

TRADE UNIONS & DISPUTE RESOLUTION PROCESSES IN THE EMPLOYMENT RELATIONS BILL 2004

[Attorney General's Conference, 03 December 2004]

1.0 INTRODUCTION

- 1.1 This paper highlights the desired outcomes and key policy features of the Employment Relations Bill 2004 (ER Bill), especially the underlying principles of "Good Faith" and key elements governing the Trade Unions and Dispute Resolution processes.

2.0 DESIRED OUTCOMES OF THE BILL

- 2.1 The Ministry's commitment under the National Strategic Plan 2004-2006 is to rebuild confidence, stability and growth in the labour market in facilitating economic and social development towards achieving Government's goal of a " Peaceful, Prosperous Fiji".
- 2.2 To help achieve this goal, the Ministry is tasked with reforming all outdated labour legislations with the aim of providing a progressive business environment that promotes flexibility in wage fixing, stable employment relationships, improved terms and conditions of employment and good faith bargaining that will enhance productivity.
- 2.3 This Reform has been long overdue. The current labour laws generally reflects colonial heritage, values, norms and institutions that have outlived their usefulness. The piecemeal changes in the last three decades only strengthened the adversarial nature of employment relationships to the detriment of the workers, the employers and the economy as a whole.
- 2.4 It also did nothing to reform the culture of conflict resolution in favour of informal mutual dialogue without the need for judicial intervention. To facilitate this paradigm shift in the context of emerging international challenges, a complete overhaul of current labour laws is therefore necessary.
- 2.5 In this context, this Bill marks a new era in employment relations in Fiji. The era that will be distinguished by a commitment to the fundamental principle of "Good Faith" that underlines all parts of this Bill – namely, that it is better to work together co-operatively for the common good in the

workplace than to work in opposition to each other. Therefore, this Bill is intended to produce positive outcomes for everyone: Government, employers and workers.

- 2.6 The Bill is also designed to get rid of bureaucratic bottlenecks and delays in resolving employment related disputes that have contributed to work stoppages and strikes causing significant economic losses and downturn in national productivity. In essence, this Bill will create a productive environment through the introduction of fundamental social justice principles that will improve employment relationships and boost investor confidence.

3.0 CONSULTATIONS

- 3.1 Over the past twenty-four months, the Labour Advisory Board set up a Sub Committee comprising employers, workers and Government representatives to review the draft Bill in detail, agree on matters that they could agree with and identify those areas where further discussions would be necessary.
- 3.2 The comments raised by this Committee were submitted to an ILO Consultant who had incorporated those comments before he submitted to the Ministry a further revised Bill in October 2003. This revised Bill was sent to our social partners and other key stakeholders in February 2004 for another round of comments. At the same time, the Bill was also presented to the workers and employers organizations after it was discussed in four sessions of the Development Sub-Committee (DSC) in April 2004.
- 3.3 We received very positive comments from the social partners including NGOs, interest groups, civil societies and the DSC. A Task Force, comprising senior officials from the Solicitor General's and Labour Ministry was established in June 2004 to review these comments with the aim of aligning provisions of the Bill to Government's policy. As a result of this exercise, the Task Force produced the final revised draft Bill on 31 August 2004 after consultations with the Judiciary, Office of the Solicitor General, the Labour Ministry's CEO and the Labour Minister.
- 3.4 This revised draft Employment Relations Bill was circulated once again to the members of the Labour Advisory Board and all other stakeholders for their comments by 14 September 2004. Currently, this Bill is being discussed at the Cabinet Sub-Committee on Legislation (CSL) and members of the CSL also consider the comments from the social partners during their deliberation on the Bill.

4.0 OBJECTS OF THE BILL

4.1 In its present form, the ER Bill contains 22 Parts, 267 sections and eight Schedules. The Bill will provide a legislative framework for:

- Creating labour standards fair to workers and employers to build productive employment relationships;
- Elimination and prevention of discrimination in employment to enhance quality of working life and promote good governance;
- Establishment of a structure of rights and responsibilities for parties engaged in employment relations and encourage good faith bargaining;
- Establishment of Mediation Services as the primary mechanism for resolution of employment grievances and disputes. The establishment of the Employment Tribunals and Employment Court for adjudicating disputes;
- Encouraging labour-management consultations in workplaces to promote quality employment relationships between parties; and
- Complying with international obligations and Fiji's Constitution.

5.0 LEGISLATION TO BE REPEALED

5.1 The enactment of the ER Bill, is designed to repeal and replace the following separate pieces of labour laws:

- Employment Act (Cap92)
- Public Holidays Act (Cap 101)
- Trade Disputes Act (Cap 97)
- Trade Unions Act (Cap 96)
- Trade unions (Recognition) Act 1998 and
- Wages Councils Act (Cap 98)

- 5.2 We are not at this stage proposing any changes to the Health and Safety at Work Act, Workman's Compensation Act and Industrial Association Act. These Acts are scheduled to be reviewed next year.

