STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS

REPORT ON THE EMPLOYMENT RELATIONS PROMULGATION

(AMENDMENT) BILL 2015, (BILL NO. 10 OF 2015)

PARLIAMENT OF THE REPUBLIC OF FIJI
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CHAIR'S FOREWORD

Our workers, whether employed in the essential national services and industries or elsewhere, are an integral part of the human resources and the economy in general. They are literally the arms and legs on which a country's services, industry, trade and the general economy run. The status and rights of the workers of a country are not only a concern for a nation's government but also that of international observers.

It will be an understatement to say that the services and industries are also essential for a nation since they form a major part of the economy. The general public and the nation as a whole rely on these sectors of the economy for their well-being and it is for this reason alone is becomes important to protect these sectors from crisis on any given day and even in extremely critical situations.

Therefore it becomes important for any government to provide employment laws which not only protects its workers and allows them certain freedom, but are also consistent with international conventions which the country has ratified. It also then becomes essential for a government to protect its services and industries from crisis which inadvertently would harm the economy, the people and the very workers who rely on those for their daily bread.

The Fijian Government with that vision has sought to amend the existing employment laws of the country to bring them in line with international best practice to suit its workers while maintaining the sanctity and affording protection to its essential national industries and services.

I am pleased to present the second report of the Standing Committee on Justice, Law and Human Rights on the Employment Relations Promulgation Bill 2015 (Bill No. 10 of 2015).

This report examines the submissions and oral evidence heard at the Committee's public hearings in Parliament, and takes into consideration the concerns raised by those presenting oral and written submissions.

The Committee held its first meeting on 28th May 2015 and in response to a call for submissions, held a series of public hearings from 15th to 19th June respectively. Due to the short time-frame given to the Committee to report back to Parliament in the July session, advertisements were placed in the Fiji Sun and Parliament website calling for written submissions on the Bill.

On behalf of the Honourable Members on the Committee, I would like to express my sincere thanks and appreciation to all those organisations and individuals who made a submission and/or attended public hearings. The strength and depth of the Committee's inquiry rests with the voluntary commitment and time of groups and individuals making submissions and appearing at public hearings. This was evident in the high quality of submissions received and with presenters at the public hearings, who candidly provided their opinions and advice to the Committee.

The Committee has been through the Bill, clause by clause, and has made a number of amendments as outlined in the amended copy of the Bill which appear in red colour.

This report and the amendments to the Bill have been made possible through many days and nights of hard work provided by my members on the committee and the parliamentary secretariat staff.

At this juncture, I wish to extend my sincere gratitude to the Honourable Members involved with the production of this bipartisan report: my Committee colleagues Hon. Semesa Karavaki (Deputy Chair), Hon. Lorna Eden and Hon. Niko Nawaikula. I also wish to express my appreciation to the Honourable Members who were able to attend our meetings during the absence of substantive Committee Members, of particular mention are the Hon. Semi Koroilavesau, Hon. Dr Brij Lal, Hon. Mikaele Leawere, Hon. Balmindar Singh, Hon. Alvick Maharaj and the Hon. Ratu Sela Nanovo.

Lastly, I wish to place on record our utmost appreciation to the Secretary General and her staff who were present at all times namely Kalo Takape, Savenaca Koro, Lemeki Senibale, Lavenia Ledua, Kitione Bete, Ateca Tabaki, Penijamini Valebuli, Maurice Shute and not forgetting the Hansard Staff; thank you for the assistance provided during the Committee meetings.

With these words I commend this report to the Parliament.

HON. ASHNEEL SUDHAKAR, MP
CHAIRMAN

LIST OF ACRONYMS

ENI	Essential National Industries
ERAB	Employment Relations Advisory Board
ERP	Employment Relations Promulgation
FBFSEU	Fiji Bank and Finance Sector Employees Union
FCEF	Fiji Commerce and Employers Federation
FDPF	Fiji Disabled Peoples Federation
FICTU	Fiji Islands Council of Trade Unions
FNCDP	Fiji National Council for Disabled Persons
FPSA	Fiji Public Service Association
FRCA	Fiji Revenue and Customs Authority
FTUC	Fiji Trade Unions Congress
FWRM	Fiji Women's Rights Movement
ILO	International Labour Organisation
JLHR	Justice, Law and Human Rights
NGOs	Non-Government Organisations
SO	Standing Orders

1.0 INTRODUCTION

1.1 Background

The Employment Relations (Amendment) Bill 2015 seeks to amend the Employment Relations Promulgation 2007.

The Bill attempts to implement Government's policy to repeal and replace the Essential National Industries (Employment) Decree 2011, the Employment Relations (Amendment) Decree 2011 and the Public Service (Amendment) Decree 2011. It aims to consolidate and harmonise the provisions in these legislations with our Constitution, international human rights and its obligations towards the ILO Conventions.

A major feature of the Bill is the repealing of the old Part 19 of the Employment Relations Promulgation 2007 and its substitution with a new Part 19 on Essential Services and Industries.

1.2 The Standing Committee on Justice, Law and Human Rights

The Committee is a standing committee of the Fijian Parliament and was established under Section 109(2)(f) of the Parliament Standing Orders (SO). The Committee comprises five Honourable Members representing the Government and the Opposition parties.

The Committee is mandated to examine matters related to crime, civil rights, courts and their administration, the Constitution, policing and human rights. Section 110(1) of the SO mandates the Committee to examine and make amendments to the Bills, to the extent agreed by the Committee.

On Thursday 14th May 2015, the Attorney General and Minister for Finance, Public Enterprises, Public Service and Communications introduced a Bill to amend the Employment Relations Promulgation 2007 (Bill No. 10 of 2015).

The House resolved that the Bill be committed to the Standing Committee on Justice, Law and Human Rights to review and report back to Parliament during the July sitting.

1.3 Procedure and Program

On 6th June the Committee called for submissions by placing an advertisement in the local newspaper (Fiji Sun) and through the Parliament website (www.parliament.gov.fj). Due to the tight timeframe for the Committee to consider and

report back to Parliament in the July sitting, the deadline for submissions was Friday 12th June 2015. However, in noting the response from various stakeholders, it was agreed that the deadline for submissions be extended to Friday 19th June 2015.

The Committee also wrote to Government agencies and NGOs, seeking submissions and to appear before the Committee at a public hearing. The Committee then met between 15th and 19th June 2015 to hold public hearings and consider submissions received. The Committee then undertook deliberations from 23rd June 2015 to consider the Bill clause by clause and also prepare its report, with recommendations, to the Parliament for the next session on 6th July 2015.

1.4 Committee Members

The members of the Standing Committee on Justice, Law and Human Rights are:

- Hon. Ashneel Sudhakar MP (Chairman)
- Hon. Semesa Karavaki MP (Deputy Chairman)
- Hon. Lorna Eden MP (Member)
- Hon. Iliesa Delana (Member)
- Hon. Niko Nawaikula (Member)

During the Standing Committee's meetings, the following alternate membership arose pursuant to Standing Order 115(5):

- Hon. Dr Brij Lal (Alternate Member for Hon. Iliesa Delana)
- Hon. Alvick Maharaj (Alternate Member for Hon. Iliesa Delana)
- Hon. Balmindar Singh (Alternate Member for Hon. Lorna Eden)
- Hon. Mikaele Leawere (Alternate Member for Hon. Niko Nawaikula)
- Hon. Ratu Sela Nanovo (Alternate Member for Hon. Semesa Karavaki)

2.0 EMPLOYMENT RELATIONS PROMULGATION (AMENDMENT) BILL 2015

2.1 Introduction

Consultations on the Employment Relations Promulgation (Amdt) Bill, 2015 were held in the Parliament Complex from Monday 15th June 2015 to Friday 19th June 2015 and were open to the public and the media. The Committee resumed its deliberations on the ERP (Amdt) Bill from 23rd June 2015 until the tabling of its report on 8th July 2015.

2.2 Summary of Written and Oral Submissions Received

The Committee received 10 oral submissions and one written submission. The Committee noted that the written submission received from the Fiji Disabled Peoples Federation was in relation to Part 9 – Equal Employment Opportunities. The Committee noted the concerns raised in the submission however, it felt that the issues raised did not fall within the ambit of their terms of reference. It was therefore agreed that if the need arises a proposal should be tabled in Parliament to enable amendments to other Parts of the ERP 2007.

