

PUBLIC ENTERPRISES BILL 2019
(BILL NO. 4 OF 2019)

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BILL NO. 4 OF 2019**A BILL****FOR AN ACT TO PROVIDE FOR THE REGULATION AND GOVERNANCE
OF PUBLIC ENTERPRISES AND FOR RELATED MATTERS**

ENACTED by the Parliament of the Republic of Fiji—

PART 1—PRELIMINARY*Short title and commencement*

- 1.**—(1) This Act may be cited as the Public Enterprises Act 2019.
- (2) This Act comes into force on a date or dates appointed by the Minister by notice in the Gazette.

Interpretation

- 2.** In this Act, unless the context otherwise requires—
- “accounting standards” has the meaning given in section 3 of the Companies Act 2015;
 - “board” means the directors of a public enterprise;
 - “chief executive officer” means the person appointed under section 51 as the chief executive officer of a public enterprise;

“child” means a biological child, an adopted child or a stepchild who is—

- (a) under the age of 18 years; or
- (b) over the age of 18 years and is dependent on his or her parent for support;

“civil servant” means a person employed in the public service as defined in the Constitution of the Republic of Fiji, whether on a full-time or a part-time basis;

“company” has the meaning given in section 3 of the Companies Act 2015;

“constitution”, in the case of a public enterprise that is a company, means its articles of association;

“director”, in relation to a public enterprise that—

- (a) is a company, has the meaning given in section 3 of the Companies Act 2015; and
- (b) is not a company, means a member of the governing body of the public enterprise;

“entity” includes a statutory entity, corporation, company or other body corporate;

“executive officer” means—

- (a) the chief executive officer, however described; and
- (b) any other senior employee with responsibility for management of the entity;

“financial year” means a period that is a financial year for accounting purposes for a public enterprise;

“Minister” means the Minister responsible for public enterprises;

“Ministry” means the ministry responsible for public enterprises;

“non-commercial obligation” means the specified service or activity referred to in a non-commercial obligation agreement;

“non-commercial obligation agreement” means an agreement referred to in section 21 between the Government and a public enterprise for the undertaking of a non-commercial obligation by the public enterprise;

“primary objective” has the meaning given in section 18;

“public enterprise” has the meaning given in section 8;

“public enterprise principles” means the principles set out in section 6;

“spouse” includes a *de facto* partner;

“statement of corporate intent” means the statement of corporate intent required by section 22;

“subsidiary” has the meaning given in section 3 of the Companies Act 2015; and

“working day” means any day other than a Saturday, Sunday or public holiday.

Purpose

3. The purpose of this Act is to provide for the regulation and governance of public enterprises according to public enterprise principles.

Application

4.—(1) This Act applies in addition to the Companies Act 2015 and any other written law that establishes an entity that is a public enterprise but prevails in the event of any inconsistency.

(2) Anything done under this Act counts towards compliance with any other written law and anything done under any other written law counts towards compliance with this Act.

Act binds the State

5. This Act binds the State.

PART 2—PUBLIC ENTERPRISE PRINCIPLES

Public enterprise principles

6. For the purposes of this Act, the public enterprise principles are—

- (a) the principle of commercial objective where a public enterprise must operate on a commercial basis that is efficient and profitable;
- (b) the principle of measurable performance where a public enterprise must identify its business goals;
- (c) the principle of responsible management where the management of a public enterprise must be competent, honest and accountable;
- (d) the principle of transparent performance where a public enterprise must report its performance fully, publicly and in a timely manner; and
- (e) the principle of monitored performance where a public enterprise must be subject to rigorous monitoring, approval and review.

Act must be applied in accordance with public enterprise principles

7.—(1) This Act must be applied in accordance with the public enterprise principles.

(2) Any person who performs any function or exercises any power under this Act must do so in a manner intended to advance the public enterprise principles.

PART 3—ESTABLISHMENT OF PUBLIC ENTERPRISE

*Division 1—Nature of public enterprise**Public enterprises*

8.—(1) Subject to subsection (2) and section 9(1)(b), a public enterprise is an entity controlled by the State and that is—

- (a) at the commencement of this Act, specified in Schedule 1; or
- (b) designated as a public enterprise under section 9(1)(a).

(2) A public enterprise must be one of the following—

- (a) a company; or
- (b) an entity established by a written law.

When Minister may designate entity as public enterprise

9.—(1) Subject to the approval of Cabinet, the Minister may, by notice in the Gazette—

- (a) designate an entity as a public enterprise if the Minister considers that it is in the public interest that the entity is governed by the public enterprise principles; or
- (b) revoke the designation of an entity as a public enterprise,

effective on the date specified in the notice.

