

**STANDING COMMITTEE ON
JUSTICE, LAW AND HUMAN RIGHTS**

**[Verbatim Report of Interview with the
Fiji Law Society (FLS)]**

HELD IN THE

COMMITTEE ROOM (EAST WING)

ON

MONDAY, 15TH APRIL, 2019

VERBATIM NOTES OF THE MEETING OF THE STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS HELD AT THE COMMITTEE ROOM (EAST WING), PARLIAMENT PRECINCTS, GOVERNMENT BUILDINGS ON MONDAY, 15TH APRIL, 2019 AT 3.20 P.M.

Interviewee/Submittee: Fiji Law Society (FLS)

In Attendance:

- | | | | |
|----|----------------------|---|------------|
| 1. | Mr. Aminiasi Vulaono | - | Counsellor |
| 2. | Ms. Marica Hussein | - | Member |
| 3. | Ms. Laisani Macedru | - | Member |
| 4. | Ms. Munifa Manuelli | - | Secretary |

MR. CHAIRMAN.- On behalf of the Committee on Justice, Law and Human Rights, I would like to welcome the Team from the Fiji Law Society (FLS). Thank you very much for availing yourselves at this hour in such short notice with regards to the Public Enterprises Bill 2019. I would like to introduce the Members of the Committee.

(Introduction of Honourable Members by Chairman)

I will be chairing this Committee and with us we have Madam DSG, who is sitting in as a technical advisor to this Committee.

(Introduction of Secretariat staff by Chairman)

Without further delay I believe you have two presentations, so you can introduce your team and from there, you can take the floor and do your presentation. Thank you very much.

MR. A. VULAONO.- Thank you, Mr. Chairman. Firstly, Madam President of the Fiji Law Society, Ms. Laurel Vaurasi, do send her apologies, she is currently in a trial in the High Court and wishes to be here. Unfortunately, the Judge requests her, so for that we do apologise.

(Introduction of Team members by Mr. Vulaono)

For our submission, Mr. Chairman, you will see that there are actually two Bills and our understanding was that, we are given the opportunity to present on two. For that, we thank the Committee for the time that it has allocated to us.

To start off, I think the Bill that perhaps, requires the immediate attention is the Public Enterprises Bill.

On short notice, we have prepared this submission which I hope that is of assistance to the Committee for their consideration. As far as FLS's concern for the Bill generally, we agree that for any law, in fact, it needs to be updated to stay in trend - global trends, political environment, social environment and economy. For that, we believe that is the purpose for this Bill and if that is the purpose, then we fully agree that the law needs to be updated in that regard.

On the Bill itself we stand to be corrected, but we believe that the whole principle of the Bill is the idea that public enterprises are to be run like a private company for profits and perhaps, give competition in the market as well, but with a slight difference that it's the taxpayers who are the majority of shareholders.

From that understanding is what our comments are based on, so briefly we will just go through the comments that we have had which was generally in Part 3. Now, I understand that the Bill is stating that no matter what, the State is not binding for any action whatsoever under Part 3, Clause 12

We are of the view that perhaps, that should be reconsidered, especially if we read the whole Bill, there is a lot of control decisions that are made by the State in that regard. If we are to encourage investors, encourage competition or in fact dealings with private sector, you need to give that confidence that whoever is a decision making on your counterpart there should be avenues that you should address your concern to. So for that Act, it perhaps will affect the confidence.

I might understand why the need that the State should not be held liable or be bound, but if the State as it is, is participating a lot in the operation of enterprises, perhaps on the same level, then there should be some of form of accountability towards the State.

The second part that we have stated in our submission is in regards to Part 4 - Non Commercial Obligations (NCOs). Reading through the Bill, there is not a definition of what a NCO really is. As an example, I would assume that for private companies or private law firms, this would be the same as, for example, *pro bono* or things that you do, not so much of profit but for the interest of the public. That is what we are assuming this NCO refers to.

Our suggestion is that the Bill must define what a NCO is. At the moment, I think anything that is not commercial may come under this heading of NCOs. As a suggestion, I think it may be considered that it should be limited perhaps, to public interest, for example, Fiji Energy Limited - commercial obligation for them is to assist after a natural disaster has occurred in Fiji. In those basis we would understand the need why such enterprises should participate in NCOs. But as it is, those are not well defined or limited and actually it can just mean anything.