6.0 SALIENT FEATURES OF THE BILL

- 6.1 In a nutshell, the Bill retains many of the existing provisions contained in the existing legislation that are considered still relevant and applicable. However, some provisions have been modified to reflect the changing circumstances.
- 6.2 Further, the Bill introduces new laws in line with developments and practices in Fiji and internationally, ensures compliance with ILO Conventions especially those, which Fiji has ratified, and brings various outdated provisions in line with Fiji's Constitution.
- 6.3 Some provisions of our existing labour laws have also been tested through the Courts either by employers, trade unions or individual workers. These provisions were updated to reflect case law judgments that are compatible with the policy direction of the Bill.
- 6.4 In line with this policy framework, the outdated provisions of the labour laws which were noted to be superfluous are also deleted and not included in the Bill.

7.0 OVERVIEW POLICY FRAMEWORK OF THE BILL

General Policy Statement

- 7.1 This Bill implements Government policy to repeal and replace the above mentioned legislation and introduce a framework for the conduct of employment relations based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, not simply a contractual, and economic one.
- 7.2 The overarching objective of the Bill is therefore to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment. The employment environment encompasses the entire complex and dynamic system of relationships, which includes all participants, not just employers and workers. In order to achieve this primary purpose, the Bill specifically:
- recognizes that employment relationships must be built on good faith behaviour;

- acknowledges and addresses the inherent inequality of bargaining power in employment relationships;
 - promotes collective bargaining as a democratic choice of workers;
 - protects the integrity and right of individual choice;
 - promotes mediation as the primary problem-resolving mechanism; and
 - reduces the need for judicial intervention.
- 7.3 The Bill also seeks to promote observance in Fiji of the principles underlying all the eight 'core' International Labour Organization Conventions, including Conventions 87 and 98, regarding the right to freedom of association for all workers and employers, and the promotion of collective bargaining. These Conventions have also been circulated to the members of the CSL in their deliberation. The Bill also ensures that its provisions comply with and give effect to relevant provisions of the Constitution (Amendment) Act 1997.
- 7.4 In order to address the issues underlying its objectives, the Bill therefore promotes the voluntary organization of workers via unions and collective bargaining as the best means of redressing bargaining power imbalances, whilst giving individuals the choice as to how their terms and conditions are negotiated, either individually or collectively. Alongside this is the notion that the employment relationship itself should be conducted in a manner that promotes good faith, fair dealing and mutual trust and confidence between the parties.
- 7.5 In particular, the Bill requires employers and unions to conduct their collective relationships in good faith. Whilst good faith will be of particular importance during negotiations, the duty will apply at all times - essentially it will require all participants in the employment environment to act reasonably in their dealings with each other. In a bargaining context, however, good faith will not require the parties to conclude collective agreements or specify particular outcomes, recognizing that these are for the parties themselves to determine and that the most effective means of settling problems is by the voluntary agreement between the parties.
- 7.6 The Bill also provides a range of services, codes, bodies and judicial institutions designed to support good faith behaviour and the overall objectives of providing informal, accessible and effective means of problem resolution which, in turn, are intended to support and enhance ongoing employment relationships wherever possible.

SUMMARY OF KEY ELEMENTS

8.0 Good Faith

- 8.1 The principle of good faith underpins the Bill, both generally and specifically. The simple requirement of the concept is that the parties to employment relationships (unions, employers and workers) deal with each other in good faith, and that those dealings are based on fair dealing and mutual trust and confidence. This includes, but is not limited to, not directly or indirectly misleading or deceiving each other.
- 8.2 In respect of collective bargaining, "core" good faith duties are defined, although the concept is not limited to these alone. The Bill also provides for the tripartite development of a Code of Good Faith, dealing with the specific application of the general principles of good faith. This Code will also guide the Employment Tribunal and Employment Court in determining employment related matters.
- 8.3 For individual employment relationships, good faith will be expressed through the application of the common law concept of mutual trust and confidence, as well as specific provisions in the Bill dealing with unfair bargaining.

9.0 Freedom of Association

- 9.1 Importantly, to maintain a balance between collective and individual employment rights, the Bill retains provisions for freedom of association, namely the voluntary membership of unions and prohibitions on any preference or undue influence in employment arrangements designed to influence the choice of whether to become or not become, remain or cease to be, a union member.