(2) The Minister must, by the same notice referred to in subsection (1), amend Schedule 1 to reflect the designation or revocation.

Constitution of a public enterprise must be consistent with this Act

10. The constitution of a public enterprise must be consistent with this Act and is void to the extent of any inconsistency.

Meaning of State control

11. For the purposes of this Act, unless the context otherwise requires, an entity is controlled by the State—

- (a) in the case of a company, if the State—
 - (i) holds at least 50% of the shares of the company;
 - (ii) has the power to exercise, or control the exercise of, voting rights attached to at least 50% of the shares of the company;
 - (iii) has the power to dispose of, or control the disposition of, at least 50% of the shares of the company; or
 - (iv) has the power to appoint a majority of the persons who are directors of the company; and

- (b) in the case of an entity established by a written law that is not a company, if the State—
- (i) has the power to appoint a majority of the persons who are directors of the entity;
 - (ii) must consent to or approve the appointment of a majority of the persons who are directors of the entity; or
 - (iii) otherwise has the power to determine the outcome of decisions about the entity’s management or financial and operating policies.

State not bound by public enterprise act or transaction

12. No act or transaction by a public enterprise or its subsidiary binds the State, or creates a liability on the part of the State, unless—

- (a) the State agrees to be bound or liable; or
- (b) the State is expressly bound or liable by a provision of any written law.

Division 2—Shares and securities

State may acquire shares and securities issued by public enterprise

13. The State may acquire shares and other securities issued by a public enterprise.

Restrictions on dealing with State-owned shares

14.—(1) A share or other security that is issued by a public enterprise and held by the State—

- (a) must not be subject to a security interest; and
- (b) unless approved by Cabinet, must not be subject to a trust.

(2) A security interest or trust granted or created by the State in contravention of subsection (1) is void.

Division 3—Powers and capacity

Powers and capacity of public enterprise

15. Unless otherwise provided for in this Act, any other written law or the constitution of the public enterprise, a public enterprise has full powers and capacity to do any act for the purpose of performing its functions.

Division 4—Joint ventures and subsidiaries

Restrictions on joint ventures

16. A public enterprise must not be a party to an agreement to form a joint venture that is inconsistent with this Act or the constitution of the public enterprise.

Subsidiary must provide information

17. The subsidiary of a public enterprise must provide the public enterprise with—

- (a) all information and documents that are necessary or expedient for compliance by the public enterprise with its obligations under this Act in relation to the subsidiary; and
- (b) any other information that the public enterprise requests in writing.

PART 4—PRINCIPLE OF COMMERCIAL OBJECTIVE

*Division 1—Primary objective**Primary objective of public enterprise is to be a successful business***18.—**(1) The primary objective of a public enterprise is to be a successful business.

(2) A public enterprise must conduct its business and operations with a view to being a successful business.

(3) A public enterprise is a successful business if it is at least as efficient and profitable as comparable businesses in the private sector.

(4) This section—

(a) overrides anything that may be contained in the constitution of the public enterprise or any written law that establishes an entity that is a public enterprise; and

(b) does not affect the validity or enforceability of any contract or other transaction entered into by a public enterprise.

*Public enterprise must give effect to statement of corporate intent***19.** A public enterprise must strive to—

(a) give effect to its statement of corporate intent; and

(b) ensure that it does not do anything that is inconsistent with its statement of corporate intent.

*Division 2—Non-commercial obligations**Public enterprise may undertake non-commercial obligation***20.—**(1) The Minister may propose in writing to a public enterprise that the public enterprise—

(a) provide a specified service or perform a specified activity; or

(b) cease to provide a specified service or perform a specified activity.

(2) The public enterprise must, within one month after receiving the proposal, give the Minister a notice in which the public enterprise—

(a) agrees to give effect to the proposal; or

(b) states, with reasons, that giving effect to the proposal would be inconsistent with the primary objective of the public enterprise.

(3) If the public enterprise gives the Minister a notice under subsection (2)(b), the Minister and the public enterprise must enter into good faith negotiations with a view to agree on arrangements under which the public enterprise may give effect to the Minister's proposal without acting inconsistently with its primary objective.

(4) If an agreement is reached under subsection (3), the arrangements for giving effect to the Minister's proposal are binding only if incorporated in an agreement that complies with section 21.