The reason why we said that it must also be limited is because at the end of the day again, we must consider that it is taxpayers' money and some sort of control has to be put in place on that basis.

In terms of the NCOs, I understand that it is commendable that the public enterprise may refuse any proposal from the Minister in charge of this Act for any requirements for NCOs and then the requirement goes that the Minister and the enterprise enter into a negotiation based on good faith, which is commendable.

But the concern is that, perhaps rethink then in terms of the potential conflict, in the sense that the Minister appoints the Board of the enterprise so in terms of negotiation perhaps, while there may not be any but from the public view there might be, it is nice to see that there should be a leverage or equal playing ground in terms of negotiation. So, that is the suggestion in terms of the NCO.

Part 6 is with regards to the approval of the Board of Directors. From the way it is written, I believe that it is simply with the Minister in control of the Bill that appoints it with the approval of the Board. What we recommend here is that, perhaps the approval of the Cabinet or a Board be approved on that, especially in enterprises that are not fully owned by the State. It is important to also have the

views and says of other shareholders, perhaps minority directors for those minority shareholders is what we recommend, is that of an appointment based only by the Minister.

From the appointment of the Board of Directors, unlike the Companies Act, we do not see any provisions for conflict of interest for anyone that is appointing another one. On those basis, the ministers right down to the Board of Directors, we recommend that there always should be a conflict of interest and if there is such, then perhaps consider removing one from the process of appointment.

The fourth comment that we have is on Clause 55. It is interesting that for public enterprises, we note that Directors and Chief Executive Officers may be indemnified by the State in their capacity as Director or CEO. If the intention of the Act is run the public enterprise the same as a private company, I think that, that indemnification clause should perhaps, be removed from the Act on the basis that the CEOs of public enterprises should be subject to more standard and liability of Directors than private company under the Companies Act.

Under the Companies Act, private Directors or CEOs do not enjoy such indemnification by the company and so on the basis, I think, Directors and CEOs for public enterprises should be on the same level as the private companies. And I think without the comfort of the fact that you might be indemnified, it may actually ensure more diligent on the Directors and CEOs in terms of performance of their duties in the public enterprise.

Suggestion 5 is in regards to Clause 62, the Minister may direct any public enterprise to disclose what information whatsoever in the affairs of the public enterprise or the subsidiary, and the compliance of such direction does not give rise to any civil or criminal liability.

Now, we are of the view that if such direction should be given, it has to be on certain grounds that are acceptable. At the moment, it is so wide whereby the Minister is not required to give any reason, as long as the Minister requires it, the public enterprise has to provide it and the information that can be required is not limited.

In terms of private companies, we all know that there are information within company transactions, with their competitors or their traders that your business partners in terms of other entities that you deal with may wish to be held with a little more sensitivity. The Act does not limit the Minister, for example, if the Minister requests, I think the Act then should also give the duty of confidentiality on the Minister to maintain that information in confidence. But at the moment, the Minister can ask for any information for whatever reason, without the need to keep it confidential, in terms of the private sector, in terms of driving confidence in business dealing with investors that might affect those efforts in that regard.

The last comment that we have regarding public enterprise is generally looking through the Bill, there is substantial powers and authorities that is vested to the Minister under the Bill. Perhaps, there is an intention that but we recommend that a public enterprise should, as far as we can, leave it to the public enterprise to run on their own (sort of) profit, again without much interference from the Government, except for regulatory reasons for purposes that they conduct themselves in ethical manner or they conduct themselves in ways that does not breach the Fijian Competition and Commerce Commission's regulation or fair trading.

However, in terms of the operation and the daily running of the business, it seems that the Minister has a lot of say in that. So, in that regard we would recommend that perhaps, we should

encourage that the public enterprise entity should run on their own, in terms of strategies, business plans, et cetera. At the moment, I think, any plans whatsoever has to obtain the approval of the Minister.

If there is such a thing, at the end of the day, the State is the majority shareholder and on that basis, perhaps if then approval should be obtained by the Cabinet or a body that is a representative of all stakeholders of the public enterprise, instead of it being vested in the Minister alone. That also in our opinion generally would create confidence and also for the purpose of transparency and accountability that members of the public have full faith in the running of such enterprises.