The main issues raised in the oral submissions have been summarised as follows:

2.2.1 Fiji Public Service Association

- Ms Judith Kotobalavu, President
- Mr Rajeshwar Singh, General Secretary
- Mr Praveen Chand, Finance and Admin Officer
- Ms Bua Vuli, Admin. Secretary

(a) The contents of the submission reflect the views of the National Council of FPSA comprising serving staff in the general, administrative, medical, accounting and technical sector cadres, including support staff of the Public Service.

(b) It is the Association's view that the composition of Bill No.10 of 2015 covers several fundamental and core human rights and Trade Union issues such as violations relating to Collective Bargaining, Intrusion of Bargaining Units, nullification of existing Collective Agreements, de-registration of Trade Unions and the Right to Strike in Essential Industries, etc.

(c) Although three Decrees will be repealed when the Bill becomes an Act of Parliament, there are certain aspects from the Employment Relations Decree and the Essential National Industries Decree which have been incorporated into the Bill and need special attention for a resolution of the best outcome for all.

(d) The Association notes that the most abhorrent acts were the unilateral proclamations in many Decrees that *"No action, decision, or declaration of the Government can be contested or challenged in any court of law or tribunal."* The same instruments brutally cancelled and destroyed dozens of legitimate disputes, grievances and awards that existed or which the workers had won previously.

(e) The International Labour Organisation (ILO) repeatedly undertook its social responsibilities and held the Fiji Government to account based on its undertakings under the various core ILO Conventions which the Government had ratified. After a four year campaign, it resulted in the signing of a Fiji Tripartite Memorandum of Agreement (MOA) at the ILO HQ in Geneva on 25th March 2015; that MOA is the source of Bill No. 10 of 2015.

(f) The Declaration of Philadelphia (1994) redefined the aim and purpose of the ILO and called for actions from member States which would achieve the effective recognition of the right to Collective Bargaining.

(g) It is incumbent on the Fiji authorities to always ensure that the international protocols and standards are applied, implemented and upheld. The onus passes to the Parliament of Fiji to provide the necessary oversight for such obligations, either via the enactment of suitable laws, or open discussion and debates, and by regular monitoring and audit actions.

(h) The addition of other designated corporations, companies and industries through the ENI or ESI is in breach of the ILO definition. The inclusion of new industries and corporations through this Bill means that regulations under the ENI Decree remain intact. To claim that the Bill has repealed the ENI Decree falls flat in reality.

(i) FRCA has been designated as an essential industry and it boggles the mind how a tax collecting institution can be classed as an essential service when the definition of essential services according to ILO are those where an interruption would endanger the health, personal safety or life of the whole or part of the population. The inclusion of designated corporations and industries from the ENI Decree into the new Bill must be removed to meet the ILO's definition.

(j) The Bargaining Unit under the ENI Decree exists at the behest of the employer and the new Bill is not clear on whether the Bargaining Units will function as per the provisions of the Decree (to be repealed) or will it have the same status as the Trade Unions. The formation of Bargaining Units will give the employers tendency to divide the workers in order to prolong negotiations and encourage dissensions in the ranks of the members on both sides.

(k) The proposed new Section 191 seems to reinstate substantial damaging parts of the Decree against the interests of the workers and it cannot, in all honesty, be said that the ENI Decree is repealed. The proposed new Section 191 gives unfair latitude to the employer to impose new terms and conditions unilaterally decided by them.

(l) The right of workmen to strike is an essential element in the principle of collective bargaining; there can be no equilibrium in industrial relations without the freedom to strike. Fiji is a free society according to the 2013 Fiji Constitution and FPSA vigorously protests that the Bill makes it extremely difficult for workers to go on strike.

(m) Serious consideration should be given to decriminalising labour laws as part of the current review and moving towards a system of civil penalties that do not carry the stigma of a criminal conviction.

(n) It is recommended that consideration be given to decriminalisation of the proposed law by converting all current offences to civil penalties. A penalty action should be regarded as equivalent to a civil action for a penalty or damages. The main exception to this would be in respect of refusal to comply with an order issued under the Bill.

(o) The Association is of the view that the ERP 2007 is based on good faith and it is time that the Government, as a tripartite partner, must show good faith and should honour the agreement signed in Geneva and abide by the Agreement. Good faith should be made a statutory obligation to make the tripartite or bipartite partners more responsible.

(p) Clause 191BB gives unfettered powers to the Attorney-General to intervene into any dispute as a third party on the grounds of public importance. The new clause reeks of iron fisted laws in order not to allow the workers any opportunity or freedom to freely present their case and get justice.

(q) FPSA recommends that the JLHR Committee sees to the removal of this part so it is in harmony with the ILO core Conventions.

2.2.2 Fiji Council of Employers Federation

- Mr Nesbit Hazelman, CEO
- Mr Noel Tofinga, IR Consultant

(a) The Fiji Commerce and Employers Federation is committed to the fulfilment and compliance of the Memorandum of Agreement that was signed by the tripartite partners at the ILO Convention in Geneva in March 2015.

(b) FCEF supports the Employment Relations (Amdt) Bill 2015 and also wishes to propose the following amendments:

- ☐ Clause 2 (Section 78 – *Unlawful discrimination in rates of remuneration* - amended) : FCEF is of the opinion that the restrictions should only apply to prohibited grounds for discrimination hence there is no need for the inclusion of sub-clause (a) as it is well stated in section 6 of the ERP 2007.

- ☐ Clause 8 (Section 169 – *Reporting of disputes* – amended): FCEF feels that the insertion of subclause (c) may distort the definition of "dispute" as in the existing interpretation provisions. Section 111 of the ERP 2007 would be a more appropriate clause to amend instead of section 169. FCEF recommends that the definition of "employment grievance" contained in section 4 (Interpretation) of the ERP 2007 be amended accordingly.

- ☐ Clause 9 (Section 170 – *Decisions by the Permanent Secretary* – amended): The policy intent is wholly accepted by the employers however, FCEF disagrees with having these powers rest solely with the Permanent Secretary. The responsibility should be given to the Complaints Centre to avoid any conflicts of interest.

- ☐ Clause 16 (Part 19 substituted): FCEF accepts the concept of having an Arbitration Court in its proposed form as it is consistent with the thematic principle of the ERP (*"… those who caused the problem have the primary responsibility to resolve it …."*), but disagrees with the provision that the awards of the said Arbitration Court cannot be challenged.

(c) The proposed section 186 needs to be clarified given that the interpretation provision in section 185 contains definitions that are wide and can be easily misconstrued.

(d) FCEF totally disagrees with the proposed section 191BD in terms of getting an opinion on an important question of law from the Solicitor General's Office to aid the Arbitration Court determine an Award; this would be prejudicial to any one of the disputing parties. It would be better to seek an interpretation from the Employment Court rather than having such an important matter left in the hands of a legal officer in the Solicitor-General's Office.

(e) Section 211(2) of the ERP 2007 should be amended so that employment grievances and employment disputes do not have any monetary restrictions. The amendment to section 211 would make the proposed section 188 more meaningful and consistent with section 3 in terms of inclusiveness and section 6 in terms of discrimination.

(f) Fiji has joined the rest of the world in shifting from the old Industrial Relations module where unions and employers fought for the loyalty of the workers, to the new Human Resource Management module where the human resources management advocates for the workers whilst the unions keep their place.

(g) FCEF thanks the Bainimarama Government for taking the initiative in 2007 with the Promulgation of the ERP 2007.

2.2.3 International Labour Organisation

- Mr Alain Pelce, Senior International Labour Standards Specialist, International Labour Organisation (ILO)

(a) The Bill brings back the Public Servants within the ambit of the Employment Relations Promulgation.

(b) The Essential National Industries Decree of 2011 is repealed in its entirety, which is a welcome move from the point of view of ILO standards. Concerns previously raised by the ILO Committee of Experts on the application of Conventions and Recommendations are being addressed in the Bill.

(c) Clause 3 (Section 119 amended) allows workers of more than one occupational activity to join a corresponding Trade Union. The ILO Committee of Experts had recommended that steps be taken to amend that section to allow workers engaged in more than one occupational activity to have several Trade Union affiliations corresponding to these different activities.

(d) Clause 4 (Section 122 amended) seems to satisfy a request that was made by the ILO Committee of Experts.

(e) ILO also welcomes the amendment to Section 128 which places limitations on when the Trade Unions accounts can be inspected by the Registrar. Also as a positive development, clause 14 amends Section 250 by removing penalties of imprisonment in case of unlawful strike action.

