedied retrospectively.

Section 12 of the Decree is the objectionable 'Fiji triple ouster clause' and should be repealed if a mechanism can be found.

36. Land Use Decree 2010

This Decree (sometimes referred to as the 'Land Bank' Decree) creates a statutory framework for the use of designated native land in the best interest of native land owners and for the use of designated Crown land (presumably 'State land') with a view to achieving optimal return to the State.

Section 3(2) provides for the establishment of a Land Use Unit within the Ministry; for longer tenure of leases for the agricultural and commercial sector; and for available land to be leased so as to provide a livelihood for all parties concerned.

Section 4 provides that all designated land is free of encumbrances, and cannot be the subject of any dispute in any court, tribunal or commission or before any other person or body exercising a judicial function. Section 5 says that the ownership of designated land remains with the Crown (State) or native land owners until the expiration of "the lease" or until the land is no longer required under the Decree. (It is not clear which lease is referred to here.)

Section 6 says that designated land is referred to the Prime Minister, who "uses his discretion to designate land for utilisation under this Decree." This seems a rather circular process, as the designation does not happen until the PM declares it. So what land is actually referred? It seems that in practice, all native land that is not already leased or otherwise in use is referred to the PM, and most of it has been designated.

Section 7 establishes the Land Use Bank as a register of land utilised (not designated) under the Decree.

Part 3 establishes a Land Unit in the Ministry, responsible for the valuation of the land; issuance and renewal of leases; and collection of rental. Part 5 relates to leases, but nothing is said about who issues them.

Part 4 disapplies the Native Land Trust Act (Cap. 134), Agricultural Landlord and Tenant Act (Cap. 270), Agricultural Landlord and Tenant Ordinance 1966 "and any other law" and accordingly, to the extent that there is any inconsistency between this Decree and the those Acts, this Decree prevails. The phrase "and any other Law" is obviously too wide, but that is a drafting problem.

Part 5 is about leases, including protected leases, but it still does not say who issues them. Part 6 enables the Minister to make regulations.

Comment

The Decree purports to disapply laws that are entrenched in the 1997 Constitution and are supposed to be amended only by a special procedure. See section 185 of the 1997 Constitution.

There are no substantive provisions for the issue of leases so the Decree is defective as a legislative scheme.

The whole Decree will need reviewing by a future Government for its effect on iTaukei land rights and the work of the iTaukei Land Trust Board.

Part 7 is the 'Fiji triple' ouster clause (ousting jurisdiction in respect of the Decree, decisions under it and a certificate of termination). It is unacceptable and should be repealed or declared to be of no effect.

37. Airport Departure Tax (Revised Budget Amendment) Decree 2010

This increases the airport departure tax from \$75 to \$100. Replaced by Decree No12/12 below.

38. Customs Tariff (Revised Budget Amendment) Decree 2010

This increases the rate of duty on a number of tariff items listed in Part I of Schedule 2 to the Customs Tariff Act 1986 from 5% to 15%.

Comment

A fiscal policy matter for review by a future government.

No action needed, but it is not acceptable that a law to amend what was proposed in a national budget should apparently be made without announcement or warning.

39. Mining (Amendment) Decree 2010

This decree amends Part II of the Mining Act (Cap.146) to enable the granting of special prospecting licences in respect of the seabed. It amends the definition of 'land' in the Act, to include the seabed to the limit of the EEZ as defined in the Marine Spaces Act (Cap.158A). This definition is limited to special prospecting licences

The Decree declares the surface of the earth to be divided into graticulated spaces, and provides a Grid system for prospecting purposes.

The Decree does not itself permit prospecting on the seabed, but opens the way for it.

Comment

A future government might wish to review the policy, but there are no human rights issues and no action is required.

40. Customs Tariff (Amendment) Decree 2010

This amends Part I of Schedule 2 to the Customs Tariff Act 1986 to vary the rates of duty on 2 items.

Comment

This is a fiscal policy matter for review by a future government. No action needed.

41. Land Transport (Amendment) Decree 2010

This Decree amends the Land Transport Authority Act 1998 by merging with the Authority the functions and assets of the National Road safety Council.

The Decree repeals the National Road safety Council Act 1994, expands the functions of the Land Transport Authority and provides for the transfer to the Authority of employees, assets, funds and resources of the Council.

Comment

This is a policy matter, and does not infringe on human rights, as the interests of employees are protected. A future government might wish to review the policy, but no action is needed on this Decree.

42. Value Added Tax (Amendment) Decree 2010

This Decree amends the Value Added Tax Decree, 1991, to clarify the rules about VAT payable on contracts of insurance.

Comment

This Decree means that certain insurance transactions, previously exempt, are now Vatable, generating increased income to FRCA. However, this is a fiscal policy matter and does not raise any human rights issue.

43. Media Industry Development (Amendment) Decree 2010

This amends the Media Industry Development Decree 2009 by adding to section 86 (which gives a power to exempt charities, etc.) a general power of exemption of any person, organization, class of person or class or organization by notice in the Gazette.

Comment

As the Media Decree has been criticised as being too restrictive, any exemption is to be welcomed, but it should be based on stated grounds, rather than Ministerial favour. This and the principal Decree should be considered for repeal or amendment.

44. Child Welfare Decree 2010

This Decree promotes child welfare by requiring mandatory reporting of child abuse cases by professionals dealing with children. It provides for the making of care and treatment orders by medical officers. It protects the confidentiality and integrity of cases and of professionals handling them and it creates a number of offences.

Comment

The Decree was no doubt prompted by one parent who refused medical attention for their child because of religious beliefs, and was drawn up overnight so that the Solicitor-General could get a court order under it the next day, to allow life-saving medical treatment. It raises the question of clash between medical treatment and religious beliefs, e.g. of Jehovah's Witnesses and Christian Scientists, of which there are a small number in Fiji. For people not of these faiths, it does not have any human rights problems.

No action is needed, though a future government might wish to review aspects of the policy.

45. Quarantine (Amendment) Decree 2010

This amends section 9 of the Quarantine Act (Cap.112) by adding a new subsection requiring money owed in respect of a vessel to be paid to the Authority by the agent for the vessel within 31 days.

Comment

Failure to pay can result in the Government exercising forfeiture of vessel and selling the vessel to recoup money owed, even for a small amount owed. However, this appears to be a reasonable requirement, not raising any human rights issue. No action needed.

46. National and Trade Measurement (Amendment) Decree 2010

This amends the National and Trade Measurement Decree by creating a National and Trade Measurement Office. It consists of the Director, Principal and other inspectors. They are all under the direction and control of the Minister. Functions formerly of the Chief Inspector are given to the Director. The Decree also establishes a system of fixed penalties for offences under the principal statute.

Comment

The Decree is rather muddled in its references, and there are aspects of the systems created that need tidying up, but there is no obvious breach of human rights standards and no action is needed in that regard.

47. Trade Standards and Quality Control (Amendment) Decree 2010

This Decree amends the Trade Standards and Quality Control Decree 1991 to bring it into line with the Commerce Decree 2010 (No.49/10 below). A new section 13A enables the Minister to direct the Council to investigate whether the supply of any goods or services should be prohibited, or made subject to conditions to prevent death or injury from the goods or services. The investigation can also be into unfair trade practices. The Council then reports to the Minister who can direct the discontinuance of a practice (or, presumably, the supply of goods or services.) The Director can issue enforcement notices and there are penalties for non-compliance.

Comment

The drafting is not very clear, but it does not seem that any of these provisions presents a human rights problem and no action is needed on this Decree.

48. Consumer Credit (Amendment) Decree 2010

This Decree makes extensive amendments to the Consumer Credit Act 1998. Some are to give responsibility for enforcement of the Act to the Director of Trade Measurement and Standards instead of the Chief Inspector of Fair Trading and Consumer Affairs. The Decree amends section 186 of the Act and adds new sections to give inspectors more powers of search and seizure etc. with normal checks and balances.

The Director is given power to prosecute offences under the Act.

New section 186M says -

"No suit, prosecution of other legal proceedings lie against the Director, any inspector or any other officer administering this Decree, for anything done in good faith under the provisions of this Decree or of any regulations or orders made thereunder."

Comment

The underlined words make this provision acceptable (unlike some others in recent Decrees, as noted.)

The amendments are acceptable from a human rights point of view and no action is needed on this Decree.

49. Commerce Commission Decree 2010

This Decree repeals the Counter-Inflation Act 1978, the Fair Trading Decree 1992, and the Commerce Act 1998. It establishes the Fiji Commerce Commission to administer the access regime for regulated industries. A regulated industry is one engaged in the supply of electricity, water, sewerage, post, broadcasting, telecommunications, ports or civil aviation services (or declared to be a regulated industry.)

An access regime means a scheme to permit third-party access to infrastructure facilities.

The Commission also has the function of controlling the prices charged by regulated industries and to make Price Control Orders.

The Commission also has a regulatory role in respect of restrictive trade practices, consumer protection and unfair practices generally in regulated industries. The Commission has extensive enforcement powers.

Comment

This is a large piece of legislation (96 pages) and there are several policy issues that a future government might wish to review. Indeed, section 159 imposes on the Minister a duty to review the working of this Decree every 5 years.

Meanwhile, the main objection is to clause 38A which ousts the jurisdiction of the courts with regard to the making of Price Control Orders.

The purpose of the ouster clause is presumably to ensure that price control orders can be given immediate effect, without prolonged litigation, and there might be policy justification for that. However, the courts should still have the opportunity to say whether due process has been followed in making an order, even if the order stands until a court declares it invalid. Section 31A should be amended to so provide.

50. Income Tax (Amendment) Decree 2010

This was repealed by Decree No.56 of 2010 (see below) so need not be considered.

51. Companies (Amendment) Decree 2010

This amends the Companies Act (Cap.247) to lower the age at which a person can be a secretary or director of a company from 21 to 18.

Comment

This reflects a general policy to reduce the age of majority generally, and a future government might wish to review it. It does not raise any human rights issue, and no action is needed as the new Constitution will adopt the age of majority as 18.

52. Criminal Procedure (Amendment) (No. 2) Decree 2010

This amends section 204 of the Criminal Procedure Decree 2009 (No.43/09 above) by adding provisions about the personal details of assessors. They are not to be published without leave of a judge, and a judge can order that they not be displayed at the court.

Comment

This is a policy matter intended to protect the privacy of assessors (and thus the integrity of trials.) Defence lawyers might object, and a future government might wish to review, but the Decree does not raise human right issues that require action on it.

53. Microfinance Institutions (Examination and Assessment) Decree 2010

This gives to the Reserve Bank of Fiji power to inspect microfinance institutions. It can do this by conducting examinations onsite or otherwise to assess the governance, credit policy etc off the institution. It must then report to the Cabinet.

The Governor of the Reserve Bank can call for information and documents and can obtain a search warrant from a magistrate.

Up to this point, the Decree is unexceptionable (except for lack of clarity as to its scope.) However, section 13 then says that there can be no court challenge of any decision of the Minister or of the Reserve Bank under the Decree, or the validity of the Decree itself. If any proceedings to challenge the validity of such a decision, or of the Decree, is brought, the court must send the proceedings to the Chief Registrar to terminate. The Chief Registrar must issue a certificate of termination, and that decision cannot be challenged either.

Comment

It is not clear what is a microfinance institution - does it cover e.g. credit unions, money-lenders or only banks?