That, Mr. Chairman, is our brief submission on the Bill which I believe is also just 24 pages. Generally, we agree that any laws of the country should be updated but it is s these points that the Society feels that the Committee should consider prior to finalising the Bill. Unless there any questions from the floor, our team would be happy to address.

MR. CHAIRMAN.- Thank you, Sir, for that presentation. I believe we deal with one and then we actually go to the other one, so right now, I will actually open the floor for questions and answers from our Members.

With regards to what you have actually mentioned, these points are noted and further deliberation will be done by the Committee once we are at the deliberation stage. Just a few comments with regards to Non Commercial Obligations, as far as I see it and this is my opinion actually and having dealt with, I think now seven or eight companies that are actually listed under this Bill, their NCO is very different to each other.

I will just give an example. We were at Airports Fiji Ltd (AFL), the only airport in Fiji that actually makes profit for AFL is the Nadi International Airport. They regard all other airstrips and airports within Fiji to be their social obligation because they do not get anything out of it. Whereas, for example, Fiji Rice Ltd was over here a while ago and according to them, their social obligation is collecting paddies for free all around Fiji. So defining what it is in each and every entity, I think would be a difficult task.

What is actually happening is they actually decide, the Board determines and in conjunction with the Minister, they actually agree that these are some of the social obligations that we are going to take, or the Cabinet decides that this is the social obligation you would actually expect a particular public enterprise to undertake, which is then passed on to the Board and for them to actually act on it, that these are some of the things that is going to be done.

Another example would be Fiji Broadcasting Corporation (FBC), their social obligation is with regards to something to do with the children, their welfare, et cetera. They regard that as their social obligation. So some of them might actually be directly related in terms of their revenue but some are non-tangible, for example, FBC, what they are selling is airtime and airtime equates to dollar value.

However, for AFL, running, for example, Labasa Airport is costly to them but still it is part of their social obligation. So different modes are there as to how that social obligation is actually defined in different enterprises. So I believe that is one of the reasons why it is not actually specified because it is totally dependent on Cabinet and the Board on which way they want to do and what are their social obligations, which differ from entity to entity.

MR. A. VULAONO.- When you are explaining, Mr. Chairman, it makes it clearer. I think maybe then the provision should have been, instead of non-commercial, should perhaps, have 'social obligations of public enterprises'.

MR. CHAIRMAN.- But as I stated, for some of them, it is tangible and some of them, it is non-tangible, so that is another thing. Another thing that we are receiving at the moment in submission is, some of them are saying that it should be part of their dividend because that is costing them to actually carry out this NCO. And for some, just because it is non-tangible they are not actually directly because their revenue is not involved, but then it equates to dollar value.

For Fiji Rice Limited, according to them their main business relies on the paddy. If the farmers are not providing them with the paddy, they just sit there and wait. So, they actually go out and collect paddy free of charge, and that is going around the whole of Fiji, and then they take it from Viti Levu all the way to Dreketi, to process it.

MR. A. VULAONO.- It is a challenge.

MR. CHAIRMAN.- It is a challenge, the way it is, but I believe the law actually does define that all these NCO needs to get up a prior approval from Cabinet. So, Cabinet actually approves and it is not just the Minister, who actually comes up saying that this is a particular obligation that needs to be followed by a particular entity.

With regards to the non-binding, I stand to be corrected on this but all the Boards are independent. Government actually does not interfere in the running of the Board and in the running of the company as well. The Boards are supposed to be the ones to decide how, through the CEO, these entities are supposed to be run. So, I believe that, that is why it is not binded because all the decisions made by the Board rest on them. So, if they make a blunder, they need to rectify it.

They cannot actually pass that to the Government because it was discussed in length this morning as well, whether the Boards are independent or not and majority of the Board members were actually present, they stated that they are independent. They do not have those interference from the Government has to how they should be running the public enterprise. Yes, the policies are there but the operation lies with the Board and the CEO.

I think Part 6 – Division 1: Appointment of board of directors, the Minister with approval of the Prime Minister appoints the Board, the way I see it and again, I stand to be corrected after deliberation, why do we have Prime Minister? So that the Minister does not actually appoint himself, the Prime Minister is actually there to actually govern whether there is any conflict or not.