(f) Issues raised by the ILO Committee of Experts for further consideration by the Committee include:

- ☐ Section 3 paragraph 2 of the ERP maintains the exclusion of the Correction Service from the coverage of the Promulgation - this is not in line with the Convention on Freedom of Association. The Correction Service Officers are neither members of the Military nor the Police and they should not be excluded from the right to organise and the right to join and set up Unions of their own choosing.

- ☐ Section 127(1) maintains limitations on when a person can become an officer of a Trade Union. One of the principles of Convention 87 is that the organisations, the unions hold the same rights of association for employers so the organisation should be free to decide on the election of their officers and representatives without any restriction. Section 127 is partially amended by clause 6 of the Bill which lowers the minimum requirement of time in a given occupation or industry to be eligible to positions in Trade Unions from six months to three months.

- ☐ The requirement of being a Fiji national is consistently found by the ILO supervisory bodies to be an excessive requirement because this should also be left to the Unions themselves. It is admissible in a way to have some restrictions in terms of length of residence for instance, but barring all non-nationals from exercising responsibilities in the Union will be against the Convention.

- ☐ Section 180 of the ERP provides the minister with the power to declare a strike illegal. The ILO Committee of Experts requests the Government to take necessary measures to amend section 180, to make sure that the responsibility for declaring a strike illegal lies with an Independent body having the confidence of the parties, and not the Minister.

- ☐ The combined effect of the requirements of sections 169, 170 and 181(c) of the ERP makes it difficult to engage lawfully in strike action. The combination of these various requirements, in practice, would make it difficult to lawfully engage in a strike and in particular, at the request of one of the parties or at the discretion of the public authorities; if disputes can be referred to compulsory arbitration procedures, then this provision should also be amended.

(g) The scope should be reviewed in order to ensure that it is compatible with the ILO Standards and Principles on Freedom of Association. Under the ILO Standards and principles on Freedom of Association, there are instances where services may be subjected to a separate industrial relations regime, including compulsory arbitration and limitation on the right to strike in certain circumstances. In particular, ILO subsidiary bodies have consistently maintained that restrictions or even prohibition of the right to strike, as well as the imposition of compulsory arbitration may be permitted in a number of circumstances.

(h) Part 19 has a much wider scope and covers a broad range of activities and services, including activities and services that were previously covered by the ENI Decree. It also covers essential services under the existing Promulgation. By contrast, most if not actually all of the essential national industries which were previously covered by the Essential National Industries Decree are obviously not essential services in the meaning of the ILO principles.

(i) The recourse to compulsory arbitration under Part 19 of the Bill is also admissible, not only for the essential services, but also under ILO standards and principles on Freedom of Association when after a protracted and fruitless negotiation, it becomes obvious that the deadlock will not be broken without some intervention of a third party. This would not seem to be against the ILO standards or principle, but a word of caution may be needed on what could be the effect in practice of this provision.

(j) Question was raised on whether the Bargaining Unit model is necessary for the purposes of Part 19, especially when considering that the Bargaining Units under Part 19 would not have the same status as Trade Unions? Bargaining Units in Part 19 maybe questioned from the viewpoint of the principle on freedom of association: What is the use, what is the purpose of having a separate institution from the Trade Union for the purpose of collective bargaining?

(k) Bargaining Units are not covered by Part 15 of the Promulgation relating to rights and liabilities of the Trade Unions. Members of Bargaining Units who are subject to acts of anti-union discrimination also do not seem to fall within the scope of anti-discrimination provisions elsewhere in the Promulgation. These provisions relate specifically to protection against discrimination based on Trade Unions activities that would not enjoy that protection. It is unclear why a Bargaining Unit should be accorded a different members threshold as compared to Trade Unions.

(l) Section 189(2) allows workers in an existing Bargaining Unit to join a Trade Union established in accordance with the Promulgation. That provision appears to require that this may only take place if a majority of the workers in the Bargaining Unit vote in favour of joining a Trade Union by a secret ballot. It is not clear whether this provision could be read as narrowing the provision of Section 190 which provides that all workers have the right to form and join Trade Unions. The extent to which provisions of Section 189(2) permits this situation is unclear and it could be interpreted as preventing such activities and thereby restricting the right of workers to form and join Trade Unions.

2.2.4 Further clarifications

The Committee sought further clarification from the ILO on some areas which were raised in the submissions received during public hearings. The responses below represent the views of the International Labour Office and should not be understood to prejudice any considerations that may be made by the ILO supervisory bodies in relation to their review of specific legislative provisions. All communications, both written and oral, that have occurred with the Standing Committee should be understood as the views of the International Labour Office and not as those of a particular individual.

Essential Services and Industries

"We note from the submission of Mr. A. Pelce that essential services, according to ILO standards, are services which deal with life, health and public safety matters. Schedule 7 of the Employment Relations Promulgation 2007 of Fiji contain some of those services. Is there a set criteria for the definition of essential industries in accordance with ILO standards and is there any relaxation provided for a remote island nation like Fiji to declare some of its industries as essential as well to protect its vulnerable economy?"

Response from the ILO:

The ILO Supervisory Bodies accept that restrictions, or even a prohibition on the right to strike, as well as the imposition of compulsory arbitration, may be permitted in the following circumstances:

(i) in essential services in the strict sense of the term – i.e. those, the interruption of which would endanger the life, personal safety or health of the whole or part of the population;

(ii) in cases of disputes in the public service involving public servants exercising authority in the name of the State;

(iii) in the event of an acute crisis.

These are defined by cases considered by the Committee on Freedom of Association, which regularly reviews the context and circumstances prevailing in the country. The concept of what is an essential service is not absolute and a non-essential service may become essential if a strike extends beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of whole or part of the population[1].

[1] *Digest of decisions and principles of the Freedom of Association Committee, 2006, fifth edition, para. 582*

Part 19 of the Bill covers a broad range of activities/services including services previously covered by ENID, essential services under the existing ERP and a further group of industries and services.

Essential Services in the strict sense of the term

With respect to (i) above (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) the Office points out that the ILO supervisory bodies have previously considered the term may include air traffic control services, telephone services and services dealing with the consequences of natural disasters, prison services, security forces, water and electricity services. The Committee has also considered that other services (such as metrological services and social security services) include certain components which are essential and others that are not[2].

In the view of the Office, a number of services in Part 19 extend beyond the scope of what has been considered as "essential" by the Committee. At the same time, this narrowly defined reference to essential services as set out by the ILO supervisory bodies refer to circumstances in which a total prohibition of the right to strike may be permissible. A broader range of services could be considered in a context where the category of essential services would only alter the process and possibly duration of dispute resolution mechanisms prior to allowing recourse to industrial action

Public servants exercising authority in the name of the State

The Office further observes that the ILO supervisory bodies have considered that restrictions or a prohibition on the right to strike may be permitted with respect to public servants exercising authority in the name of the State. This would include civil servants in government ministries but would not be understood to cover a broader range of public servants, such as teachers or those working in public enterprises. The definition of an "essential service or industry" in Part 19 includes "the Government" and "a statutory authority", which may go beyond the above restricted notion of exercising authority in the name of the State[3].

Minimum services

In cases where the Committee on Freedom of Association has considered explanations that the particular characteristics of a country render a certain service essential that might not be the case in other geographical context, the Committee has often suggested the establishment of a negotiated minimum service. This can be seen

[2] *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for Fair Globalisation, 2008. International Labour Conference, 101st Session, 2012, p55.*
[3] *Digest of decisions of the Freedom of Association Committee, 2006 (Fifth edition), paras. 577 and 589.*

for example in the Committee's examination of a complaint concerning restrictions on the right to strike in relation to ferry services in Norway[4].

Bargaining Units

The Bill aims to provide for Bargaining Units (BU) which the workers of an industry can join which will co-exist with trade unions. The requirements of forming or joining a trade union are essentially lower/easier than forming a BU. The objective basically is to give the workers more choice in seeking which group they choose to represent them. If BUs are allowed to co-exist with the Trade Unions and workers are free to join one or the other, will that be seen as an obstacle to the freedom of association (C078) and freedom to bargain (C098) by ILO?

Response from the ILO:

It is an important principle of freedom of association, spelled out in both ILO instruments and principles elaborated by the Committee on Freedom of Association, that the existence of other types of representation of workers should not be used to undermine the position of trade unions and their prerogative in collective bargaining.