The ouster clause in section 13 should be repealed.

The new language of penalty units (see section 56 of Decree 42/09 above) is used in 2 places but not in section 8. There should be consistency of usage for penalties.

54. Mental Health Decree 2010

This Decree provides for the care, treatment, management, rehabilitation and protection of people with mental illness and other mental disorders. It regulates mental health care, treatment and rehabilitation services and facilitates the development of community mental health services.

Comment

The Decree was drafted in conjunction with legal advisors of the WHO in Geneva to ensure that it represents current best practice for balancing the rights of those with mental disorders and those of society. Section 7 expressly prohibits discrimination against those suffering from mental disorder.

Part 2 creates a National Advisory Council on Mental Health and provides for a National Mental Health Advisor.

Part 3 deals with voluntary admission and assessment.

Part 4 provides for detention and involuntary assessment.

Parts 5 and 6 governs the giving of care and treatment. Informed consent by a patient or by the patient's carers is required at all stages of the process.

Part 7 deals with children and young persons.

Part 8 deals with persons in custody.

Part 9 provides for review of decisions by a Mental Health Review Board and for Boards of Mental Health Visitors in institutions.

Part 10 provides for the guardianship and management of the affairs of persons with mental

Incapacity.

The Decree repeals the Mental Treatment Act (Cap 113) with savings for things done under it

Comment

The Minister's powers are limited to designating premises and appointing the Council, receiving reports and similar functions. There are no arbitrary or unreasonable powers and there are no human rights issues that need to be addressed.

There could however usefully be a reference to the UN Declaration on Human Rights.

There could also be a general instruction for consequential amendments to amend references to the title of the old Act wherever appearing in any written law.

55. Tax Administration (Amendment) Decree 2010

This amends the Tax Administration Decree 2009 (No.50/09 above) to require named institutions and persons to have a computer-generated tax identification number. The purpose of this is that any payment of salary or movement of funds by the institution will be identified and thus more easily traced by the tax authorities. This in turn makes avoidance of tax more difficult and the collection of tax more efficient.

Comment

The obligation is on institutions, not taxpayers, and does not impose an undue burden. Nor does it appear to amount to an unreasonable invasion of privacy. No human rights issue arises, and no action is needed on this Decree.

See other amendment Decrees at Nos. 4/10, 69/10 and 9/12.

56. Income Tax (Amendment) (No. 2) Decree 2010

This repeals Decree No. 50 of 2010 and replaces it by a provision that allowances paid to assessors in trials in the High Court are exempt from tax.

Comment

This is a fiscal policy matter. No action needed.

57. Security Industry Decree 2010

This Decree establishes a Security Industry Licensing and Registration Board appointed by the Minister, and provides for the appointment of a Registrar of Security Licence holders. The Decree establishes a licensing system for persons who wish to employ or provide other persons to carry on any security activity. There are 3 classes of security licence - a master licence, an individual licence or a provisional licence.

Applications are to the Board, and the Decree sets out the criteria for granting a licence.

The Decree establishes a Security Industry Licences Appeal Tribunal to review decisions by the Board about licences.

The court may also suspend a licence if a licence holder is convicted of an offence.

Section 56 requires the Minister to conduct a review of the Decree after 5 years to ascertain if it is fulfilling the policy objectives.

Comment

The penalties are rather severe and could be reviewed in a future review under section 56.

Otherwise, the Decree sets out a proportionate scheme with necessary safeguards, powers of review etc. and there are no human rights issues arising.

No need for action.

58. Fiji National University (Amendment) Decree 2010

This amends the Fiji National University Decree 2009 (No.39/09 above) in several significant ways. It establishes a Training and Productivity Authority of Fiji 'within the University' (or perhaps makes the University the Authority; the text is not clear.)

It also seems to make the University the National Training and Productivity Centre.

It gives the Minister power to impose a levy on employers, to be paid to the Council of the University. It enables the Minister to make Training Orders

Comment

These amendments seem to load onto the University several non-academic functions relating to employment, training and apprenticeship. That is presumably the intended policy and it does not present a human rights problem. However, the drafting of this Decree is not very clear and the resulting principal Decree should be reviewed. For example, section 31 is repealed - but there is no section 31.

The Decree is unfair to those employers who contributed to the levy by allowing the FNU to utilise the funds for unrestricted purposes and not necessarily for training of workers, as was its original purpose. A future government might wish to review the policy (and the drafting), but no action is needed on the Decree meanwhile.

59. 2011 Appropriation Decree 2010

This appropriates from the Consolidated Fund for the services of the Government in 2011 the sum of \$1,667,680,586. It also authorizes borrowing up to the sum of \$734,801,481.

See under previous Appropriation Decrees for comments on this Decree. No action needed.

60. Land Transport (Road Levy) (Amendment) Decree 2010

This amends section 24 of the Land Transport (Road Levy) Act (not identified by year or number.)

It removes the provision that the Road User Levy is to be paid into the Infrastructure Rehabilitation and Development Account held by the Authority for the Minister of Transport. Instead, the levy will be paid to the Consolidated Fund.

Comment

This is a public accounting matter which a future government might wish to review, but no action needed now.

Originally, the reason for a road levy was for LTA to repair roads, but did not prove feasible so a new Fiji Roads Authority was set up ---see Decree No.2/12.

61. Exchange Control (Amendment) Decree 2010

This amends the Exchange Control Act (Cap.21) to increase the maximum penalties for offences under the Act and to refer to fines by reference to 'penalty points' as provided for by the Sentencing and Penalties Decree 2009 (on which see above.)

The maximum penalty for an offence by a corporate body is also increased.

Comment

The increases in penalties reflect a policy decision about exchange control offences, but some are rather extreme e.g. from 3 months to 5 years. A future government might wish to review this Decree, but no action is needed now.

62. Dairy Restructure Decree 2010

This Decree aims to restructure the dairy industry in Fiji through the change of name from "Rewa Co-operative Dairy Company Limited" to Fiji Co-operative Dairies Limited and to separate the supply of milk and milk products from the processing of such products. It transfers the interests from RCDL to FDL. It ensures that the shares in RCDL continue to be owned by its existing shareholders in accordance with its constituent documents and the Co-operative Dairy Companies Act (Cap 1191); and it enable RCDL (now known as FCDL) to continue to hold an equitable stake in FDL.

Comment

As in the case of the Momi Bay Development Decree (No.28/10 above) the Decree sets aside all other requirements for registration of title etc. (See also the Denarau (Nadi River) Development Decree 2011 (No.3/11) and the Regulation of Surfing Decree 2010 (No.35/10.)

(In practice, fees are required for transfer of assets under this Decree.)

More importantly, there is an ouster clause in section 24 which should be repealed or declared of no effect.

63. Tobacco Control Decree 2010

This repeals the Tobacco Control Act 1998 and replaces it by a more extensive system of controls. It prohibits certain tobacco product advertisements and giving or distributing free sample; it restricts sponsorship, regulates competitions and prohibits 'brand stretching'.

The Decree imposes an obligation to display health warnings and tar and nicotine content warnings. It prohibits misleading labeling, limits permitted tar and nicotine content and prohibits supply of tobacco to persons under 18 years or sale of tobacco by vending machines.

The Decree prohibits smoking in certain public places and empowers the Minister to prescribe smoke-free buildings or smoke-free areas.

The Decree requires sellers of tobacco products to be registered and manufacturers etc. to be licensed.

The Minister can appoint authorised officers with powers of entry, search and seizure and power to obtain information.

The Minister can grant exemptions, but only by regulations.

There is a fixed penalty system.

Contracts inconsistent with the Decree are declared void.

Comment

All these provisions are reasonable and proportionate to achieve the purposes of the Decree and no human rights issue arises.

The fixed penalty of \$5,000 for a first offence is rather severe and should be reviewed, but no other action is required on this Decree.

64. Marriage (Amendment) Decree 2010

This Decree amends Part II of the Marriage Act (Cap.50) to enable the Attorney-General to appoint suitably qualified person as civil marriage celebrants.

They will have power and authority to solemnise civil marriages.

The Attorney-General must be satisfied that an applicant for registration as a Civil Marriage Celebrant is a suitable person, may impose conditions on the registration and may revoke the registration.

Comment

The policy intention is presumably is to encourage 'wedding tourism' and a future government might wish to review it.

Of more concern are the wide powers given to the Attorney-General, without any provision for review or appeal. The Decree does not offend human rights standards as such but might be appropriate for review.

65. Value Added Tax Decree (Amendment) (No. 2) Decree 2010

This amends the Second Schedule to the VAT Decree by adding to the list of zero-rated articles a category consisting of personal school equipment.

Comment

The concession ended on 28 February 2011 so this decree is spent and need not be considered further. It was a flood-relief measure.

66. Value Added Tax (Budget Amendment) Decree 2010

This amends the Value Added Tax Decree of 1991 to vary some rates of tax, and to revise the form for use in connection with the tourist refund scheme.

Comment

It reflects fiscal policy and no action is required.

67. Customs Tariff (Budget Amendment) (No. 3) Decree 2010

This amends Schedule 2 to the Customs Tariff Act 1986 by increasing from 12.5% to 15% the concession code or tariff rate in Parts 1, 2 and 3 of that Schedule.

Comment

This is a fiscal policy matter and does not raise any human rights issue.

68. Customs Tariff (Budget Amendment) (No. 4) Decree 2010

This amends Part 1 of Schedule 2 to the Customs Tariff Act 1986 by varying the tariff rates on a number of items and introducing some new ones.

Comment

This is a fiscal policy matter and does not raise any human rights issue. No action required.

69. Tax Administration (Budget Amendment) Decree 2010

This Decree amends the Tax Administration Decree 2009 (No.50/09 above) in a few minor respects, one relating to microfinance.

Comment

This is a fiscal policy Decree and there are no human rights issues. No action is required.
See other amendment Decrees at Nos. 4/10, 55/10 and 9/12.

70. Income Tax (Budget Amendment) Decree 2010

This amends the Income Tax Act (Cap.201) in 3 minor ways.

One gives the Minister power to grant exemption if there is no double taxation agreement with a country (presumably to encourage investment from such countries.)

Another extends the period for export income deduction, except for export to Australia or New Zealand (perhaps reflecting political dissatisfaction with those countries.)

Comment

This is a fiscal policy measure, but reflecting wider policy issues. There are no human rights issues, but a future government might wish to review the policy implications. No action needed.

2011 DECREES**1. Trade Standards and Quality Control (Amendment) Decree 2011**

This amends the Trade Standards and Quality Control Decree 1992 to enable the Minister to grant exemptions from the rules about dangerous goods and services in section 31. The exemption can include government entities (as defined) and must be in specified areas of Fiji.

Comment

The reason for this amendment is not apparent, but it might relate to mining operations etc.

The Decree is does not breach human rights, but a future government might wish to review the policy.

2. Water Resource Tax (Budget Amendment) Decree 2011

Amends rate of tax on water provided in the Water Resource Tax Promulgation 2008.

Comment

This is a fiscal policy matter. No action needed.

3. Denarau (Nadi River) Development Decree 2011

This aims to promote Fiji as a tourist resort and travel destination, including for yachts. It therefore liberalises access to specified areas of Denarau and the Nadi River for non-commercial purposes. It cancels any lease, licence or other instrument of title in relation to the relevant area, and vests the title in the Director of Lands on behalf of the State. This is expressly stated to be without compensation (section 4(1)).