10.0 Trade Unions

- 10.1 Recognizing the inherent imbalance of power and influence in the employment relationship, the Bill promotes collective organization of workers. Accordingly, unions are given specific legal recognition as representatives of workers' interests.
- 10.2 The Bill makes provision for the lawful operation of unions. In order to participate in collective bargaining and fulfill other roles specified in the Bill, unions must be registered. Registration will involve satisfying the Registrar of Trade Unions that the union is a democratic organization of workers that is accountable to its members, independent of employers,

and has appropriate rules (that are not unreasonable, undemocratic, unfairly discriminatory or unfairly prejudicial, or contrary to law).

- 10.3 It is intended that the Registrar will take a proactive role in disseminating information about how to meet the registration requirements. The Registrar will also be able to investigate complaints over whether unions are fulfilling their obligations under the Act, and enforce these through the Employment Tribunal or Court established under the Bill.
- 10.4 Union membership will authorize the union to represent members in their relationships with employers and the employment institutions (although unions may develop different categories of membership for functions outside of those dealt with by the Bill - for example in relation to certain benefits or specialist services they may provide). In order to carry out their roles, unions will have statutory rights of access to workplaces for bargaining, representation, and union business purposes, including recruitment (in all cases subject to not unreasonably interfering with the conduct of the employer's business).

11.0 Bargaining

- 11.1 The Bill provides specific procedural requirements to enable the orderly conduct of collective bargaining on both a single and multi-party basis. Unions may be required to ballot members prior to entering into multi-union or multi-employer negotiations to ensure that each enterprise indicates a simple majority in support of the negotiations. To promote bargaining flexibility the Bill includes procedures for the addition of parties after negotiations have commenced, subject to the agreement of the existing parties.
- 11.2 Only employers and registered unions will be able to negotiate and be parties to collective agreements. The parties to collective bargaining must meet specific good faith obligations, but these do not require unions or employers to settle, or include particular matters in, agreements. However, all agreements must:
- be in writing;
 - signed by the parties;
 - registered by the Registrar;
 - state the term of the agreement;
 - describe the coverage clause of the agreement; and
 - describe the disciplinary procedure and settlement of disputes.

- 11.3 Similarly, all collective agreements will have an implied term (which may be varied or excluded by agreement) that workers bound by it will continue to be employed by the employer for the term of the agreement. This provision is intended to provide employment security and certainty in situations where work or workers are "contracted out" or the business sold by the employer. This will not, however, limit or affect an employer's right to dismiss a worker for just cause.
- 11.4 Where a collective agreement expires, workers bound by it are deemed to be employed on individual employment agreements based on the previous collective agreement.

12.0 Terms and Conditions of Employment

- 12.1 The Bill provides for both collective and individual employment relationships and sets processes for negotiating employment agreements.
- 12.2 Essentially, collective agreements set the terms and conditions of union members who undertake the work covered by the coverage clause of the collective agreement. Additional terms and conditions can also be negotiated on an individual basis, provided that these are not inconsistent with those of the collective agreement. Any worker can elect to be employed on the collective agreement at any time, if they fall within the coverage clause of the agreement, by joining the union.
- 12.3 Recognizing that workers are often most vulnerable at the commencement of employment the Bill makes special provision to protect new workers.
- 12.4 For the first 30 days of employment new workers are employed on oral contract. However, thereafter the Bill requires the parties to enter into written contract stipulating minimum terms and conditions of employment consistent with the Bill.

13.0 Strikes and Lockouts

- 13.1 The Bill provides for lawful strikes and lockout actions to be taken in pursuit of single or multi-party collective agreements after the expiry of an existing collective agreement and where the parties have been negotiating for at least 21 days. Allowing strikes and lockouts recognizes that, from time to time, parties in collective bargaining will have strongly held positions about their employment relationships and will want to express their dissatisfaction with the status quo and their desire for change without bringing the employment relationship to an end. Good faith behaviour does not preclude strikes or lockouts during the negotiation of a

collective agreement. This is consistent with the emphasis of the Bill on maintaining and enhancing the employment relationship - continuity of employment, even if interrupted, is better than ending the employment relationship.

- 13.2 Where workers are locked out by their employer, the workers are not entitled to any remuneration in respect of the period of the lock out, unless the lock out is unlawful.
- 13.3 With regard to essential services, the current 28-day notice requirements before strike or lockout action is taken will be retained. There will be a duty to notify the other party and the Chief Executive of the Labour Ministry of any proposed strike or lockout involving essential industries so that mediation services are available and taken up during the notice period before any strike, lockout or injunction actions occur.
- 13.4 The unions have the right to strike and this right is protected by the Bill. However, this right is confined only to the negotiation phase of collective bargaining and is forfeited when either party reports the matter as a dispute to the Ministry. In essence, the report of a dispute will render a strike unlawful under any circumstance. The validity of the mandate to take a strike action no longer exist in perpetuity, but now restricted to 6 months only from the date of obtaining the mandate.
- 13.5 In any case of strike or lock out, including those in essential services, the Labour Minister is vested with the unilateral powers to declare a strike or lock out unlawful on grounds of public interest. The Minister is also empowered to report a dispute to the Tribunal in the event that none of the parties wish to report a dispute which causes a strike.