It is also noted that s.189(2) of the Bill enables workers in an existing bargaining unit established under the ENI Decree to join a trade union established under the Employment Relations Promulgation. However, s.189(2) appears to require that this may only take place if a majority of the workers in a bargaining unit vote in favour of joining a trade union by secret ballot. Questions are likely to arise in instances where:

(i) an individual who is part of an existing bargaining unit wishes to leave it to join an existing trade union and be represented by that trade union;

(ii) a group of seven or more workers in an existing bargaining unit wish to form a new trade union under s.119(2) of the ERP as amended by the Bill.

These instances present possible barriers to workers in bargaining units join trade unions. An important principle considered by the Committee on Freedom of Association is that the number of persons required to establish a trade union should be fixed at a number that is reasonable so that the establishment of a trade union is not hindered.

The institution of bargaining units may be questionable from the viewpoint of these issues. As also indicated in the question, the fact that a bargaining unit may be set up through an easier process involving fewer requirements may also facilitate the

[4] *291st Report of the Committee on Freedom of Association, paras. 130-160*

capacity of the employer to interfere in the choice of the workers and establish a unit which is more clearly under the his or her domination or control. Moreover, given that a bargaining unit by its very nature does not embody the democratic structures established in trade union constitutions which outline the rules of officer elections, general assemblies and engagement with its membership on critical issues, it is not clear how a bargaining unit ensures that its engagement with the employer reflects the interests of the worker base.

Strikes

The position of ILO seems to suggest that the combined effect of Sections 169, 170 and 181(c) is to make going on strikes difficult if not impossible for essential industries and services listed. The view of the Standing Committee is while strikes in essential industries will need to meet a higher threshold as is normal they don't make strikes in essential industries impossible. If a dispute is not reported by either party to the Arbitration Court and the mechanisms of the court are not applied or negotiations fail, after the end of the notice period the workers can go on strike. Once at the Arbitration Court if there is no conciliation there seems to be a possibility of strikes. What is the ILO's view on this?

Response from the ILO:

The ILO Committee on the Application of Conventions and Recommendations has previously commented on the application of provisions in the ERP in relation some of these matters. A number of these comments continue to remain relevant for the purposes of interpreting provisions in the Bill.

In this respect, it is noted that the Committee of Experts on the Application of Conventions and Recommendations previously commented on the combined effect of sections 169, 170, 181(c) and 191(1)(c) of the ERP which may be considered as restricting strike action. The Committee stated that:

> "a prohibition of strikes may result in practice from the cumulative effect of the provisions relating to collective labour disputes under which, at the request of one of the parties or at the **discretion** of the public authorities, disputes must be referred to a compulsory arbitration procedure leading to a final award which is binding on the parties concerned. These systems make it possible to prohibit virtually all strikes or to end them quickly: such a prohibition seriously limits the means available to trade unions to further and defend the interests of their members… and is not compatible with Article 3 of the Convention (see General Survey, op cit, paragraph 153). ***Accordingly the Committee again requests the Government to amend sections 169, 170, 181 and 191(1)(c) of the [ERP] so as to ensure that compulsory arbitration can only be imposed at the request of both parties to a dispute, or in essential***

services in the strict sense of the term or for public servants exercising authority in the name of the State".

In this respect, attention is drawn in particular to sections 169 and 170 of the ERP (as amended by the Bill) and:

(i) Section191BS of the Bill which replaces, largely unamended, section 191 of the ERP relating to instances where the Minister can refer a strike to the Arbitration Court and must order a discontinuance of a strike in such an event.

(ii) Section 181 in the Bill which provides that the Minister can now apply for an injunction to discontinue a strike or lockout at the request of a union or employer.

The ILO supervisory bodies have however accepted the possibility of compulsory arbitration in more limited circumstances, such as where both parties to the negotiation (and not just one of the parties) request it, in the case of a dispute in collective bargaining for a first agreement and in the case of essential services as narrowly defined and as determined by an independent body, such as a court, and not by a government ministry.

With respect to broader issues relating to industrial action, the Office reiterates the following points.

Firstly, is noted that section 175(3)(b) relating to strike ballots has not been amended by the Bill. This section sets in place requirements for strike ballots and requires a 50% vote of all members that are entitled to vote. The Committee of Experts on the Application of Conventions and Recommendations has previously commented on the application of this section (in its 2012 report) noting that:

> "the quorum and majority required should be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. If a member State deems it appropriate to establish in its legislation, provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast and that the required quorum and majority are fixed at a reasonable level. The Committee requests the Government to take the necessary measures to amend section 175(3)(b) of the [ERP] so as to ensure that, regardless as to whether the strike ballot is conducted during a union meeting or at each individual workplace, only a simple majority of votes case in a secret ballot is required."

It is noted that section 180 of the existing ERP provides that the Minister has the power to declare a strike illegal. The Committee of Experts has commented that responsibility

for declaring a strike illegal should not lie with the government and the right of appeal to the courts does not in itself constitute a sufficient guarantee. The Committee said:

> "The Committee once again requests the Government to take the necessary measures to amend section 180 of the [ERP], so that responsibility for declaring a strike illegal lies with an independent body which has the confidence of the parties involved".

2.2.5 Mr John Apted

(a) Clause 2 (*Section 78 amended*): this section is too broad and complicated and does not fit with sections 79-81 which deal with equal pay on gender grounds. The existing section 78 went beyond the international standard by prohibiting wage discrimination on any ground including a prohibited ground.

- ☐ The proposed amendment is a result of a realization that the section currently prohibits wage differentiation for legitimate reasons such as productivity, experience etc. While this is an improvement, it does not go far enough. The amended section would still prohibit differentiation on other economically acceptable grounds such as family relationships, headhunting etc. The better solution would be to limit discrimination to gender discrimination and link it to the following sections 79 to 81.

(b) Clause 3 (Section 119 amended): this section should this to section 127(2) which refers to persons engaged in "an industry, trade or occupation". It should be made consistent.

(c) (Section 122 amended): The amendments to subsection (1)(c) and (4) appear inconsistent. The amendment to subsection (1)(c) appears to limit the Registrar to rejecting names which are racially discriminatory, but subsection (4) refers also to names which are "offensive or insulting".

(d) (Section 125 amended) : The amendment requires the Registrar to have "good faith consultations" with those who wish to register a Trade Union. The application of good faith to a regulator seems misplaced. This duty should apply only to dealings between employers, Trade Unions and workers. The Registrar is already under implied duties of reasonableness and natural justice. This should, refer only to a duty to consult or hear the applicants.

(e) (Section 128 amended): The amendment appears to require 10% of a union's voting membership to requisition an inspection before the Registrar can audit a union's books. This threshold appears far too high especially for national unions. It will make it almost impossible for concerned members to require an inspection of the union's books.

(f) (Section 169 amended): This amendment gives employers the right to report a "dispute" against a worker or group of workers. It does not fit with the definition of "dispute" in section 4 of the ERP or the traditional concept of a dispute which is a difference between an employer and a union (as opposed to a grievance which is between a worker and an employer). It also does not fit easily into Part 17 of the ERP (sections 168 and 169) or the new Part 19. It is not clear what kinds of dispute are intended to be covered. An employer already has the right to bring breach of contract actions against workers in the Employment Court and Employment Tribunal under sections 220(1)(h) and 211(1)(g) and 212. If these need to be extended, the amendment might be better placed in those sections.

(g) (Section 170 amended): Section 170(1) places a duty on the Permanent Secretary to accept or reject both employment disputes and grievances within 30 days of their report to him. However, section 170 sits in Part 17 – which deals only with Employment Disputes. Employment Grievances are dealt with by Part 13. They are reported to Mediation Services, not the Permanent Secretary. Insofar as this amendment deals with grievances, it does not make sense.Section 170(10) must have a typographical error as it says that a dispute or grievance that is rejected within 30 days is deemed to be accepted. Insofar as subsection 170(10) provides that in default of action by Permanent Secretary within 30 days, a dispute or grievance is deemed to be accepted, this leaves parties at the mercy of the Permanent Secretary and can result in disputes or grievances which contravene the law being accepted because the Permanent Secretary has been too busy to respond.

(h) (Section 177 amended): The amendment means no strike or lockout can take place in an essential industry or service while negotiations are on-going or before the Tribunal. This may effectively mean that no industrial action can be taken. It may breach ILO standards.