The Decree displaces any other law relating to title to land in the relevant area and waives any consent, permit, fee or charge in respect of relevant documents. The vesting made by this Decree is stated to be effective despite any non-compliance with any other law. (See the Regulation of Surfing Decree 2010 (No.35/10) above for a similar provision.)

Comment

This is a rather wide exercise of the power to override existing regulatory rules by statute, and would no doubt be challenged in a Parliamentary system. The Decree has probably had effect, but the absence of any provision for compensation is something that could be remedied retrospectively. Section 7 of the Decree is the objectionable 'Fiji ouster clause' and should be repealed if a mechanism can be found.

4. Bank of South Pacific Ltd (National Bank of Fiji Ltd) Decree 2011

This provides for the transfer to the Bank of South Pacific Limited of the whole undertaking of the National Bank of Fiji Limited.

The Decree waives any requirement under any other law in relation to transfer of assets, which is acceptable. However, section 4(6) says that -

"NBF and BSP shall not be liable to any customer for any common law, contractual or statutory breach of privacy or confidentiality resulting from the operation of this Decree."

[This is too wide as it includes liability for default or bad faith.]

Section 16(1) says that -

"This Decree operates to the exclusion of any other written law relating to or affecting the transfer of property, land titles or securities or companies or the keeping of public records, and to the extent of any conflict or inconsistency between this Decree and any other written law, this Decree prevails."

[That is too wide a statement of the doctrine of implied repeal as it seems intended to act in the future also.]

Section 17 says that "The transfer and vesting of any right or obligation by this Decree is not invalidated by any accidental omission or procedural irregularity."

Comment

This Decree seeks to displace every other rule of law relating to the transfer. It does not, however, include the 'Fiji ouster clause' so that a review is still a theoretical possibility if there is someone with a grievance who alleges he has suffered as a consequence of the transfer.

This Decree is for query, but no human rights action needed.

5. HIV/AIDS Decree 2011

This aims to provide human rights-based measures to assist in HIV prevention, and HIV/AIDS care and support. It is similar to recent legislation found in other countries, and seems to follow the model recommended by the WHO.

The Decree prohibits discrimination on the ground that a person has HIV/AIDS and requires the provision of counselling services. It regulates testing for HIV/AIDS. It establishes the HIV/AIDS Board.

The Immunity provision in section 43 correctly refers to acts done in good faith.

Comment

The Decree is in line with human rights standards and no action is needed.

Note that there is an amending Decree (No.38/11 below) relating to the RFMF and the offence of causing infection.

6. Value Added Tax (Amendment) Decree 2011

This amends the Second Schedule of the Value Added Tax Decree 1991 by adding omnibus transport services to the list of exempted services.

Comment

This is a fiscal policy matter. No action needed.

7. Native Lands (Amendment) Decree 2011

This amends references to 'Native' in the Native Lands Act to become 'iTaukei.' A similar amendment is made in respect of all other written laws.

Comment

This reflects the policy decision to change from 'Native' to 'iTaukei' noted above. It might need to be considered in the light of the new Constitution nomenclature, but otherwise no action is needed.

Note however that neither this nor No. 8/11 are clear on which of these 2 Decrees apply the consequential changes to all other laws as the wording for consequential changes is the same. There is no instruction on what to do if a revisioner should find "native Fijian" in the text as a revision by Decree No. 31/10 would render one of the newly changed words otiose.

8. Native Land Trust (Amendment) Decree 2011

This achieves the same result as Decree No.7/11 in respect of the Native Land Trust Act. The Board becomes the 'iTaukei Land Trust Board'. (It is probably not needed in light of the general amendment in Decree No.7/11).

No action needed, except to consider in the light of the nomenclature in the new Constitution.

9. Fiji Islands Audio-Visual Commission (Amendment) Decree 2011

This amends section 4 of the Fiji Islands Audio-Visual Commission Act 2002, which provides for the composition of the Commission. The Decree replaces the system of representative appointees by a power for the Minister to appoint 7 other members. It also removes the restriction on re-appointment.

Comment

This is a policy matter, which a future government might wish to review, but it does not have human rights implications. No action needed.

10. Trust Accounts (Amendment) Decree 2011

This further amends section 22 of the Trust Accounts Act 1996 which was amended by Decree No.20/09 above as to the disposal of the proceeds of trust accounts. It changes the proportions in which trust moneys are to be transferred to the Judiciary Fund, the Fidelity Fund or the Independent Legal Services Commission Fund.

It also requires some of the money to be transferred to a new Legal Aid Fund to meet the costs and expenses of the Legal Aid Commission established by the Legal Aid Act 1996, and to the Legal Practitioners Unit Fund to meet the costs and expenses of the Legal Practitioners Unit under the Legal Practitioners Decree 2009. (See also Decree No.22/12 below.)

Comment

The Government knows that trust account interest is lucrative, and requires all lawyers to maintain trust accounts, on pain of cancellation of their certificates.

This amendment Decree has implications for lawyers' trust accounts as money is raised from interest on monies kept in lawyers' trust accounts, yet with no say on how the proportions should be utilized. A future Government might wish to review the consultation aspect, as a matter of courtesy, else lawyers might start refusing to put money into trust accounts.

11. Prisons and Corrections (Amendment) Decree 2011

This amends the Prisons and Corrections Act 2006 to become the Corrections Service Act. It also changes all references to 'Prisons and Corrections Service' or 'Prisons Service' to become 'Fiji Corrections Service'.

Comment

This is a policy matter and does not raise any human right issues.

However, the system of parole needs reviewing, as it appears that the method of calculation of parole and release of prisoners is not fully functioning and the Parole Board has not yet been set up. See remarks by the DPP in Kamlesh Kumar v State (CAV 1/09 AAU 45/05) and Mesake Sinu v State (CAV 1/10 AAU 115/07S) 21 August 2012.

12. Excise (Budget Amendment) Decree 2011

This amends the rates of duty in Part 1 of Schedule 2 to the Excise Act 1986.

Comment

This is a fiscal policy matter and no action is needed.

13. Stamp Duties (Amendment) Decree 2011

This amends sections 6 and 7 of the Stamp Duties Act (Cap.205) to remove the references to the Commissioner or Deputy Commissioner being appointed by the Minister. It does not say who appoints the Commissioner, but see decree No.15/11 below for this.

The Commissioner then appoints a deputy.

Comment

The reason for this change is not apparent, but as it reduces the influence of the Minister in this area, it is not unacceptable.

The policy intention was to amalgamate all functions centrally, but the effect has been that payment of stamp duties and filing of documents for settlement were in one place. Now lawyers have to make 2 trips to 2 different places, some 2 km from each other, so the almost instantaneous settlement of transactions achieved in the past has gone; this might account for Fiji's lower ADB standing on ease of doing business.

A future government might therefore wish to review, but no human rights action is needed on this Decree.

14. Water Resource Tax (Amendment) Decree 2011

This amends the Water Resource Tax Promulgation, 1998 to allow for natural wastage in the calculation of amounts. More important, it enables the Comptroller to station an officer in the premises of water extraction businesses, to ensure compliance with the promulgation.

Comment

This seems a proportionate response to the problem of possible abuse by water bottling companies and does not offend against human rights principles. No action needed on this Decree.

15. Fiji Revenue and Customs Authority (Amendment) Decree 2011

This provides that the Chief Executive Officer of the FRCA also holds office as the Commissioner of Inland Revenue under the Income Tax Act Cap.201), the Commissioner of Stamp Duties under the Stamp Duties Act (Cap.205) and the Comptroller of Customs and Excise under the Customs Act 1986 and the Excise Act 1986.

Comment

There is no human rights issue and although a future government might wish to review the policy, no action is needed on this Decree.

16. Regulation of National Spectrum (Amendment) Decree 2011

This amends the Regulation of National Spectrum Decree 2009 (No.48/09 above)

In a number of respects, including the power to appoint a designated person to administer the Decree.

Comment

None of the amendments presents a problem, except that section 11 of the original Decree, which is an ouster clause, is replaced by another ouster clause which adds a reference to a designated person. It should be repealed.

17. Biological and Toxin Weapons Decree 2011

This Decree prohibits the development, production, manufacture, possession, stockpiling, etc. or use of biological agents and toxins and of biological weapons. It implements in Fiji the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction and the 1925 protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.

The Decree requires any person wishing to deal in biological weapons to have a licence. The Minister is to appoint a 'responsible authority' for the purpose. The Minister must also appoint inspectors, who have powers to search, call for documents etc.

Comment

Section 38 is a rather odd saving power, and needs further consideration -

"(1) Except as specifically provided herein, nothing in this Decree affects the validity of any other written laws made prior to the commencement of this Decree, and all such duties and responsibilities shall be carried out in accordance with the laws applying at the time that they were made.

(2) No procedure used to enforce any duties and responsibilities under this Decree shall be invalid by reason of the use of forms and processes applying to the enforcement of powers and seizure prior to the commencement of this Decree, unless a regulation made under this Decree requires the use of other forms or processes."

This seems to mean that if anyone was dealing in biological weapons before the commencement of this Decree, they can continue to do so, which cannot be right. There may be a policy reason for this, to do with the armament of the RFMF (though one hopes not.) Further research is needed; or section 38 could simply be repealed.

Note that the penalties under this Decree are very steep.

18. Fiji Islands Revenue and Customs Authority (Amendment) (No. 2) Decree 2011

This removes the word 'Islands' from all references to the Fiji Islands Revenue and Customs Authority.

Comment

This flows from the policy decision to rename the country as 'Fiji', and there are several other legislative changes resulting.

It is not a human rights issues, and the nomenclature is in line with proposals in the new Constitution.

However, the change of name to "Fiji" should be done on a co-ordinated basis throughout the statute book (and reflected in signage.).

19. Anti-Personnel Mines Decree 2011

This Decree aims to give effect in Fiji to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.

The Decree confers information-gathering powers, and powers of fact-finding missions.

It provides for the destruction of anti-personnel mines and creates various offences. The offence for an individual fetters a judge's discretion to apply a fine if circumstances permit. There is no licensing system for this product.

The text of the Convention is set out in a Schedule.

Comment

This should be read with Decree No.17/12 above on biological weapons. Presumably the government was keen to implement these two conventions as they relate to military activity.

Section 29 is the same rather odd saving provision as in No. 17/12 above.) The same comment can be made i.e. it should be repealed.

There are textual anomalies that should be tidied up; section 24 refers to non-existent subsections 3(a) and (b).

20. Water Resource Tax (Amendment) (No. 2) Decree 2011

This further amends the Water Resource Tax Promulgation 1998 in respect of loss by leakage (see Decree No. 2/11 above). It also clarifies that the tax is payable on all water extracted.

Comment

This is a fiscal measure which resulted from arguments by the owners of Fiji Water about payment of tax.

No human rights issue. No action needed.

21. Employment Relations (Amendment) Decree 2011

This amends the Employment Relations Promulgation, 1997, by replacing section 3 as to the application of the ERP, and adding a new section 266 which ousts the jurisdiction of the courts.

New section 3 applies the ERP to all workers, except employees of the Government, including the PSC and members of the RFMF, police and prisons service. It leaves intact claims under the Workmen's Compensation Act (Cap.94) and the Health & Safety at Work Act 1996.