14.0 Employment Grievances & Dispute Resolution

- 14.1 Consistent with the emphasis on the maintenance of the employment relationship wherever practicable, reinstatement becomes the primary remedy for grievances where this is sought by the complainant.
- 14.2 The Bill also provides that every collective agreement and individual agreement must set out a grievance procedure to effectively manage any differences between the parties. However, if there is no such agreed procedure, the Bill provides for a standard procedure for settlement of grievances and disputes.
- 14.3 In terms of dispute resolution in employment relationships, a strong emphasis is placed on the prior resolution of differences by the parties themselves, who will have access to a wide range of resources, through

- information provision, structured or unstructured mediation and other services to voluntarily resolve matters at an early stage. Mediation is the preferred option at all stages, although it is recognized that some problems will nevertheless eventually require specialist intervention, but this should not necessarily be constrained by the application of strict procedural requirements.
- 14.4 A key element of this approach is the establishment of specialist nationwide mediation services, delivered via range of information and problem resolution means provided by the Ministry of Labour, operating across the whole range of employment matters to facilitate their speedy resolution. The Bill embodies a general presumption that mediation will be the first port of call for dispute resolution before any decision-making forum is sought.
- 14.5 Mediation, in this context, takes on a very broad and flexible meaning, in effect covering any service or intervention that can make a difference. The Bill gives the providers of these services wide discretion to operate as they see fit to meet the objectives of mediation, including the ability, by the consent of the parties, to conclude mediated settlements with no right of appeal. While mediation is not compulsory in all cases, the Bill makes it a general prerequisite that all mediation options should be exhausted, wherever practicable, before further actions can be taken.
- 14.6 The Bill also establishes a separate specialist adjudicating body, known as the Employment Tribunal, to hear and determine employment matters in a speedy and sometimes non-adversarial way. The Tribunal will have the power to gather information, call evidence and investigate matters as they see fit, in order to understand the key issues in dispute, and make pragmatic determinations about them.
- 14.7 It is intended that the Tribunal will make practical decisions quickly, with a minimum of detail, focusing on key issues and how to resolve them. Informality may be emphasized by the Tribunal, and efforts to achieve prior settlement encouraged by enabling the Tribunal to order the parties to try to resolve their differences through mediation before it proceeds to deal with any matter, where this is appropriate in the circumstances.
- 14.8 The Bill establishes an Employment Court as a division of the High Court dealing primarily with labour related matters. The Court will also hear cases on appeals, where the parties are dissatisfied with decisions of the Tribunal. Any appeals from a decision of the Employment Court will be heard by the Court of Appeal, on points of law.

15.0 Labour Inspectorate

15.1 The Bill enhances the powers of Labour Inspectors, by enabling them to serve "demand notices" on employers for the direct recovery of minimum entitlements where the Inspector is satisfied a liability exists. Further, an Inspector can also issue on-the-spot Fix Penalty notices for minor infringements. An employer can accept or contest the notice or the penalty in the Tribunal. The power is intended to function much like the ability of Police Officers to traffic infringement notices, and to address the delays presently experienced by Inspectors in enforcing obligations in the first instance through the Magistrate Court. The intention is to reduce the need for litigation and associated enforcement costs and enable a speedier and lower level recovery of workers' entitlements.

16.0 Application of the Bill

16.1 The provisions of the Bill apply equally to the State sector (with its Government and statutory entities) as to the private sector, including the Sugar Industry which is not covered under the current trade dispute legislation. The domestic workers will also come under the ambit of this Bill.

17.0 Concluding Remarks

17.1 In the context of Trade Unions and Dispute Resolution Processes, the draft ER Bill incorporates the principles underlying all the eight 'core' ILO Conventions, including Conventions 87 and 98, regarding the right to freedom of association for all workers and employers, and the promotion of collective bargaining. The Bill also ensures that its provisions on freedom of association and the right to bargain collectively comply with and give effect to relevant provisions of the Constitution (Amendment) Act 1997.

17.2 The Bill ensures workers are treated fairly, with dignity and are rewarded fairly for their work. It ensures smooth and speedy resolution of grievances and disputes whether individual or collective, with mediation as the primary resolution mechanism.

17.3 Consistent with the OHS Reform, the Bill aims to change the focal point of dispute/grievance resolution culture away from the adversarial & legalistic approach towards empowering the parties themselves to resolve their own disputes & grievances with the help of an easily accessible and free of charge mediation services.