(i) (Section 181 amended): This amendment makes a ministerial order declaring a strike or lockout illegal effective from the time the Minister signs it, even before the Order is served on the union or employer. This may mean that an offence is committed under section 250 of the ERP even before a party is aware that they are breaking the law.

(j) (Section 241 amended): This makes ministerial decisions under the new Part 19 non-appealable. This makes the Minister unaccountable. It contravenes the spirit of section 16(1)(c) of the Constitution which gives a right to have any executive or administrative action reviewed by a court. Although the right under section 16 may be limited by law, it is unclear why this limitation is necessary.

(k) Proposed amendments to the new Part 19 can be found in Appendix B.

2.2.6 Fiji Bank and Finance Sector Employees Union

- Mr Sailesh Naidu, National Secretary
- Ms Usa Kalim, National President
- Mr Matia Tuisawau, Vice President
- Ms Serai Dikula, Secretary (FBFSEU)
- Mr Manish Deo, Former Bank Employee

(a) Clause 189 contravenes ILO Convention 87 where authorisation is required by 50% of the workers in a Bargaining Unit to cease operations and join the industry union which used to represent pre-ENI. The provision makes it logistically difficult for workers to re-join their industry union and strongly favours the continuation of Bargaining Units in the workplace.

- ☐ The Bill should not have any provisions which should interrupt, hinder or purposely delay the orderly return of workers' rights violated under the ENI Decree. Fiji, as a member of the ILO, should not by the provisions of the Bill, prohibit or impose preconditions to workers in respect of their right to organise and join a union of their free choice.

(b) The FBFSEU makes the following recommendations:

- ☐ Workers should be allowed to freely choose a union of their choice without seeking any authorisation derived out of any present or previous law.
- ☐ All workers in the country should have a right to redress within the judicial system.
- ☐ Workers should also be allowed the freedom to seek legal advice and representation.
- ☐ The Finance industry should specifically be removed from the essential industries and corporations list since there is no justification.
- ☐ The Employment Relations Advisory Board should be the only body to decide on any new inclusions to Schedule 7 of the ERP 2007.
- ☐ Reinstate all legal matters cancelled or terminated due to the provision of ENI.
- ☐ Reinstatement of Collective Agreements that existed prior to the ENI Decree.
- ☐ These Collective Agreements were a result of decades of struggle for workers. Without this provision, many workers would be required to start afresh.

(c) FBFSEU welcomes Governments' intention to repeal the ENI Decree. The Bill should be progressive rather than being regressive. Any reform to the Employment Relations Promulgation should be to provide liberty to workers from any form of prohibition.

2.2.7 Fiji Women's Rights Movement (FWRM)

- Ms Michelle Reddy, Programme Director
- Ms Veena Singh, Gender and Transitional Justice Team Leader

(a) Clause 2 (*Section 78 amended*): The words "*sex, gender, sexual orientation, gender identity and expression, disability, age, marital status or pregnancy*" should also be incorporated into Section 75 of the ERP. Sexual orientation and gender identity are integral to everyone's dignity and humanity and must not be the basis for discrimination or abuse in the workplace.

(b) Part 19: The Committee should review the definition and scope of "essential services and industries" and also review the current listing under Schedule 7 of the ERP. FWRM further recommends the establishment of a procedure to determine whether an activity should be deemed to be an essential service with the participation of employers and workers organisations.

(c) The definition of Collective Agreement under Section 4 of the ERP 2007 and the amendment of Clause 16 (*Section 185*) under the current Bill appear to be inconsistent.

(d) FWRM supports ILO's recommendation that where the right to strike is subject to restrictions or a prohibition, the workers concerned should be afforded compensatory guarantees such as conciliation and mediation procedures leading (in the event of a deadlock) to arbitration machinery seen to be reliable by the parties concerned.

(e) Clause 6 (*Section 127 amended*) contravenes ILO Convention 87 on the Freedom of Association and ILO Convention 98 on the Right to Organise and Collective Bargaining. It is the sole prerogative of the Trade Union to appoint its officers, to establish its governance structures, to facilitate its work and other requirements.

(f) The practicability of Section 175(b) should be reviewed as it can be problematic.

(g) FWRM supports the ILO's submission which recommends that the power to declare a strike or lockout unlawful should lie with an independent body and not the Minister.

(h) Clause 16 (Sections 191BC and 191BD) allows essential services and industries separate access to Arbitration Court unfortunately employers and Trade Union reps are not allowed legal representation, but legal representation is possible by leave of the Arbitration Court in proceedings in which the Attorney General has intervened.

(i) Bargaining Units vs Trade Unions: the purpose and scope of Bargaining Units, its formation, functions and governance structures are not defined. FWRM strongly recommends the removal of these Bargaining Units as it only further erodes the rights of employees.

(j) Clause 13 (*Section 241 amended*) : Widening the definition of "essential services and industries" will only curtail the operations of these various services as the inability to challenge any decision made by the Minister will act as a major hurdle. This further entrenches the powers of the executive in that they are both the judge and jury.

(k) Previous agreements before the ERP 2007 are not addressed in the Bill. As such, FWRM recommends that the Standing Committee seriously considers these agreements and ensure that they are protected.

(l) Women's NGOs and their views need be better recognised and one way of doing this is to ensure the appointment of at least one suitable NGO representative on the ERAB.

2.2.8 Fiji Trades Union Congress

- Mr Felix Anthony, National Secretary
- Mr Mark Perica, Senior Legal Officer SPSF, Melbourne
- Ms Jotika Sharma, Workers Education Officer

(a) The Bill is fundamentally flawed in that it:

- ☐ Does not bring the labour law of Fiji up to the binding international standards prescribed by the ILO;
- ☐ Does not solve legacy problems created by the imposition of the ENID, in particular the deregistration of unions in Essential National Industries and the cancellation of Collective Agreements;
- ☐ Seriously undermines the freedom of association of Fijian workers by perpetuating barriers to representation by registered unions;
- ☐ Sustains and expands the role of Bargaining Units as in-house unions which enjoy lesser standards of accountability and governance than traditional Trade Unions;
- ☐ Creates an expanded class of employees within an excessively broad definition of Essential Services and Industries with different rights for no good reason;
- ☐ Makes it virtually impossible for workers in Fiji to take lawful industrial action and provides the Government with the tools to terminate any industrial action virtually at will;

- ☐ Fails to address the serious limitations on the right to freedom of association contained in other executive decrees (e.g. Public Order Amendment Decree and the Electoral Decree)

(b) Strongly recommends that the ENID simply be repealed, which would address many but not all of the inconsistencies between Fijian law and ILO Conventions 87 and 98.

(c) The Committee should reject the Bill in its current form and direct the ERAB to initiate meaningful tripartite dialogue to agree on a new ERP that is consistent with international law.

2.2.9 Fiji Islands Council of Trade Unions

- Mr Attar Singh, General Secretary
- Mr Manoa Seru, President
- Mr Kamlesh Kumar, Assistant General Secretary
- Mr Nigel Fiu, Fiji Airways Bargaining Unit
- Mr Pramod Rae, Delegate
- Mr Bala Dass, Vice President
- Mr Marika Uluinaceva, Fijian Teachers Association
- Mr Josaia Boleinakasi, VNUTW
- Mr Gerald Chute, Observer
- Mr Glen King, Observer

(a) Key issues raised in the submission are as follows:

- ☐ Total repeal of the ENI (Employment) Decree 2011 including the Regulations and Schedules; Employment Relations (Amendment) Decree 2011; and the Public Service (Amendment) Decree 2011.
- ☐ Six months' time for reporting disputes and grievances instead of three months
- ☐ Removal of restrictions on right to strike in essential services and industries
- ☐ Declaration of unlawful strikes/lockouts from time of delivery of order, not time of ministerial signature.
- ☐ Restoration of right of appeal from decisions of Minister
- ☐ Amendments to the essential services/industries list to be by resolution of Parliament and not the discretion of Minister
- ☐ Reduction of draconian fines and decriminilisation of union activity
- ☐ No "essential" industries, only genuine essential services

- ☐ Remove all references to Bargaining Units and Arbitration Court concept
- ☐ Strengthening of employment tribunal
- ☐ Arbitration Court, if any, to have judicial basis
- ☐ Remove permanent employer/worker panels. Replace with direct nominees of disputing parties on case by case basis
- ☐ Questions of law to be determined by higher courts and not the Solicitor General
- ☐ Restoration of Collective Agreements lost under ENI decree
- ☐ Reinstatement of all disputes and grievances terminated under ENI for completion of determination/decisions
- ☐ Immediate restoration of check-off facility for all unions lost under ENI
- ☐ Independent and confidential verification of a union membership if demanded by employer.
- ☐ The Minister while inviting members to be part of the Employment Relations Advisory Board under Section 8 of the Promulgation must invite all other worker representatives like smaller unions to be part of ERAB.