New section 266 ousts the jurisdiction of the courts in respect of decisions by the Government, any Minister or the PSC under the ERP, except in respect of claims under the Workmen's Compensation Act and the HSW Act. It also says that any order of the Employment Tribunal or Employment Court "which challenges or involves" the Government, any Minister or the PSC shall terminate.

Comment

By inserting a new section 3 which excludes Government, PSC, members of the RFMF, Fiji Police Force and Fiji Corrections Service from application of the ERP but retains application only to local authorities, statutory authorities and the Sugar Industry, this Decree is inconsistent with the 1997 Constitution (section 33 and 34) and the ERP, as well as labour rights protected by the ILO.

In addition, new section 266 seeks to oust the jurisdiction of the judicial bodies about employment matters. It is objectionable and should be repealed or declared to be of no effect.

The whole Decree violates ILO Conventions and should be repealed.

22. Scrap Metal Trade Decree 2011

This Decree regulates the sale and disposal of scrap metal in Fiji.

It prohibits trade in "public infrastructure metal" metal without approval of the Licensing Authority. This covers e.g. power cables, water meters, manhole covers, street signs and railway lines.

The Decree also requires every scrap metal dealer to be licensed by the Licensing Authority.

The Licensing Authority is the Permanent Secretary and the system for applying for a licence etc. is fairly standard.

Scrap metal dealers must keep records, and the Licensing Authority must keep a register.

There is a power of entry to and inspection to premises of scrap metal dealers.

Comment

There is a right of appeal to the Minister on licensing decisions. This is acceptable, but it would be preferable to spell out how the Minister is to deal with appeals.

Section 17 is an exempting power, and is rather widely couched -

"The Minister may, upon receipt of an application in writing, exempt any person or body from the provisions of this Decree."

It would be preferable to spell out how exemptions are to be decided and declared.

Section 19 is an ouster clause and should be repealed.

23. Capital Gains Tax Decree 2011

This Decree imposes a new tax - the capital gains tax - based on the increase in the fair market value of a capital asset. It makes consequential amendments to the Tax Administration Act - see Decree 50/2009.

See also the amendment Decree at No.34/11.

Comment

This is a fiscal policy matter but can work injustice in its implementation, and a future government might wish to review it.

No human rights issue; no action needed.

(Note however that FRCA started applying CGT before this Decree was published, so the Decree had to be made retrospective, and transactions lodged and in process before the start date were held up for CGT to apply.)

24. Magistrates' Court (Amendment) Decree 2011

This Decree amends the Magistrates' Courts Act (Cap.14.) It adds a new Part 8A to enable magistrates to exercise the power of statutory tribunals.

This is presumably because such tribunals were proving troublesome in being prepared to challenge government action.

Comment

This Decree represents an interference with the independence of statutory tribunals, which are supposed to include persons with specialised knowledge of the subject.

The Decree is unacceptable and the amendment should be repealed or its effect removed.

(Note that this Decree removes the influence of the Chief Magistrate, and avoid the need to appoint independent tribunals, some of which were defunct for lack of appointment. Thus, magistrates' workloads have increased, but the decisions they make are still not transparent or published.)

25. Liquor (Amendment) Decree 2011

This amends the Liquor Act 2006 in respect of the Divisional Liquor Licensing Authority. Each one is to include the Solicitor General or his nominee, rather than a magistrate. The limitation on term of office is removed.

Comment

This amendment gives the Government's law officers more influence in liquor licensing decisions, which might be desirable, but a future government might wish to review.

There is no obvious human rights issue, as there can still be appeals to the courts.

No action needed.

26. University of Fiji Decree 2011

This Decree incorporates the University of Fiji with its own Council and Senate. The University previously operated as an entity of Shiksha (Fiji) Ltd under the Companies Act (Cap.247). It continues to operate as an entity of the Sabha (the Arya Pratinidhi Sabha of Fiji) and the consent of the Sabha is required for certain decisions and appointments. The Sabha is given the right to take over control of the University if it is in breach of its obligation under the Decree (section 43.)

There is a non-discrimination provision (section 39) and academic freedom is preserved (section 40.)

The Minister has power to make regulations for the University (section 38).

Comment

Section 49 says that the Decree is not binding on the State. This is a curious provision, as the Decree does not impose obligations on the public and there is nothing to disapply. Presumably the Government recognises the University of Fiji as it is expected to provide money under section 33. This section does not offend human rights, but could usefully be repealed.

No other action needed on this Decree.

27. Higher Salaries Commission (Revocation) Decree 2011

This repeals the Higher Salaries Commission Act (Cap.2A) and subsidiary legislation made under it. It abolishes the Higher Salaries Commission and transfers the function of setting the salaries of relevant officers as follows -

- CEOs of corporations - the corporation, with the approval of the PM and the Public Enterprises Minister;
- CEOs of government companies - the directors of the company, with the same approval;
- Permanent Secretaries - the Public Service Commission with approval of the PM;
- CEOs of local councils - the relevant Council, with the approval of the PM.

Before fixing a salary, the relevant body must obtain an independent assessment.

Comment

This Decree interferes with existing contractual rights and is objectionable in that regard.

It is not however a clear breach of human rights, but only amounts to a salary reduction in some cases.

For further consideration.

(It would appear that the Chair of this Commission was not consulted on the repeal. Several agencies had breached the law by not having brought salaries to the Commission for approval before awarding increases. Abolishing the Commission was one way of dealing with this problem.)

28. Fiji Islands Trade and Investment Bureau (Amendment) Decree 2011

This changes the name of the Fiji Islands Trade and Investment Bureau to 'Investment Fiji'.

Comments

No human rights issue, though a future government might wish to review the name.

29. Telecommunications (Amendment) Act 2011

This make minor textual amendments to the Telecommunications Promulgation, 1998.

Comment

No human rights issues. No action needed.

30. Immigration (Amendment) Decree 2011

This replaces 'Fiji Islands' by 'Fiji' in all laws relating to immigration.

Comment

This will be consistent with the nomenclature in the Constitution, and no action is needed.

31. Civil Aviation Authority of the Fiji Islands (Amendment) Decree 2011

This replaces 'Fiji Islands' by 'Fiji' in the name of the Civil Aviation Authority and all laws relating to immigration.

Comment

This will be consistent with the nomenclature in the Constitution, and no action is needed.

32. Fiji Revenue and Customs Authority (Amendment) (No. 3) Decree 2011

This adds the Pharmacy and Poisons Board to the list of bodies for which the Bard of the Authority has fiscal responsibility.

Comment

A minor policy matter (but suggests that the Ministry of Health has not been able to control the supply of pharmaceuticals.)

No action needed.

33. Industry Emblem Decree 2011

This Decree aims to increase import substitution by developing and promoting locally grown produce or products made in Fiji. It repeals the Industry Emblem Act (Cap.246) and replaces it with a new system to regulate the branding of products.

A series of emblems is set out in a Schedule and any person seeking to use any of those emblems must apply to the Minister for a licence. It is an offence without a licence to use such an emblem or anything "so resembling it as to be likely to deceive."

Comment

There should be an intention to deceive as part of the offence.

There is no right of appeal from a decision of the Minister, and judicial review is barred by section 14.

The Minister has an exempting power, which is stated rather broadly and is not subject to any restrictions.

Section 14 is an ouster clause and should be repealed.

34. Capital Gains Tax (Amendment) Decree 2011

This amends the Capital Gains Tax Decree 2011 (No.23/11) in relation to place of residence. More important, it provides that if a person seeks to include an amount of expenditure in the cost of a capital asset, including expenditure incurred in carrying out improvements to a capital asset, but is unable to produce any record of the expenditure, the person can apply to the Solicitor-General to appoint an independent assessor.

New section 17(6) says that the decision and assessment of the assessor "is final and binding on all parties", but that does not preclude review by the courts on natural justice principles.

Comment

The definition in the Decree is still not clear.

However, new section 17(6) does not preclude review and no action is needed on this Decree.

35. Essential National Industries (Employment) Decree 2011

This Decree is described as "A Decree to provide for the governing of relations between employees and employers in essential national industries in Fiji." Essentially, it precludes trade union activity in a range of industries and has provoked widespread disapproval as being a disproportionate denial of the right of collective bargaining.

An "essential national industry" is one which is "vital to the present and continued success of the Fiji national economy or gross domestic product" or in which the Government has a majority and essential interest. It needs to be declared by the Minister by regulations.

The Decree requires any union registered under the Employment Relations Promulgation 2007 which represents workers employed by designated corporations to re-register as a representative pursuant to the Decree.

Existing collective agreements are only valid for 60 days while new or replacement collective agreements are negotiated under Part IV of the Decree. (This period was subsequently extended to 3 months by Decree No.47/11)

Part 3 provides for the registration of new bargaining units to replace existing trade unions and Part 4 provides for a new collective bargaining process.

Part 5 provides a dispute resolution process.

Section 30 has a full 'Fiji triple' ouster clause with refinements.

The following national industries were declared by Schedule 1 of the Essential National Industries & Designated Corporations Regulations 2011 to be 'essential': (i) ANZ Bank; (ii) Bank of Baroda; (iii) Bank of South Pacific (BSP); (iv) Westpac Bank; (v) FIRCA; (vi) Fiji International Telecommunications Ltd; (vii) Telecom Fiji Ltd; (viii) FBCL; (ix) Air Pacific Ltd; (x) FEA; (xi) Water Authority of Fiji.

Comment

This Decree has been attacked by unions and workers for having the effect of eliminating worker representatives and repealing important protection provisions of the ERP, especially in Collective Bargaining, in The Decree specifically cancels all Collective Agreements in existence prior to its promulgation. The ILO has also criticised Decree No 35 for not complying with Fiji's ratification of conventions of the ILO.

This Decree is inconsistent with the labour protection provisions of the 1997 Constitution as well as the ILO Conventions and should be repealed.

The ouster clause - section 30 - should in any event be repealed or declared to be of no effect.

See also Decree No.47/11 for an amendment.

36. Public Service (Amendment) Decree 2011

This Decree amends the Public Service Act 1999 by adding new Parts 2A and 2B.

New part 2A is on "Fundamental principles and rights at work."

New Part 2B is on "Equal employment opportunities" and restates the prohibited grounds of discrimination in employment already stated in the Human Rights Commission Decree 2009. (Decree No.11/09 above)

Comment

The relationship between this Decree and the Human Rights Commission Decree 2009 and Public Service Decree 2009 is not easy to ascertain, but as this Decree appears to be restating some of the human rights provisions in relation to employment, it appears to be unobjectionable, and even commendable (although FICTU has it on its list of problem Decrees.)

(There is some confusion in the Regulations which state a retirement age, then say there is to be no discrimination on age, and in another place, remove the retirement age.)

37. Income Tax (Amendment) Decree 2011

This amends the Eleventh Schedule of the Income Tax Act (Cap.201) by adding a category of 'Integrated tourism development' to the costs which can be deducted from tax liability.

Comment

This is a fiscal policy matter and no action is needed on this Decree (although like other tax exemption laws it is open to abuse.)

38. HIV/AIDS (Amendment) Decree 2011

This amends the HIV/AIDS Decree 2011 (No.5/11) to remove the provision which disapplies the Decree to the Royal Fiji Military Forces generally. Instead, section 22 of the Decree will say -

"(2) Nothing in subsection (1) or in section 21 renders unlawful any discrimination in relation to recruitment, promotion, posting or discharge of members of the Republic of Fiji Military Forces."