This also coincides with what you have actually stated that if there is any conflict of interest, it needs to be declared. That would be covered by the Code of Conduct Bill which is supposed to come into an Act. So, if the Minister or Prime Minister has a direct conflict they need to declare that interest before they actually endorse because if they do not and someone complaints, there will be a breach of the Code of Conduct.

MR. A. VULAONO.- That is encouraging, Mr. Chairman.

MR. CHAIRMAN.- Indemnity Liability, I believe that is something that we need further discussion on. I do not have any direct or indirect explanation to that at this point in time.

As far as Clause 62 is concerned, these disclosures I believe, are those information which should be readily available to the general public, for example, a financial statement by the law needs to come out on 31st January every year. If it does not come out by 31st January, then the Minister has the powers to direct them in conjunction with the Board, that this information needs to come out. Not personal information, for example, if someone has been awarded a contract, but you need to actually give the information as to how much the contract value was. Those kind of information.

MR. A. VULAONO.- Right.

MR. CHAIRMAN.- But as you have stated, because this is public, this is taxpayers' money, it belongs to taxpayers, so any information that is supposed to be released to the public should be a public information and if it is not released by these entities, the Minister steps in to ask them to actually release this information. But then again, the Minister has to go with the Board. He has to actually discuss this with the Board first before this kind of information are released which is stated, I think, in Clause 62(3), which states, and I quote:

“The Minister must –

a) consult the board before giving a direction under subsection (1)...”

If that is what you are actually referring to.

MR. A. VULAONO.- Our reading of it, it is just that perhaps any specified information or documents, it should be defined as those that ought to be released public anyway. At the moment it does not give any definition, I think it is more of a technical drafting rather than...

MR. CHAIRMAN.- Yes, you have stated, “not give rights to any civil or criminal activity”, so any personal information or confidential information, the Minister cannot actually ask them to release because the contractor can take the entity to Court, if those information are not supposed to be released in the first place.

As I said, he cannot actually ask the entity to release the value of the contract because that will be a breach of contract itself and confidentiality, which will actually give rise to a civil or a criminal case in future. So, he cannot ask for those kinds of information to be released to the general public.

I think it is just a checklist for the Minister to see that the information that are supposed to be released to the general public is released in a timely manner.

MR. A. VULAONO.- Understood, Sir.

MR. CHAIRMAN.- Honourable Members, the floor is open.

HON. N. NAWAIKULA.- First, I want to thank the Fiji Law Society. Your submission has always been very comprehensive, specific and very useful to our debate in Parliament, and to note also that it has been useful because a lot of the points that you raise now and previously, we refer it up for clarification to the Drafters.

I understand this Bill is like this, there are 11 public enterprises altogether and some of those are incorporated by way of an Act. The latest ones, for example, EFL, they form a company and it

becomes public only because Government owns more than 50 percent of it. The purpose of this is to ensure that, when you become a company, you become a bottom line thing, you just think about your dollars and cents. So, this gives it to some kind of responsibility and I think the gist of it comes under Clause 2 where things are called non-commercial.

I think the correct term you said is “social”, so that is to ensure that those companies do not forget their social responsibility. But the question that I wish to ask is, what is your view in relation to some other companies who will still be more regulated than these, for example, Fiji Hardwood Corporation Limited (FHCL). Their regulation is limited to this but in their Act, they still have or are subjected to their Council.

So, in your view, should those remain or should this Bill have a uniform application to all things that turned public enterprise?

MR. CHAIRMAN.- Just to add on that, I think what the Honourable Member is referring to is your last Clause, to have a committee to oversight the Minister. What he is referring to with regards to FHCL is, there is a higher Commission to which, Honourable Nawaikula has some reservations because we have been having some discussions with regards to that. So, what is your opinion, should we actually go with the Commission then why do we actually need to have the Board if there is another....?

MR. A. VULAONO.- If we have to address that, Sir, my opinion will come back to how those enterprises are established or structured. For these ones, we have to make up our mind. If it is a Board of Directors and CEO, leave it at that, otherwise we think that even in private companies, the CEO, Directors and then further a Commission it kind of affects, in my opinion, the general running of the company in the sense that there is a lot of bureaucracy that affects the running of the company. So, again, the way I read this Bill is that, it is (sort of) the Government’s contribution or idea towards the private sector. On that basis, if that is the purpose of it, run it as such. If there is such another body like the off stated FHCL that structurally or there is an intention behind it that is different from this, that is again for the Parliament to debate on. But I do think that if there is a Board of Directors, and then there is another Commission, it sort of confuses the hierarchy because basically, I think everyone knows that everything stops with Board of Directors.