2.2.10 Fiji Airways

- Ms Shaenaz Voss, General Manager Govt Intl Industries
- Ms Cecille Sanchez, General Counsel & Corp. Sec

(a) Fiji Airways fully supports the proposed amendments in the Bill as it reflects provisions that in the Company's view are fair and equitable. Individual grievances will still follow the normal process of being taken to the Employment Tribunal which can adjudicate on the matters as usual.

(b) The new Part 19 added to the ERP which governs Essential Services and Industries provides for similar terms in the ENID which had worked well for Fiji Airways for the last 4 years.

(c) Fiji Airways however submits that the Bill makes provision for any and all outstanding disputes or claims that were logged prior to ENID should not be permitted to be reinstated.

(d) Further, Fiji Airways is of the view that any awards made by an Arbitration Court must not derogate from any right or privilege which a worker has under the provisions of any written law.

(e) Fiji Airways therefore fully recommends the Bill with the hope that Fiji Airways be considered as an essential service and industry in view of the above.

Copies of all written submissions presented to the Committee are attached as Appendix B.

3.0 COMMITTEE DELIBERATIONS ON THE EMPLOYMENT RELATIONS PROMULGATION (AMENDMENT) BILL 2015, (BILL NO. 10 OF 2015)

3.1 Essential Services

The Committee took note of the submission from Mr Alain Pelce that essential services, according to ILO standards, are services which deal with life, health and public safety matters. The ILO defines "essential services" as services whose interruption could endanger the life, personal safety or health of whole or part of the population. Schedule 7 of the Employment Relations Promulgation 2007 lists some of those services, some of which the Unions are not in agreement with.

The Committee further noted that there are certain 'grey areas' which may allow for certain industries to be brought in as essential industries for an isolated economy like Fiji. Some of those industries could be national airline, ports, transportation and so on but certainly not banks and other financial institutions.

3.2 Bargaining Units

The Bill aims to provide for Bargaining Units (BU) which the workers of an industry can join which will co-exist with Trade Unions. The requirements of forming or joining a Trade Union are essentially lower/easier than forming a BU. The objective basically is to give the workers more choice in seeking which group they choose to represent them.

If Bargaining Units are allowed to co-exist with the Trade Unions and workers are free to join one or the other. Will that be seen as an obstacle to the freedom of association (C078) and freedom to bargain (C098) by ILO is the question?

Should the workers have a choice in terms of forming Bargaining Units or joining Trade Unions? Are Bargaining Units within the workplace desirable?

Bargaining Units were deemed in principle to have the same powers as that of a Trade Union once it was registered. After the amendment there was no longer a requirement to have a minimum of 75 members to form a bargaining unit.

According to the submissions the concept of Bargaining Units may be unique to Fiji. There were opposing views on whether there was a need for bargaining units. The submissions in favour of bargaining units were that a large trade union might not appreciate the problems of a small group of workers with a unique problem. The

opposing view was that a bargaining unit would be a weak force to rely on for negotiations and would only be representing individuals of the same profession within an organisation (for example, flight attendants from Fiji Airways) but a Trade Unions would represent all the workers and would have a greater bargaining power.

3.3 Strikes and Lockouts

The position of ILO seems to suggest that the combined effect of Sections 169, 170 and 181(c) is to make going on strikes difficult if not impossible for essential industries and services listed. The view of the Standing Committee is while strikes in essential industries and services will need to meet a higher threshold as is normal, they do not make strikes in essential industries impossible. If a dispute is not reported by either party to the Arbitration Court and the mechanisms of the court are not applied or negotiations fail after the end of the notice period the workers can go on strike. Once at the Arbitration Court, if there is no conciliation there seems to be a possibility of strikes.

The right of workers to strike is an essential element of collective bargaining. However that has to be balanced with the need to run the essential services and industries and there should be a chance given to the parties to negotiate before strike action is taken.

Organisations listed as essential services could still go on strike subject to the provisions laid out in the Bill.

3.4 Arbitration Court

The power of the Minister may be used unfairly in terms of the appointments and selection of representatives for the Arbitration Panel.

If the Minister only nominates persons from the most representative organisations for the panels, smaller representative organisations like FICTU could be left out. Therefore it is prudent that other worker representatives like smaller unions should also be part of the panel for selection and also for ERAB under section 8 of the ERP 2007.

There were submissions that the Solicitor General should not be providing legal opinions for the Arbitration Court as there could be an apparent conflict and would be no way to challenge the opinion if it is acted on by the Arbitration Court.

Conflict of interest would arise if the Solicitor General were to give an opinion on a dispute involving public sector workers. Suggestion was made for legal opinions to be provided by a higher authority like the Chief Justice instead of the Solicitor General.

The Committee noted the support by some unions including FPSA for the setup of the Arbitration Court provided that the list of organisations falling under essential services remains as is under Schedule 7 of the ERP 2007.

3.5 General Offences and Penalties

There were suggestions that current offences should be converted to civil penalties instead of criminal penalties because the offences are not criminal in nature. The committee considered reducing the penalties for some offences which were not serious.

3.6 Gender analysis

The Committee took into account the provisions of Standing Order 110(2) which states:

> *Where a committee conducts an activity listed in clause (1), the committee shall ensure that full consideration will be given to the principle of gender equality so as to ensure all matters are considered with regard to the impact and benefit on both men and women equally.*

The Committee received an oral submission from the Fiji Women's Rights Movement. It noted that most (if not all) of the issues raised by respective presenters also concerned all working women irrespective of their being employed in the industrial, commercial, public or private sector.

The Committee is satisfied that the matters considered in the amendment of the Employment Relations Promulgation 2007, will have equal impact on the livelihood of both women and men.

3.7 Consideration of Bill Clause by Clause

The Committee considered Bill No. 10 of 2015 clause by clause in its deliberations pursuant to Standing Orders.

ERP (AMDT) BILL 2015 (Proposed amendment)	**Summary of suggested changes received by the Committee**
2. The Promulgation is amended by deleting section 78 and substituting with the following – *Unlawful discrimination in rates of remuneration*	1) The two ILO Conventions in question are C087 – Freedom of Association and Protection of the Right to Organise and C098 – Application of the Principles of Right to Organise and to Bargain

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
78. An employer must not refuse or omit to offer or afford a person the same rate of remuneration as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description for any reason including- (a) The actual or supposed personal characteristics or circumstances of that person, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy; or (b) Opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the dimunition of the rights of freedom of others, Provided however that nothing in this Promulgation shall prevent an employer from prescribing or imposing different rates of remuneration to workers depending on productivity or quality of work or years of service or performance of duties and functions.	Collectively. ILO is suggesting that certain parts of the ERP Amendments especially those which are in Part 19 may infringe the conventions. This is addressed further below. 2) Section 78 is too broad and complicated. Previously only gender discrimination was mentioned now there are other grounds. Amending section 78 does not fit well with Section 79 to 81 which only deal with gender. 3) Section 78 (a) words is different from Section 75 words. Both should be amended for uniformity. 4) Provision for positive discrimination is restricted to productivity or quality of work or years of service or performance of duties and functions. It should also have provisions for qualifications, head hunting (attracting better employees from other firms etc), family members, etc. The use of words 'any reasons including' in the last sentence of Section 78 widens the scope. If those words are removed then other positive discrimination can be allowed.
Application for registration **3.** Section 119 of the Promulgation is amended by deleting subsection (2) and substituting with the following— "(2) An application for registration as a trade union must be made to the Registrar in the prescribed form and signed by a minimum of 7 members of the trade union applying for registration provided that no member shall belong to more than one trade union in the same <u>occupation or industry</u> concerning the same employer."	Section 119 – provides people in same "occupation or industry" can form a trade union. Section 127 (2) provides for "industry, trade or occupation". Should be made uniform.
Alteration or change of name of trade unions **4.** Section 122 of the Promulgation is amended—	