Section 29 is amended to say that testing for HIV/AIDS is OK if needed for operational reasons or for service overseas. Section 40, which treated the offence of deliberate infection, is repealed.

Comment

These amendments do not unsettle the balance of the HIV/AIDS Decree and no human rights issue arises. No action needed.

39. State Lands (Amendment) Decree 2011

This amends section 6 of the State Lands Act (Cap.132) to provide that in exercising powers to exchange portions of State land for portions of native land, or for portions of private freehold land, the Minister may require the payment of money in addition to the exchange. This allows for adjustment in light of the differences in the value of the land exchanged.

Comment

It is a lands policy matter and no human rights issue arises. No action needed.

40. Succession, Probate and Administration (Amendment) Decree 2011

This amends section 47 of the Succession, Probate and Administration Act (Cap.60). It increases from \$1200 to \$5000 the threshold below which deposits may be paid to the widow or next of kin of a deceased person without probate or administration.

Comment

This is a policy matter, with no human rights implication, and no action is needed.

41. Nursing Decree 2011

This Decree replaces the Nurses and Midwives Act (Cap. 256) with a new statutory scheme for the regulation of the nursing profession. It establishes the Fiji Nursing Council and requires all nurses to be registered by the Council. There does not appear to be any right of review of the Council's decisions on registration.

Nurses also need to obtain from the Registrar and renew annually a practising certificate. The Director of Nursing Services is the Registrar.

An appeal in respect of a practising certificate lies to a judge. Nothing is said about appeals in respect of registration.

The Council, through a committee, has disciplinary powers, and an appeal against a disciplinary decision lies to the High Court.

The Decree establishes the Fiji College of Nursing. It does not appear to be a body corporate and its assets are stated to be those of 'the College' which is confusing. There is no right of appeal against expulsion. However, this does not raise any human rights issue as membership of the College does not appear to be a qualification for registration as a nurse.

The Minister can make rules for the Council procedure and regulations to implement the Decree.

Comment

The right of judicial review is not excluded by an ouster clause. However, the absence of a right of appeal on a registration (and, to a lesser extent, on expulsion from the College) though possibly not a deliberate policy decision, should be rectified.

42. Real Estate Agents (Amendment) Decree 2011

This Decree makes several significant amendments to the Real Estate Agents Act 2006. The most significant is that it constitutes the Real Estate Agents Board as a statutory authority.

New sections 66A to 66D then give the Board power to enter and search premises etc. in order to investigate possible breaches of the Act and to cancel a licence as a result.

Comment

It is not clear what mischief is aimed at, or whether these powers are appropriate, but there is no obvious breach of human rights standards so no action appears to be needed.

43. High Court (Amendment) Decree 2011

This adds a new subsection (3) to section 22 of the High Court Act (Cap.13) to clarify the rule about application of English laws. It says that any amendment made on or after 2 January 1875 to the statutes of general application in force in England on that day do not apply in Fiji.

Comment

This arose out of a decision that a Court could not award 4% post-judgment interest because of the wording of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act see Decree No. 46/11 for a related amendment.

The Decree answers a question that has hung over the laws of Fiji for 237 years. The answer is probably the correct one, as there is no reason why Fiji should adopt English amendments. It is for consideration, however, whether amendments up to the date of Independence should still apply.

The Decree does not offend against human rights principles and no action is needed.

44. Value Added Tax (Amendment) (No. 2) Decree 2011

This amends the First Schedule to the Value Added Tax Decree, 1991, by adding commercial aircraft to the list of exempt items, if prior written approval of the Minister is obtained.

Comment

This is a fiscal policy matter and no human rights issue arises. No action needed.

45. Land Transfer (Amendment) Decree 2011

This amends section 145 of the Land Transfer Act (Cap.131) about easements. It adds new subsections to the effect that if it appears that an error or omission has made in respect of an easement, the Registrar may make the necessary correction. The new subsections then go on to say that a decision of the Registrar to make such a correction cannot be challenged and that a certificate of the Chief Registrar of the High Court is conclusive and cannot be challenged.

Comment

This goes beyond the usual evidentiary presumption about certificates, and the exclusion of any right of review of the Registrar's original decision is also objectionable. This is not as egregious a case of ousting jurisdiction as some others, but it should be considered in the context of such clauses.

46. Law Reform (Miscellaneous Provisions)(Death and Interest)(Amendment) Decree 2011

This amends the LR(MP)(D & I) Act (Cap.27) by adding a new section 4. It provides that all judgment debts under the Act carry interest at 4%. However, no interest is payable on a judgment against the State or against the Attorney- General.

Comment

This amendment is problematical, because section 3 of the Act already provides that the High Court may (but not must) award interest in any proceedings for the recovery of a debt or damages. So there are now 2 rules - one giving the court power to award interest, including in cases against the State and the A-G; the other making interest obligatory but not against the State or A-G.

This is clearly unsatisfactory and needs reviewing by a future government. Meanwhile, given the discretionary power to award interest against the State or A-G, there is little point in seeking to remove the effect of this Decree, as the payments on the actual awards of damages take a long time to settle.

47. Essential National Industries (Employment) (Amendment) Decree 2011

This amends section 8 of the Essential National Industries Decree 2011 (No.35/11) by giving the Minister power to extend the period of 60 days within which a collective agreement in an essential national industry becomes void. The extended period cannot be longer than 3 months.

Comment

This appears to be a concession to trade unions, who oppose the whole concept of the Essential National Industries Decree (see above.) This decree is not a problem in itself, but it will stand or fall depending on whether the principal Decree stands or falls, in this review, or under a future government.

48. Charitable Trusts (Amendment) Decree 2011

This Decree amends the Charitable Trusts Act (Cap.67) to add a new section 13A. The section enables the Minister (the A-G, in fact) by notice in writing to cancel the incorporation of the board of trustees of any charitable trust established with Government funding (whether fully or partially) if the Minister is satisfied that the trust has failed to achieve its objects, or that the trustees have acted contrary to the objects of the trust.

The certificate of incorporation must be surrendered and the PS for Justice must wind up the affairs of the trust as directed by the Minister.

Comment

The new section ends with 2 out of the 3 components of the 'Fiji triple ouster' clause i.e. no proceedings to challenge a decision of the Minister, and no proceedings to challenge a certificate of the Chief Registrar terminating any such proceedings. These subsections (6) to (9) are not acceptable and should be repealed or declared to be of no effect, whatever else is done with this Decree.

The absence of any appeal mechanism is unacceptable. Section 14 of Cap.67 provides for an appeal from a decision of the Registrar to cancel the incorporation of a charitable trust, and there is no reason for the Minister's decision to be different. In fact, there is no reason for the Minister to intervene at all, except to protect Government money. Giving the Minister power to dissolve a trust is a disproportionate response to breaches of trust involving government money. To the extent that the government is funding the trust it can withdraw the funding as a sanction. It does not need to dissolve the trust itself.

The whole Decree i.e. new section 13A, should be repealed or declared to be of no effect.

(Note that an unintended effect of this Decree is that charitable trusts feel less secure in accepting government funding for their operations.)

49. Allied Health Practitioners Decree 2011

Thus Decree creates a statutory scheme for the regulation of allied health professionals similar to that for nurses (see the Nursing Decree 2011 (No.41/11 above.) That in turn was based on the Medical and Dental Health Practitioners Decree, 2010.

The Decree establishes the Fiji Allied Health Practitioners Council and the Fiji Allied Health Practitioners Association. It continues in existence the Fiji Medical Laboratory technologists Association, the Fiji Institute of Nutrition and Dietetics, the Fiji Institute of Environmental Health and the Fiji Physiotherapists Association.

Comment

The main difference from the Nursing Decree is that a person wishing to be registered as an allied health practitioner must be first registered as a member of one of the Associations, so that expulsion from an Association deprives the person of his or her livelihood. It is therefore necessary that there should be

a right of appeal against expulsion, but this is not provided for. There is a right of appeal in respect of disciplinary matters to a Disciplinary Appeals Committee, but that only deals with decisions of the Council, not of the individual Associations.

The other significant difference is that there is no mention of appeals in respect of the annual practising certificate, and the Decree is defective in that respect also.

These defects are probably a result of oversight rather than of deliberate policy, and the right of judicial review is not ousted. However, if the opportunity presents itself, these defects in the Decree should be remedied.

50. 2012 Appropriation Decree 2011

This appropriates the sum of \$1,788,753,571 from the Consolidated Fund to the service of the Government for 2012. In fact, the requirement should be shown as \$1,765,331,571 for appropriation, and \$23,422,000 for borrowing.

Comments

See comments above on the constitutionality of appropriation without a legislature.

No human rights issue. No action needed.

51. Fiji National Provident Fund Transition Decree 2011

This Decree provides transitional arrangements arising out of the repeal of the FNPF Act (Cap.219) and its replacement by Decree No.51/11. It is consequential on Decree No.52/11 and should logically follow it.

The Decree makes provision in relation to current pensions/annuities offered by the FNPF, and for winding up the share investment scheme under part IXA of the FNPF Act (Cap.219).

The principal object of Part 2 of the Decree is to ensure that the arrangements for the provision of annuities by the Board are sustainable, non-discriminatory and do not involve cross subsidy of one group (pensioners and annuitants) by another (FNPF members). This recognises advice from The World Bank, the IMF, the ILO and others that the current annuity arrangements do not meet these criteria.

Comment

This Decree has had the effect in practice of reducing the pensions or annuities paid to some members of the Fund, and has been criticised as a denial of human rights. However, the calculation of pensions etc. is an actuarial function, and unless there is evidence that the Government has improperly interfered in the decision-making process, it is difficult to see how an attack on the decisions of the Board can be mounted. Nor does the Decree itself contain any objectionable features, and the Minister's only function is to make regulations.

No action is proposed on this Decree, though a future Government might wish to consider ways to alleviate the plight of existing pensioners/annuitants.

52. Fiji National Provident Fund Decree 2011

This Decree reorganises the Fiji National Provident Fund in order to make it more viable. It is intended to repeal the FNPF Act (Cap.219). (Although the Act is wrongly referred to as Cap.121 in section 3(3), it must be taken to be repealed.) There are also other consequential repeals and amendments. The decree aims to ensure that workers will accumulate savings throughout their working lives to provide income after they cease working; and to improve the operation and governance of the Fiji National Provident Fund.

The Fiji National Provident Fund Board, established by the former law, is continued in existence as a body corporate under the same name. The Fiji National Provident Fund continues under the same name. The Board keeps and administers the Fund. It must ensure that the Fund keeps the solvency requirement.

The Decree incorporates several protective provisions -

- The Board must formulate a Code of Conduct applicable to Board members, staff members and other persons and review it every 3 years.
- The Board must establish a scheme for reviewing decisions and determinations made by staff members in respect of FNPF members and annuitants.
- The Board must hold a forum for FNPF members and annuitants in each financial year in accordance with this section.
- Board members must disclose their interests.
- The Board must formulate a Code of Fair Practice approved by the Reserve Bank of Fiji.
- The RBF has general supervisory control and can issue 'prudential standards' and give directions and appoint a statutory manager of any fund.
- The RBF may report to the Minister any matter of concern over a fund.
- Annual reports are to be published.
- Undue pressure on an actuary or auditor is an offence.
- The Board's powers in relation to the management, investment and application of a fund are not subject to direction by any other person.
- Section 139 protects 'whistleblowers' from victimization.