In terms of a Commission, I would think perhaps, not so much of the running of the company certainly, if there is a Board of Directors that exists, perhaps an oversight in terms of the general performance, et cetera.

But in terms of their running, I am not too sure as to otherwise, the CEO too might get confused on who to listen to, et cetera. Again, we would reserve our comment until we are sure as well in terms of the structure of each and everyone and the intention and preamble behind every corporation or entity that will be, I think, a step that we will take from there.

MR. CHAIRMAN.- Any other comments?

HON. M.D. BULITAVU.- Thank you, Honourable Chairman. Thank you for that presentation, it was quite specific and you have highlighted some very interesting points that the Committee will deliberate upon, and also will refer to the Drafters in terms of what your submission has sought.

You have raised a very important issue, in terms of oversight, on how the authority in the Bill is centralised and how that authority needs to have some checks and balances within that. That is what the Bill proposes.

My question is, given that most of you in the Fiji Law Society do private practice and you deal with clients who somehow have engaged with certain private enterprises in their own dealings, as you have said red tape and also bureaucracy, as well as the approval that takes time when you thought most of these have corporatized or privatised or things should be much faster.

But it seems that the control of Government in decision making sometimes causes many delays, given that the set of procedures that you have rightfully said in the Bill, that goes from this desk to that desk, a client could be waiting for longer, whether you can talk about those experiences as a background to help the Committee in its deliberation when we go into final deliberation on the various Clauses, on how this particular law will affect citizens who are out there? They are also taxpayers as you have rightfully said and also represented by the Government in its more than 51 plus one shares that they own in this company. How are these delivered? And if you have got cases, if that could be related to the Committee.

MR. A. VULAONO.- I am not too sure whether I or any other members will be able to disclose personal experience due to private confidentiality but generally though, from reading the Bill, I think the general principle is that, the difference between public enterprise and private enterprise, of course, is the use of taxpayers' money and on that basis, obviously we would agree that a lot of checks and balances should exist in the operation, but then it is a matter of balancing as well. At the moment, with the utmost respect, reading through the Bill of the public enterprises and knowing full well that in any commercial setting time is of the essence, perhaps it can be if there is any duties that require the decision of the Cabinet or Ministers that might hinder those such decisions, in essence, I do agree that any delay would hinder progress.

At the moment, our practical example is that whoever the Minister may be under the Bill, if he is out of the country and there are deals that need to be addressed or transactions that, of course, may hinder any progress in the general profitable performance of the public enterprise. But, as I have stated before, we should encourage that the public enterprise runs on its own and we are encouraged by the comment by the Chairman that the Board of Directors are completely different and on that assumption that decisions are made by the That is how it should be run but if there is a lot of bureaucracy, et cetera, obviously it will delay progress.

From our experiences in terms of the private sector, yes, there can be some improvements in areas, it does affect that. Some more delays are longer than the others, but I believe that, that is why this Bill is here for, in the sense that everything we hope that those are improved and perhaps, this Bill in terms of the public enterprise is a step forward in improving on that, if there is any improvement that is required.

HON. N. NAWAIKULA.- What is your view on membership of civil servants not being allowed to be Board Members?

MR. A. VULAONO.- In terms civil servants not being allowed to be Board of Directors, I think you have to refer to the Code of Conduct for Civil Service. If that prohibits it, then that is the starting point for all of us.

And in terms of the Board of Director generally, it will be commendable that if the Board of Directors is representative of all stakeholders, whether the Minister may choose from the private and depending on what the public enterprise is, it is always healthy, of course, to bring different expertise into the Board. But, as far as the civil servant is concerned, I am not too sure whether it will be completely free from any conflict of interest.

Again, it just comes under the Civil Service Code that if it is allowed by all means, otherwise, at the end of the day, who can bring contribution to the Board of Directors, ought to be welcomed in terms of the progress of the company.

MR. CHAIRMAN.- Thank you, Honourable Members. I believe that concludes the presentation with regards to the Public Enterprises Bill.

The Committee adjourned at 3.59 p.m.