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
(a) in subsection (1)*(c)* by deleting the word "undesirable" and substituting with "racially or ethnically discriminatory"; and *(b)* by inserting the following new subsection after subsection (3)— "(4) In making a consideration under subsection (1), the Registrar may have regard to whether the proposed trade union's name is offensive or insulting, can incite racial or ethnic hatred, or would contravene any other written law."	Section 122(1)(c) and (4) – the words appear inconsistent. Registrar can reject names which are "racially or ethnically discriminatory" but (4) has words offensive or insulting, can incite racial or ethnic hatred. Should be made uniform.
Refusal of registration **5.** Section 125 of the Promulgation is amended in subsection (1) by inserting the words ", after good faith consultation with those who are intending to register as a trade union," before the word "may".	Section 125 – why is there is need to say the Registrar is to act in good faith? The Registrar is always required to act in good faith since he is a public official. Use of these words might give an argument to the Registrar that he is not required to act in good faith in other places.
Section 127 amended **6.** Section 127 of the Promulgation is amended in subsection (1) by deleting— *(a)* "6" and substituting with "3" in paragraph *(a)*; and *(b)* paragraph *(b)*.	
7. Section 128 of the Promulgation is amended in subsection (2) by deleting the words "or by a person authorised in writing by the Registrar" and substituting with "upon requisition of 10% of the voting membership." .	Section 128 – Under the ERP the Registrar was allowed to inspect the books of a union on his own accord but now he can only inspect when there is a requisition by 10% of the votes. What is the rationale for this? If the word 'or' is kept and not deleted then the Registrar can still on his own accord inspect the books and also on the request of 10% votes.

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
8. Section 169 of the Promulgation is amended in subsection (1) by inserting the following new paragraph after paragraph *(b)*— "*(c)* an employer reporting a dispute with a worker who is not, or with workers who are not, a union member."	Section 169 – there seems to be some problem with this section. As per definition in the ERP a dispute is between a trade union and an employer. A dispute between an employee and an employer is a grievance hence there is no need to report a grievance to the Permanent Secretary. It's an ERT matter. Does not fit with the definition of dispute.
9. Section 170 of the Promulgation is amended by— *(a)* deleting subsection (1) and substituting with the following— "(1) The Permanent Secretary must, within 30 days, accept all employment disputes and employment grievances reported to him or her, provided that— *(a)* the employment dispute or employment grievance is not vexatious or frivolous; *(b)* all existing internal procedures have been exhausted in resolving the employment dispute or employment grievance; and *(c)* the employment dispute or employment grievance is reported within 3 months from the date in which the employment dispute or employment grievance arose except where the delay to report was caused by mistake or other good cause."; and *(b)* inserting the following new subsection after subsection (9)— "(10) If an employment dispute or employment grievance reported to the Permanent Secretary is not accepted or is rejected by the Permanent Secretary within 30 days of it being reported, then the employment dispute or employment grievance shall be deemed to have been accepted."	1) Section 170 – this is a problem area. Dispute and grievance should be kept separate. Disputes are handled by Part 17 and grievances are handled by part 13. Should not be mixed up. Employment grievance are not reported to the Permanent Secretary. Those are ERT and Labour Ministry issues between individual workers and employers. 2) Section 170(10) – second line the word 'is' should be removed otherwise it will have an unintended meaning.

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
10. Section 177 of the Promulgation is amended— *(a)* in paragraph *(c)* by inserting the words ", or relates to any trade dispute lodged with the Arbitration Court under Part 19 or relates to any matter over which collective bargaining, or negotiation or conciliation is taking place under Part 19" after the word "Promulgation"; and *(b)* in paragraph *(e)* by deleting "186, 187 or 191(2)" and substituting with "191BN, 191BO or 191BS(2)".	Section 177 – ILO suggested that it is impossible for the strike to go ahead in an essential industry while the matter is before the Arbitration Court. Will this be classed as restricting the right to strike as per ILO standards?
11. Section 180 of the Promulgation is amended in subsection (2) by inserting the words "signed by the Minister or" after the words "the order is".	Section 180(2) – the words should be "signed and served" and not "signed or served" as usually is in legal practice.
12. Section 181 of the Promulgation is amended in paragraph *(c)* by inserting the words "upon the request of a union or an employer" after the word "Minister".	
13. Section 241 of the Promulgation is amended in subsection (1) by deleting the words "or Part 19".	Section 241(1) – There has to be good reason to take away the right to appeal from a decision of the Minister from Part 19 decisions.
14. Section 250 of the Promulgation is amended— *(a)* in subsection (1) by inserting the words "and is liable upon conviction to a fine not exceeding $50,000" after the word "offence"; *(b)* in subsection (2) by inserting the words "and is liable upon conviction to a fine not exceeding $20,000" after the word "offence"; and *(c)* in subsection (5) by inserting the words "and is liable upon conviction to a fine not	Section 250 fines are said to be excessive. Should be in line with other sections of the Promulgation.

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
exceeding $10,000" after the word "offence".	
15. Section 264 of the Promulgation is amended by deleting subsections (6) and (7).	Section 264 – deleting (6) and (7) will give the Minister power to add or subtract from schedule 7 as list of essential industries without taking it to the parliament. Instead (5) should be deleted to leave the power with Cabinet and Parliament as need arises. Also that will not gel well with 191 BU of the amendment where consultation with ERAB is required to add to list of essential services and industries.
16. The Promulgation is amended by repealing Part 19 and substituting with the following— PART 19 – ESSENTIAL SERVICES AND INDUSTRIES "PART 19—ESSENTIAL SERVICES AND INDUSTRIES *Division 1—General* *Interpretation* 185. Notwithstanding anything contained in section 4, in this Part, unless the context otherwise requires— "Arbitration Court" means the Arbitration Court established under this Part; "award" means an award made by the Arbitration Court; "Bargaining Unit" means a Bargaining Unit, formed or established under the Decree or under this Part, comprising at least 25% of workers employed by the same employer, and whose officers, executives, representatives and members shall be made up of the workers who are part of the Bargaining Unit;	ILO says it is an ILO principal to restrict essential services to services withdrawal of labour from which will endanger life, personal safety or health of population and not to industries which were put in Essential National Industries Decree. **Definitions** 1) There is no definition of bargaining unit in new Part 19 but attempts to prescribe requirements of a bargaining unit. The definition should be imported from ENID. 2) Definition of collective agreement is erroneous and confusing. Compare with definition of collective agreement in ERP 2007. 3) Disputes of interest should not include grievance matters. Dispute of interest

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
"Chair" means the Chair of the Arbitration Court appointed under this Part; "collective agreement" means an agreement as to disputes of interest; "Decree" means the Essential National Industries (Employment) Decree 2011; "disputes of interest" means matters or disputes arising between employers and trade unions or workers out of collective bargaining and pertaining to the relations of employers and workers which are connected with the employment or non-employment or the terms of employment, or the conditions of work of any person, but shall not include matters concerning dispute of rights including the following— *(a)* dismissal or termination of any worker; *(b)* discrimination within the terms of Part 9; *(c)* duress in relation to membership or non-membership of a union; *(d)* sexual harassment in the workplace within the terms of section 76; or *(e)* worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer; "employer" means any person who employs another person in an essential service and industry under a contract of service and includes— *(a)* the Government; *(b)* a statutory authority; *(c)* a local authority, including a city council, town council or rural authority;	deal with union matters only i.e disputes between employers and unions. 4) Employer – it is not clear which group (e) and (f) is meant to capture. A manager for example could be an employer and employee at the same time.