Comment

No action is proposed on this Decree, but there are some unsatisfactory features of it -

- Withdrawals can only be made with the approval of the Board and cannot be used to buy income products that are not approved. However, the list of approved withdrawals is not published/ gazetted, which results in lack of transparency.
- Departure prohibition notices can be issued against non-payers of contributions, and can be abused for small sums owed.
- The 'fit and proper person test' for membership of the Board appears to have been used to exclude workers'/trade union representatives. This is objectionable as workers contribute half the sums to the Fund, but are not represented.

(In practice, all appointments are apparently scrutinized by the PM and can be disapproved.)

2012 DECREES

1. Public Order (Amendment) Decree 2012

This amends the Public Order Act (Cap.20) by adding a new Part 2A on Control of Arms and Ammunition, adding a new Part 3A on Terrorism Offences, adding a new Part 4A on Powers of Arrest, increasing various penalties under the Act, and by adding an 'ouster clause'.

The decree also amends section 8 of the Act, and replaces section 9, 10 and 11.

The Decree followed the decision not to renew the Public Emergency Regulations which had been imposed for several months, under powers conferred by section 2 of the Public Safety Act (Cap.19).

The Decree had the effect of enacting some of the provisions of the PERs, and the Public Order Act as amended by this Decree has been the subject of criticism in several quarters (see the separate Note on the Public Order Act.)

Comment

In the light of the criticisms of the original Public Order Act, it seems that repealing the amendment Decree would not cure the defects in the Act.

Consideration could perhaps be given to repealing the whole Act, and enacting a new Public Order Act along the lines of the UK legislation. The resulting law would remove the offending provisions of the POA and of this Decree. It would also include riot and affray, which are at present only common law offences in Fiji.

The provisions of this Decree on arms and ammunition and terrorism, if still required, could be enacted separately, or slotted into other legislation (e.g. the Crimes Decree.)

The 'Fiji triple' ouster clause at section 21 inserted by this Decree should in any event be repealed or declared to be of no effect.

2. Fiji Road Authority Decree 2012

This establishes the Fiji Road Authority as a statutory corporation for the purpose of managing roads in Fiji. It takes over the functions of the Department of National Roads in the Ministry. A later Decree amends the title of the Authority to 'Roads' authority in the plural (See Decree No. 46/12 below.)

The Authority consists of a Chairperson and 4 other members appointed by the Minister. The Minister can give directions (as is normal in such cases.)

There is to be a CEO of the Authority. The assets and employees and functions of the Department are transferred to the Authority. Employee rights are preserved.

The transitional provisions include the functions of the Authority being performed by a Fiji Road Advisory Committee to be appointed by the Minister.

(It presumably ceases to exist on the appointment of the Authority.) There is also to be a Change Manager to oversee the transfer from the Department on a temporary basis.

Comment

The Decree is unobjectionable, but the final section 39 - 'Consequential - is puzzling - "This Decree has effect notwithstanding any provision of any written law, and accordingly, to the extent that there is any inconsistency between this Decree and any other written law, this Decree prevails."

This is an unusual provision. If it relates to previous laws, it is not needed as the doctrine of implied repeal applies. If it relates to later law, it is inappropriate as one Decree cannot have paramountcy over others (unless it is entrenched by special voting procedures etc. which is not the case here.

Section 39 should be repealed if opportunity arises.

3. Customs Tariff (Budget Amendment) 2012

This Decree makes a number of changes to the rates of duty payable on a various articles under the Customs Tariff Act 1986.

Comment

This is a fiscal policy measure and does not have human rights implications. No action needed.

4. Customs (Amendment) Decree 2012

Amends the Customs Act 1986 by adding new sections 95B, C and D relating to garnishee orders.

Comment

Such orders are common features of tax and duty collection legislation and no human rights issue arises. There is also a minor textual amendment. No action needed.

5. Excise (Budget Amendment) Decree 2012

This decree makes a number of changes to the rate of duty payable under Part 1 of Schedule 2 of the Excise Act 1986.

Comment

It is a fiscal policy measure and does not have HR implications. No action needed.

6. Income Tax (Amendment) Decree 2012

This Decree amends the Income Tax Act (Cap.201) to add some new categories of tax and to make a number of technical amendments to existing taxes.

The new taxes are -

- a) a Social Responsibility Levy on all resident and non-resident tax payers (except non-resident companies) with high incomes;
- b) a Telecommunications Levy payable on all voice calls transmitted by telecommunications services
- c) a Credit Card levy payable on all outstanding monthly balances on bank credit cards, including interest and other bank charges
- d) a Third Party Insurance Levy on the total third party insurance premiums collected in a month.

Comment

These new taxes (though imposed without representation, like all taxes since December 2006) cannot be said to infringe human rights more than any others. No special action is needed on this Decree, though a future government might wish to review the tax policy generally.

7. Fringe Benefit Tax Decree 2012

The Decree imposes a new tax, to be known as the Fringe Benefit Tax, for each quarter on an employer who has a fringe benefit taxable amount for that quarter. Fringe benefits include such things as a debt waiver, provision of housing and household personnel, loans, meals or refreshments and motor vehicles.

The tax is to be administered by the FRCA and the CEO has power to make such assessments as the CEO "considers just and proper if not satisfied in the circumstances." (Section 18.)

Comment

Section 18 is rather broad but cannot be said to amount to a denial of human rights as the normal channels for contesting an assessment remain open to the taxpayer.

No action is needed, though a future government might wish to review the policy of a fringe benefit tax. (The Decree imposes an additional burden on employers to pay a tax when providing a benefit, but the employee enjoying the benefit pays no tax on the benefit.)

See Decree No.41/12 below for an amendment.

8. Service Turnover Tax Decree 2012

This also creates another new tax - a 'turnover tax' on amounts received or receivable by or on behalf of the owner of a prescribed service in respect of amounts charged for the service.

The prescribed services are listed in a Schedule to the Decree and include hotels, tourist vessels, hotel bars, nightclubs, inbound tour services, artistic performances, recreational activities for gain, cinemas, vehicle rental, bistros, coffee shops and restaurants, charter flights, water sports and guesthouses. The Decree repeals the Hotel Turnover Tax Act 2006.

Comment

The same comments apply as to the Fringe Benefits Decree 2012 (No.7/12 above) and no action is needed on this Decree. See Decree No.43/12 below for an amendment.

9. Tax Administration (Amendment) Decree 2012

This Decree amends the Tax Administration Decree 2009 in a number of respects. It removes references to the Hotel Turnover Tax (which was abolished by the Service Turnover Tax Decree above.) It increases some penalties and raises some thresholds.

Comment

None of these amendments raises a human right issue and no action is needed on this Decree, which is a matter of fiscal policy.

10. Value Added Tax (Amendment) Decree 2012

This Decree amends the Value Added Tax Decree 1991 in a few minor respects.

Comment

There is a significant amendment in respect of tax in respect of the supply of land for a dwelling house, but it does not raise any human rights issue. No action needed.

11. Value Added Tax (Amendment) (No.2) Decree 2012

This Decree further amends the VAT Decree 1991, this time in respect of the provision of insurance services.

Comment

No human rights issue. No action needed.

12. Airport Departure Tax (Amendment) Decree 2012

This Decree increases the airport departure tax from \$100 to £150.

It replaces Decree No.37/10.

Comment

This is a fiscal measure. No action needed (though a future government might wish to review.)

13. Income Tax (Amendment) (No. 2) Decree 2012

This Decree amends the Income tax Act to require the payment of any branch profit remittance additional normal tax which fell due before 1st January 2010, notwithstanding the repeal of that tax by Decree No.8/10.

Comment

A fiscal measure which relates to past liability. No action needed.

14. State Proceedings (Amendment) Decree 2012

This Decree amends the State Proceedings Act (Cap.24) by adding a new section 18. New subsection (1) says that neither the Prime Minister, any Minister of the Government or the State itself are liable in any proceedings for statements made by the PM or a Minister. The statements may be either verbal or written, and may be made in either in an official or personal capacity.

Further subsections provide that the courts do not have jurisdiction to hear legal challenges about statements made by the PM or Ministers, or to award compensation or grant any other remedy in respect of them. The proceedings must be terminated and the Chief Registrar must issue a certificate of termination, and that cannot be challenged either.

Comment

In effect, this displaces the law of defamation in respect of statements made by the Prime Minister or other Ministers and protects them from legal consequences of public speeches or writings. The protection is extended to media organisations, which are not liable in any proceedings for broadcasting or publishing statements made by the PM or other Ministers.

This is an unacceptable provision, as it allows the Government Ministers to say what they like about their critics, but their critics are still governed by the law of defamation; and by the fear of being prosecuted for sedition under the Crimes Decree 2009 (No.44/09 above.) A possible cure for the defect would be to suspend the laws of defamation in respect of debate on the constitutional process, or to extend the 'public interest' defence to make it clear that such debate is not defamatory

The ouster clauses and are unacceptable. They should be repealed or declared to be of no effect.

Subsection (7) says -

"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."

This contemplates the constitutional and electoral process now under way going ahead, which is reassuring. It does not however cure the defects in the Decree, which should be reviewed as suggested.

15. Veterinary Surgeons (Amendment) Decree 2012

This amends the Second Schedule of the Veterinary Surgeons Act (Cap. 257) by adding to the list of approved colleges for qualifications of veterinary surgeons a number of overseas institutions.

Comment

This is a policy matter with no human rights implications. No action needed.

16. Bankruptcy (Amendment) Decree 2012

This amends section 89 of the Bankruptcy Act (Cap.48) to give the Minister, rather than the court, power to order reimbursement of money if sums are recovered as a result of action taken under the section.

Comment

The reason for this change is not apparent, and it seems to put a judicial function into the hands of the Minister, and usurps the Court's power. It means that a bankrupt/debtor is now brought before a minister and not a court (see section 89(3)(f)) which is not acceptable. Probably not a human rights issue, but is for consideration. Recommend repeal of section 89.

17. Companies (Amendment) Decree 2012

This amends section 344 of the Companies Act (Cap.247) by replacing the court by the Minister. The relevant text is -

"(4) Where it appears that it is in the public interest so to do, and that other funds are not available or properly chargeable, **the court may**, on the application of the registrar or of the official receiver, authorize the registrar or the official receiver to use money from the Companies Contingency Fund to meet expenditure which the **court** considers to be necessary or advisable to incur for the purpose of enabling the registrar or the official receiver, as the case may be, to carry out more efficiently the provisions of, and his duties under, this Act, and...of enabling the registrar to meet any indemnity or to pay any expenses which he is required, by this Act, to meet or to pay.

(5) Where an application is made by the registrar under subsection (4), **the court** shall consult the official receiver before granting the application; and, if the application is granted, then the official receiver shall pay to the registrar, out of the Companies Contingency Fund, the amount authorized by the court."

Comment

Substituting the Minister for the court might be a reasonable administrative change, but it is worrying as possibly representing interference by a Minister in a judicial process. For further consideration, as it gives the AG too much control in this area of law.

18. Corrections Service (Amendment) Decree 2012

This adds a new section 49A to the Prisons & Corrections Act, 2006 (now called the Corrections Service Act.) The section comes after the section on Parole, and enables the Minister to direct that a prisoner be released "on such terms and conditions as the Minister may think fit."

Comment

Thus is a clear interference in the working of the parole system, and has been used to order the release of persons imprisoned for politically motivated offences. The effect of this Decree should be reversed i.e. repeal new section 49A.

19. Income Tax (Amendment) (No. 3) Decree 2012

This amends the Income Tax Act (Cap.201) by giving a tax concession for donations to the Prime Minister's Flood Relief Fund made between 27 January and 31 March 2012.

Comment

This is a political decision on a tax matter which sets a bad precedent, but its effect is spent and there is no need to consider the Decree further. It would however have been better to have tax relief on natural disasters in general, and the period of relief be stated in a GN or LN.

20. iTaukei Land Trust (Amendment) Decree 2012

This amends section 19A of the Native Land Trust Act (now called the iTaukei Land Trust Act) by replacing the Great Council of Chiefs by the iTaukei Affairs Board.

(Section 19A gave the GCC a role in advising the Minister on the use of income pending allotment of extinct mataqali lands.)

Comment

This is part of a package of measures to remove the powers of the Great Council of Chiefs.

It is not a human rights issue but a policy issue which a future government will wish to review.

It might also need to be reviewed in the light of the role of the GCC/BLV in the new Constitution.

21. iTaukei Lands (Amendment) Decree 2012

This makes a similar amendment to section 19 of the Native Lands Act (now called the iTaukei Lands Act.)

(Section 19 gave the GCC a role in advising the minister on the use of income from the disposal of vacant lands.)

Comment

The same comment applies as to Decree No.20/12 above i.e. it might need to be reviewed in the light of the role of the GCC/BLV in the new Constitution.

22. iTaukei Affairs (Amendment) Decree 2012

This amends the Native Affairs Act (Cap.120) (now called the iTaukei Affairs Act) by repealing section 3 which constituted the Great Council of Chiefs.

The Decree also removes all references to the Great Council of Chiefs, leaving all decisions to the iTaukei Affairs Board (formerly the Native Affairs Board.).

Comment

The same comment applies as to Decree No.20/12 above i.e. it might need to be reviewed in the light of the role of the GCC/BLV in the new Constitution.

23. iTaukei Trust Fund (Amendment) Decree 2012

This amends the Native Trust Fund Act (now called the iTaukei Trust Fund Act) by removing all references to the Bose Levu Vakaturaga (BLV). The BLV is the Fijian name for the GCC and this completes the package of amendments abolishing that body.

Comment

The same comment applies as to Decree No.20/12 above i.e. it might need to be reviewed in the light of the role of the GCC/BLV in the new Constitution.

24. Gaming (Amendment) Decree 2012

This amends the Gaming Decree 2009 to enable the Minister to issue an exclusive licence for casino games, and makes other minor amendments about issuing of lottery tickets by machines, etc.

Comment

The power to issue an exclusive licence is a policy matter, and giving the Minister the power would be acceptable in a Parliamentary system. It is uncomfortable that there is no Gaming Board or similar and that the Minister has all the powers, but this does not amount to a human rights abuse and no action is needed.

(This lacuna was highlighted at the time of bids for a casino, but no action was taken for 3 years.)

25. Income Tax (Amendment) (No.4) Decree 2012

This amends the Sixth Schedule of the Income Tax Act (Cap.201) to give additional tax concessions to the audio-visual industry. This is consistent with the stated policy of encouraging the film industry to make movies in Fiji.

Comment

A future government might wish to review the policy, but there are no human rights issues involved and no action is needed on this Decree.

26. Civil Aviation (Ownership and Control of National Airlines) Decree 2012

This Decree provides that only a citizen of Fiji can operate as an air carrier in Fiji i.e. be incorporated here. The term 'citizen of Fiji' means in the case of a company at least 51% of shares held by citizens and in the case of a partnership means all the partners must be citizens.

The Decree requires all existing air carriers to submit to the Minister all corporate governance documents within 30 days of the commencement of the Decree for the purpose of determining citizenship. A carrier must then comply with the requirement or cease to be entitled to be a carrier.

Comment

There is an ouster clause at section 11. It is rather half-hearted compared to some; it only ousts a challenge to a decision (although it is headed 'Decree and decisions made under this Decree not to be challenged'). Section 11 should be repealed or its effect nullified.

This Decree was a solution for Government after refusing to accept normal negotiations in the purchase of Qantas shares in Air Pacific. It is a forfeiture Decree and amounts to compulsory acquisition of property so probably infringes the human rights provisions in the new Constitution.

27. Civil Aviation (Ownership and Control of National Airlines) (Amendment) Decree 2012 This amends section 2 of Decree No.26/12 to clarify the definition of 'air carrier'.

Comment

This Decree stands with the previous Decree and no separate consideration is needed.

(Note that Decrees 26 and 27 were signed by the Acting CJ - is this consistent with the State Succession Decree?)

28. Bail (Amendment) Decree 2012

This amends section 26 of the Bail Act 2002 which makes it an offence to fail to surrender to bail. The amendment makes it also an offence to breach a bail condition.

Comment

There is a reverse onus of proof to show reasonable cause for the breach, but this was in the 2002 Act and is normal in bail statutes. No action needed.

29. Fiji Public Trustee Corporation (Amendment) Decree 2012

This amends the Fiji Public Trustee Corporation Act 2006 in the definition of "minor" by deleting "21" and substituting "18".

Comment

This is in line with the policy to reduce the age of majority from 21 to 18, which will be reflected in the new Constitution.

30. Legal Practitioners (Amendment) Decree 2012

This amends the Legal Practitioners Decree 2009 (No.16/09) in respect of the appointment of commissioners for oaths. The Decree limits the appointment of persons who do not hold a practicing certificate to a term of years.

Comment

This Decree was aimed at discouraging the use of favourite Commissioners for Oaths who know a signature well, and who might be more willing to witness a Court document/affidavit not signed in front of him or her. This is consistent with the policy on legal practice and is not objectionable in human rights terms.

No action needed.

31. Airports (Development and Modernisation) Decree 2012

This Decree aims to modernize the operation of Nadi airport. It does this by cancelling the existing licences and converting them to temporary licences; providing for the redesigning and renovating the airport; offering a rate determined by Airports Fiji Ltd to temporary licensees for use of areas determined by the Board in consultation with the Minister and in accordance with market surveys; and allowing AFL to tender the areas to the public if the temporary licensees fail or refuse to accept the offer made by AFL.

Comment

This seems a fairly innocuous bit of statutory reorganization, but for some reason it was felt necessary to add the full Fiji triple ouster clause as section 10. Subsection (6) adds nothing, as there is no reason to suppose the Commerce Commission Decree applies. The remainder of section 10 should be repealed or disappplied.

32. Trust Accounts (Amendment) Decree 2012

This amends the trust Accounts Act by requiring the approval of the Minister to be obtained before a new trust account can be opened. It also varies again the proportions of trust moneys to be paid into various funds (see Decrees Nos.20/09 and 10/11 above.)

Comment

The main amendment reinforces the policy of removing responsibility for trust accounts from the Law Society and appears to give the Minister a right of veto. This might be acceptable in a Parliamentary system, but less so under the present regime. There is still a right of recourse to the courts on this Act, however.

The policy on trust accounts (and the role of the Law Society) might be reviewed by a future government, but meanwhile, this Decree does not obviously infringe human rights and no action is needed.

33. Income Tax (Amendment) (No 5) Decree 2012

This amends the Income Tax Act (Cap.201) in a number of respects, all relating to the setting off or carrying forward of losses in the hotel trade.

Comment

The Decree presumably reflects a policy decision to give incentives to the hotel trade and is a fiscal policy matter, for possible review by a future government. No human rights issue. No action needed.

34. Family Law (Amendment) Decree 2012

This amends the Family Law Act 2003 (which is about divorce and related matters) to enable persons in a *de facto* relationship to have the same benefits and protection in separation etc. as married couples.

Comment

A "de facto relationship" means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other. The Decree does not mention same-sex relationships and unless these are provided for in the Constitution, no human rights issue arises and no action is required.

35. Exchange Control (Amendment) Decree 2012

This Decree adds a new Part VA to the Exchange Control Act (Cap.211). It provides that "where by virtue of the provisions of the Income Tax (Transfer Pricing) Regulations 2012, there is an adjustment or adjustments to a person's income or expenditures, in respect of any transaction or transactions to comply with the arm's length principle, a corresponding adjustment shall be required to comply with this Act."

Comment

The amendment seems unobjectionable in human rights terms, but it is a puzzle as to why this provision is in a Decree, rather than in Regulations, as it seems to amend the regulations. No action needed.

36. Public Hospitals and Dispensaries (Amendment) Decree 2012

This amends the Public Hospitals and Dispensaries Act (Cap.110) to require the Minister to appoint a Board of Visitors for each public hospital and public dispensary.

Comment

The Boards are to keep accounts, disclose members' interests, report to the Minister, etc. all of which helps to make them transparent and accountable. It would be better if the Minister had to act on advice in making these appointments, and a future Government might wish to review the powers of the Minister.

However, the Decree itself does not present any human rights problems and no action is needed on it.

37. Value Added Tax (Amendment) (No 4) Decree 2012

This Decree applies to goods in bonded warehouses in the Western Division from Sigatoka to Ba, "including those areas that were declared as Natural Disaster areas under the Natural Disaster Management Act 1998 or such other areas that the Commissioner deems to be affected by the flood during the months of March to May in 2012." It extends the period for payment of VAT to the end of July 2012.

Comment

This was a concession in view of the floods. It has had effect and no action is required.

38. Tax Administration (Amendment) (No 2) Decree 2012

This amends the Tax Administration Decree 2009 to insert some missing words, and to replace the phrase "not less than \$10,000" or similar by "not exceeding \$10,000" or similar.

Comment

This appears to be a clerical correction and no action is needed on this Decree.

39. Customs Tariff (Amendment) Decree 2012

This amends Part III of Schedule 2 of the Customs Tariff Act 1986 by giving a duty-free concession for goods up to \$2,000 purchased by holders of the FRCA Gold Card.

Comment

This is a fiscal policy matter which does not require action at this stage.

40. Fiji Revenue and Customs Authority (Amendment) Decree 2012

This adds to section 52(4) of the Fiji Revenue and Customs Authority Act 1998 a duty to display a list of registered persons in a public place and disclose the registration status of the registered persons.

Comment

This is a minor adjustment and does not present any human rights issue.
No action required.

41. Fringe Benefit Tax (Amendment) Decree 2012

This amends the Fringe Benefit Tax Decree 2012 (Decree No.7/12 above) to provide that the 'market lending rate' is to be determined in relation to the previous financial year, rather than to the previous quarter. It will, as now, be determined by the Chief Executive Officer in consultation with the Governor of the Reserve Bank of Fiji.

Comment

This is a minor adjustment with no human rights issue. No action is needed.

42. Income Tax (Amendment) (No 6) Decree 2012

This makes several minor amendments to the Income Tax Act (Cap.201). One of them provides that the Minister may make Regulations with regards to the Social Responsibility Levy.

Comment

There do not appear to be any human rights issues arising, and no action is required on this Decree.

43. Service Turnover Tax (Amendment) Decree 2012

This makes a number of amendments to the new Service Turnover Tax Decree 2012 (No.8/12 above.)

One of the amendments exempts from the turnover tax "any pre-school registered by the Ministry of Education, primary school, secondary school, the Fiji National University, Monfort Boystown, the Pacific Regional Seminary, the Pacific Theological College and the University of the South Pacific, or any other similar educational institution as approved by the Commissioner, but does not include any educational institution that is carried on for the purposes of commercial profit or gain to any proprietor, member, or shareholder."