ERP (AMDT) BILL 2015 (Proposed amendment)	Summary of suggested changes received by the Committee
(d) Government commercial company, as prescribed under the Public Enterprise Act 1996; *(e)* a duly authorised agent or manager of an employer; and *(f)* a person who owns, or is carrying on, or for the time being responsible for the management or control of a profession, business, trade or work in which a worker is engaged;	
Jurisdiction over trade disputes and employment grievances 188.—(1) All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part. (2) The Employment Tribunal and the Employment Court established under Part 20 shall not have any jurisdiction with respect to trade disputes in essential services and industries. (3) For the avoidance of doubt, Part 20 shall not apply to essential services and industries, except as provided under subsection (4). (4) Any employment grievance between a worker and an employer in essential services and industries that is a not a trade dispute may be lodged by the worker or a by the worker's representative with the Employment Tribunal, and any such employment grievance shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed with the Employment Tribunal within 21 days from the date when the employment grievance first arose, and— *(a)* where such an employment grievance is lodged by a worker in an essential service	Section 188(4) – Grievance should first go to mediation. See section 110(3) for instance. Therefore the requirement to file within 21 days seems restrictive. ENID provided that bargaining unit can be formed by at least 75 workers employed by the same employer who perform similar type of work. Will the new bargaining unit have the same requirement? That would mean groups which do not have 75 members will be left out. If 25% of the group wants to form a BU they can with secret ballot. What happens to the remaining 75%? Are they required to be

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and industry with the Employment Tribunal, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and *(b)* where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Promulgation.	members of the BU without choice or can they either remain neutral or join a trade union? It brings us back to the question should Trade Unions and BUs co-exist or should BU be done away with? ILO sees the existence of BU as an impediment or restriction to joining trade unions.
Eligibility for membership of panels 191E.—(1) Subject to subsection (2), a person who is a worker shall not be eligible to be a member of the Employer Panel. (2) A person shall be eligible to be a member of the Employer Panel if he or she is nominated by the Minister responsible for public service. (3) A person who is an employer or a director of a company which is an employer or is employed by an organisation of employers shall not be eligible to be a member of the Worker Panel. (4) A person who— *(a)* is an undischarged bankrupt; *(b)* is mentally disabled and incapable of managing himself or herself or his or her affairs; *(c)* is not a citizen of Fiji; or *(d)* has within the previous 3 years been convicted of any offence under any law for which maximum penalty is a term of imprisonment of 12 months or more, shall not be eligible for appointment to a panel.	Section 191E – eligibility for panel selection is limited to citizens. Should it be open to residents too? What about expatriate workers?

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(5) The Minister may exempt any person from subsection (1) or (3).	
Representation in negotiations 191X. Notwithstanding the provisions of any other written law, a person may not in negotiations under this Part— *(a)* make, offer or receive any proposal on behalf of or purport to act on behalf of a trade union or employer; or *(b)* be present at any meeting at which employers or trade unions negotiate, unless he or she is a person who is an officer or representative of the trade union or of the employer, and shall not include any legal practitioner.	Section 191X – Why keep legal practitioners out? The trade union might have experienced unionist fighting a cause and the employer might be new to the dispute. Without a lawyer there might be unequal bargaining power.
Contents of award 191AI. In making an award in relation to a trade dispute, the Arbitration Court— *(a)* shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute but may include in the award any matter or thing which it thinks expedient for the purpose of settling the trade dispute or of preventing further trade disputes and may in fixing wages, salaries, allowances or other remuneration give effect to its decision by prescribing time rates, piecework rates, salary scales, bonus payments, severance pay, or retirement allowances or by such other prescription as it considers appropriate; and *(b)* may include provisions requiring an employer bound by the award to keep records relating to workers entitled to the benefit of the award and prescribing the	Section 191AI – If the Arbitration Court can grant relief apart from the relief claimed, without right to appeal it may become unfair on the party which did not submit on it.

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form of such records and the information to be recorded. *Award to be final* 191AN.—(1) Subject to the provisions of this Part, an award shall be final and conclusive. (2) No award or decision or order of the Arbitration Court or the Chair shall be challenged, appealed against, reviewed, quashed, or called in question in any court or tribunal and shall not be subject to any Quashing Order, Prohibiting Order, Mandatory Order or injunction in any court or tribunal on any account. *Exhibition of award* 191AQ.—(1) An employer bound by an award shall cause true copies of the award and of all orders varying the award, or true copies of the award as varied from time to time, to be exhibited and kept exhibited— *(a)* at or near the entrance to any premises in or upon which workers bound by the award are employed by him or her; and *(b)* at such other place to which workers employed by him or her have access as may be specified in the award, in such a position as to be conspicuous to and easily read by them. (2) An employer who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000. *Representation before Arbitration Court* 191BC.—(1) In proceedings before the Arbitration Court, a trade union or an employer may be represented by an officer or representative of the trade union or of the employer but shall not be represented by a legal practitioner except in proceedings under section 191AV or by leave of the Arbitration Court in	Section 191AN – not being able to challenge the award seems to be unconstitutional if access to higher courts are restricted. 191AQ – Exhibition of award is not practical. An award may be several pages long. To display it near the entrance of premises may be difficult especially with Banks which have many branches and government departments. 191BC – again prohibition on legal practitioners seem unworkable for the reasons in para 25 above.

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proceedings in which the Attorney-General has intervened. (2) In this section, "officer", in relation to a trade union, includes for the purposes of any proceedings before the Arbitration Court a person appointed by the body, by whatever name called, to which the management of the affairs of the trade union is entrusted, to represent the trade union in those proceedings. *Questions of law* 191BD.—(1) The Arbitration Court may refer a question of law arising in relation to any trade dispute or matter to the Solicitor-General for his or her opinion. (2) Before referring a question of law to the Solicitor-General in accordance with subsection (1), the Arbitration Court shall inform the parties to the trade dispute or matter, in relation to which the question arises, of the question which it proposes to refer and allow the parties a reasonable opportunity to make written submissions relating to the question. (3) Submissions made in accordance with subsection (2) shall be referred to the Solicitor-General and the Solicitor-General shall, after considering those submissions, furnish his or her opinion to the Arbitration Court. (4) Notwithstanding a reference of a question of law to the Solicitor-General (not being a question as to whether the Arbitration Court may exercise powers under this Part in relation to a trade dispute or matter), the Arbitration Court may make an award or order in relation to the trade dispute or matter in which the question arose. (5) Upon receiving the opinion of the Solicitor-General, the Arbitration Court— *(a)* may, if it has not made an award or order in the trade dispute or matter in which the	191BD – the requirement to follow legal advice from the SG appears to infringe the independence of the Arbitration Court. Might be better to refer to Chief Justice for advice or the High Court.

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question arose, make an award or order not inconsistent with the opinion; or *(b)* shall, if it has made an award or order in the trade dispute or matter, vary the award or order in such a way as will make it consistent with the opinion. *Contempt by witness* 191BI.—(1) A person who has been summoned to appear, or who has appeared, before the Arbitration Court as a witness and who without just cause, proof whereof shall be upon him or her— *(a)* disobeys the summons to appear; *(b)* refuses or fails to be sworn as a witness; *(c)* refuses or fails to answer any question which he or she is required by the Arbitration Court to answer; or *(d)* refuses or fails to produce any book, paper, document or thing which he or she is required by the Arbitration Court to produce, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 12 months, or to both. (2) A reference in subsection (1) to the Arbitration Court shall be read as including a reference to a person authorised in accordance with section 191BE to take evidence on behalf of the Arbitration Court. *Strikes in essential services* 191BN.—(1) If a strike is contemplated by a trade union in respect of workers in or in control of, an essential service and industry in pursuance	191BI – fine for non-attendance of witnesses seem harsh. $20,000 fine and 12 month imprisonment?

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of a dispute between the workers and their employer, the trade union must— *(a)* conduct a secret ballot in accordance with section 175; and *(b)* in writing, give at least 28 days notice of strike to the employer and serve a copy of the notice to the Arbitration Court. (2) The notice of strike must— *(a)* be signed by the secretary of the trade union; *(b)* state the date and time on which the strike is contemplated and the place or places where the contemplated strike will occur; *(c)* state the category of workers who propose to go on strike; *(d)* state the estimated duration of the strike; and *(e)* be served by hand, registered mail or courier. (3) If— *(a)* the notice of strike does not comply with this section; or *(b)* the strike does not take place as notified under subsection (2), the notice is deemed not to have been made and any strike undertaken under the notice is unlawful. the Minister may refer the trade dispute to the Arbitration Court. (2) If a trade dispute is referred to the Arbitration Court under subsection (1), the Minister must order the discontinuance of the strike or lockout.	Section 191BN – (2)(d) – reference to estimated duration of strike seems puzzling.

3.8 Conclusion

The Committee after hearing the submissions, taking into account the international requirements and unique local situations, doing its own research and taking into consideration all matters, have produced this report.

The amendments to the Bill have been considered in detail. Along with all other amendments the concepts of Arbitration Court, Bargaining Units, Disputes of Interest, Employment Grievance, Essential Service and Industry, Trade Unions and Workers' Rights have been thoroughly examined.

The Committee would once again like to thank the Parliament for referring the Bill to this Committee for scrutiny, the submitters for their contribution and all other persons and entities which have, in one way or another, assisted in the process. The amendments and the report are a result of careful consideration and the Committee respectfully submits its report to the Parliament for its consideration.

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