Comment

No human rights issue appears to arise and no action is required.

44. Value Added Tax (Amendment) (No 3) Decree 2012

This amends the Value Added Tax Decree, 1991, by exempting from VAT the importation of any aircraft used for commercial air transport operation, provided that prior written approval by the Minister has been obtained.

Comment

This is similar to the amendment in Decree No.44/11 above and does not raise any human rights issue.

No action required.

45. Civil Aviation Authority of Fiji (Amendment) Decree 2012

This amends the Civil Aviation Authority of Fiji Act (Cap.174A) by adding to the functions of the Authority in section 14 the duty to establish and implement "a State Safety Programme in order to achieve an acceptable level of safety in civil aviation."

Comment

This is unobjectionable in human rights terms and no action is required on this Decree.

46. Fiji Road Authority (Amendment) Decree 2012

This amends the new Fiji Road Authority Decree 2012 (Decree No.2/12 above in a number of respects. The Road Authority becomes the Roads Authority, and the Road Advisory Committee becomes the Roads Advisory Committee.

The definition of 'road' and the sections relating to directions by the Minister and transfer of assets are amended, as a tidying up exercise.

Comment

Decree is unobjectionable except for new section 38A on Indemnity. This provides -

"(1) Neither the Committee, the Change Manager, the Authority nor any officer, servant, workman or labourer employed or engaged by the Committee, the Change Manager or the Authority shall be liable for any action, suit, proceeding, dispute or challenge in any Court, Tribunal or any other adjudicating body for or in respect of any act or omission done in the exercise or non-exercise of the powers conferred by or duties prescribed under the provisions of this Decree or any other written law.

(2) Notwithstanding anything contained in subsection (1), the Minister may on an ex-gratia basis grant compensation to any person who has suffered any injury or damage to property, caused either directly or indirectly by any act or omission done in the exercise or non-exercise of the powers conferred by or duties prescribed under the provisions of this Decree or any other written law."

Subsection (1) would be acceptable if it referred to acts or omissions 'in good faith', but it does not. It is therefore too wide and amounts to a blanket indemnity even for careless or malicious acts or omissions. The power in subsection (2) to award compensation usurps the judicial function and is also not acceptable. The new section 38A should be amended in these respects if the opportunity presents.

47. Income Tax (Amendment) (No 7) Decree 2012

This amends the Sixth Schedule to the Income Tax Act (Cap.201) to provide further concessions for film-makers.

Comment

It is a fiscal policy matter, consistent with the policy of encouraging film-making, and does not have human rights implications.

No action needed.

48. Fiji Audio Visual Commission (Amendment) Decree 2012

This amends the Fiji Islands Audio Visual Commission Act 2002 and all subsidiary legislation made under it by re-naming the Commission as 'Film Fiji'.

Comment

This is similar to an earlier change of the name of the Tourist Authority to 'Tourism Fiji' and apart from the Francophile implication (reversal of the words as in 'Air France') it is unexceptionable.

A future government might wish to review the name and indeed the existence of the Commission, but no action is needed on this Decree (except to correct the reference to the principal Act which is wrong.)

49. No text for this Decree number

50. Ditto

51. Ditto

52. Television (Amendment) Decree 2012

This amends section 4 of the Television Decree 1992 by requiring a TV company to have a spectrum licence.

More significantly, it adds a new section 4A to require a licensee to comply with the Media Code of Ethics and Practice under the Media Industry Development Decree 2010 (Decree No.29/10 above.) The Minister can revoke or vary the licence of a licensee that is in breach of the Code, after giving the licensee an opportunity to provide a written explanation as to why the licence should not be revoked or varied.

Comment

TV companies are 'media organisations' within the scope of the Media Industry Development Decree 2010, so they are already bound by the Media Code of Ethics and Practice. They need to be registered with the Authority and are liable to investigation under that Decree. The Authority can receive complaints about TV programmes etc. and refer them to the Tribunal. The Tribunal can impose penalties, but cannot revoke a licence or de-register a media organisation. This Decree goes further in respect of TV companies, and has been objected to as restraint on media freedom.

If the Media etc. Decree withstands scrutiny (see the comments on Decree No.29/10 above), then this Decree does itself not represent a total denial of media freedom as it only adds an additional sanction for breach of the Media Code of Ethics and Practice. However, there is no right of appeal to the

Tribunal, or to a court, and loss of a licence would mean the end of a TV company. At the very least there should be a more formal hearing, and the Minister should not make the decision alone. So the new section 4A should be repealed, or at least reviewed in these respects.

The Decree then adds a new section 34 to the Television Decree, which ousts jurisdiction over proceedings challenging decisions relating to licences under the Decree, or challenging a certificate of the Chief Registrar terminating such proceedings. New section 34 is unacceptable on any terms and should be repealed or declared to be of no effect.

53. Legal Practitioners (Amendment) Decree 2012

This amends the Legal Practitioners Decree 2009 (No.16/09) to allow for foreign law firms to establish branches in Fiji and to allow contingency fee agreements.

Comments

The contingency fee rule is that only a 10% fee can be retained, which might not be enough to cover disbursements etc. (A fee contract with the client can provide for a higher fee.)

These are policy matters which a future government might wish to review but which do not require action on this Decree.

54. Electoral (Registration of Voters) Decree 2012

This Decree established the electoral role on which nearly 500,000 voters have been registered, with a view to voting in the elections in 2014.

The Decree sets the voting age at 18, which is not yet a Constitutional provision.

If the new Constitution sets a higher age limit, the register will need to be amended to remove persons below that age or defer registration until they reach that age.

Comment

The Decree needs to be reviewed in light of the new Constitution, e.g.

- a) persons with mental disorder cannot register under the Decree - section 3(2)(b).)
- b) provides for appointment of an Electoral Commission and for the designation of constituency boundaries, which will be provided for in the Constitution or an Electoral Act under it.
- c) Does not provide for indication off electoral district where person will vote.

If the Decree is repealed, there will need to be a saving for registrations done under it.

55. Patents (Amendment) Decree 2012

This Decree amends the Patents Act (Cap.239) to transfer all the powers of the Administrator-General to the Solicitor-General.

Comment

As intellectual property comes under the portfolio responsibility of the Attorney-General at present (though not perhaps in future) this change appears reasonable.

However, the Decree also adds a new section 32 -

"The Solicitor-General may nominate a person to act on his or her behalf for the purposes of exercising his or her powers conferred by or duties prescribed under this Act."

This means the administration of the patents law can be opened up to any person, which is too wide and could lead to an abuse of authority.

It is not a human rights issue as such, but does need reviewing as to functions.

(Note that the functions of the Administrator-General are now virtually nil and the utility of the office can be questioned in other laws.)

56. Trade-Marks (Amendment) Decree 2012

This Decree amends the Trade-Marks Act (Cap.240) in a similar way to the amendments in Decree No.55/12 above. The functions of the Administrator-General and Registrar are transferred to the Solicitor-General who can pass them on to another person without restriction.

Comment

This is not a human rights issue as such, but does need reviewing as to functions.

57. Fiji Constitutional Process (Constitution Commission) Decree 2012

This established the Constitution Commission and set out its terms of reference, including a Code of Conduct.

Comment

The Decree in effect says that a new Constitution will be drafted by a non-elected body, and has drawn criticism. However, the effect of the Decree will be spent once the Commission presents the draft Constitution to the Constituent Assembly.

No action is therefore required, (unless the CC wishes to change its terms of reference or the timetable, etc.)

58. Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012

This empowers the Prime Minister to establish the Constituent Assembly, which will have the function of adopting a new Constitution.

Comment

This process has drawn criticism as it does not provide for an elected body to adopt the Constitution.

However, the effect of this Decree will be spent once the CA has submitted a draft Constitution to the PM; or at latest once the Constitution is adopted.

No action is required, therefore, unless it is desired to change the process for adoption of the Constitution.

59. Civil Aviation (Convention on International Interests in Mobile Equipment) Decree 2012

This implements in Fiji the Cape Town Convention on International Interests in Mobile Equipment of 2001 and the Aircraft Protocol to that Convention, to both of which Fiji is a party. Section 4 says that the Convention and Protocol have the force of law in Fiji. Section 7 declares the CAA of Fiji to be the entry point for information for registration under the Convention.

Comment

Under the new Constitution the implementing of a treaty will require the approval of Parliament. However, there are no human rights issues in this Decree and no action is needed.

60. Value Added Tax (Amendment) (No. 5) Decree 2012

This exempts certain equipment needed for electoral registration from the payment of VAT.

Comment

This is a fiscal policy matter and no action is needed on it.

61. Proceeds of Crime (Amendment) Decree

This amends the Proceeds of Crime Act 1997 in a number of ways. The main one is to add a new Part VB which creates a presumption of criminality arising out of the possession of unexplained wealth.

Comment

The creation of a presumption of guilt is always problematical, but it is commonly used in proceeds of crime legislation and this Decree appears to be in line with similar legislation elsewhere. It needs to be reviewed, but no human action is needed now.

62. Casino (Operator) Decree

This confers an exclusive licence on One Hundred Sands Limited to operate a casino, and gives it a 15 -year tax holiday. The scheme confers functions on a 'Fijian [sic] Gaming Commission and Control Board' which does not exist at present.

Comment

The drafting is very defective, almost to the point of incomprehensibility, and the policy might be open to question, but no human rights issue appears to arise on the substance of the Decree. There is however an ouster clause at section 14 which should be repealed.

63. National Council for Older Persons Decree

This establishes a National Council for Older Persons as a statutory body 'for the empowerment of older persons' and related purposes. It sets out a number of functions, but does not give the Council any significant powers except to 'implement national policies on aging'. The Minister can give directions and make regulations.

Comment

This is typical of a law which establishes a toothless body, with functions but no effectual powers. No human rights issue, but there is a danger is that the Council might think its power to implement policies gives it powers to control people's activities, which it does not.

64. Fiji Constitutional Process (Constitution Commission)(Amendment) Decree 2012

This amends Decree No.57/12 to remove references to consequential amendments of laws and to publication of the draft Constitution. It also requires the Constitution Commission to publish details of all its staff and consultants and their earnings.

Comment

These amendments arose out of an argument about the employment of one particular consultant, but leave the main tasks of the Commission as before. There are still references to timelines for implementation etc. No action needed.

65. Trade Marks (Amendment)(No.2) Decree 2012

This adds a new section 14A to the Trade Marks Act (Cap.240) to prohibit the use of a trade mark including the word 'Fiji' without the approval of the Minister. New section 14B says that no court or other adjudicating body has a right to hear a challenge to a decision of the Minister.

Comment

The policy thrust of this Decree is acceptable, but the denial of a right of challenge is oddly worded and rather half-hearted compared to some ouster clauses. Nonetheless, new section 14B should be repealed.

66. Electoral (Registration of Voters)(Amendment) Decree 2012

This amends the Electoral (Registration of Voters) Decree (No.54/12) by making it an offence for a person to apply more than once to be registered, except for the purpose of correcting a mistake. It also makes it an offence to 'manipulate' the registration database, with heavy penalties.

Comment

The penalties (\$100,000 and 10 years prison) are excessive but no human rights issue arises on this Decree. The offences that it creates should be reflected in the Electoral Law in due course.