Requirements for non-commercial obligation agreement

21.—(1) A non-commercial obligation agreement—

- (a) must be in writing;
- (b) must have the prior approval of Cabinet;
- (c) if it provides for the public enterprise to provide goods or services, must—
 - (i) specify the goods or services, including any particular quantities;
 - (ii) specify an estimate of the annual total cost to the public enterprise for providing the goods or services and an estimate of the annual total revenue to be received by the public enterprise for doing so; and
 - (iii) specify how the performance of the public enterprise in providing the goods or services will be monitored and assessed;
- (d) must specify the funding or other resources to be provided by the State under the agreement;
- (e) may include provision for funding or other resources from the State to the public enterprise; and
- (f) may include any other matter, not inconsistent with this Act, that is agreed between the Government and the public enterprise.

(2) Money payable by the State under a non-commercial obligation agreement is payable out of the Consolidated Fund unless otherwise approved by the Minister responsible for finance.

(3) The obligations of the State and the public enterprise under a non-commercial obligation agreement are binding.

PART 5—PRINCIPLE OF MEASURABLE PERFORMANCE

Division 1—Statement of corporate intent

Public enterprise must have statement of corporate intent

22.—(1) A public enterprise must have, at the start of each financial year, a statement of corporate intent that specifies for the group consisting of the public enterprise and its subsidiaries if any, in respect of that financial year and the following 2 financial years, the matters set out in section 23.

(2) The statement of corporate intent must be approved by the board in accordance with section 24.

(3) The statement of corporate intent must be publicly available.

Content of statement of corporate intent

23.—(1) A statement of corporate intent must contain the following—

- (a) a description of the main business of the public enterprise;

- (b) a statement of the business goals of the public enterprise, demonstrating how those goals are consistent with its primary objective;
- (c) a description of the nature and scope of the activities that the public enterprise intends to undertake;
- (d) a statement of the strategies of the public enterprise for achieving its business goals and primary objective;
- (e) a statement or summary of the targets or benchmarks that the public enterprise will use to measure its performance against its business goals and primary objective;
- (f) a statement of the current or anticipated borrowing of the public enterprise;
- (g) a statement of the accounting policies that the public enterprise will apply for financial records and reporting;
- (h) a summary indicative balance sheet and profit and loss statement—
 - (i) for the public enterprise; or
 - (ii) if it has any subsidiaries, for the group consisting of the public enterprise and its subsidiaries;
- (i) a statement of the proposed dividend and distribution policy of the public enterprise;
- (j) a description of any non-commercial obligation and its impact on the forecasted financial outcomes of the public enterprise; and
- (k) any other matter that the Minister directs to be included in the statement of corporate intent.

(2) Notwithstanding subsection (1), the Minister may prescribe matters which a public enterprise may exclude from its statement of corporate intent.

Process for approval of statement of corporate intent

24. The board—

- (a) must give the Minister a final draft of the statement of corporate intent not less than 2 months before the start of the financial year to which it will apply;
- (b) must not approve or adopt the statement of corporate intent without first taking into account any comment by the Minister in relation to the draft statement of corporate intent; and
- (c) must give the Minister a copy of the statement of corporate intent within 10 working days of approving or adopting it.

Process for amendment of statement of corporate intent

25. A public enterprise may amend its statement of corporate intent at any time provided the board—

- (a) must give the Minister a final draft of the amendment not less than 2 months before the board approves or adopts it;
- (b) must not approve or adopt the amendment without first taking into account any comment by the Minister in relation to the draft amendment; and
- (c) must give the Minister a copy of the amendment within 10 working days of approving or adopting it.

*Division 2—Business plan**Public enterprise must have business plan*

26.—(1) A public enterprise must have, at the start of each financial year, a business plan that applies to that financial year and to the following 2 financial years.

(2) A business plan must—

- (a) contain the matters set out in section 27;
- (b) be consistent with the statement of corporate intent of the public enterprise approved or adopted by the board in accordance with section 24; and
- (c) be approved or adopted by the board in accordance with section 28.

Content of business plan

27.—(1) The business plan must contain information about the operations, strategic directions and financial projections of the public enterprise for the financial year and the following 2 financial years.

(2) The information required under subsection (1) must be sufficient for the Minister to conclude that the business plan demonstrates that the public enterprise will be a successful business in the financial year and the following 2 financial years.

Process for approval of business plan

28. The board—

- (a) must give the Minister a final draft of the business plan not less than 2 months before the start of the financial year to which it will apply;
- (b) must not approve or adopt the business plan without first taking into account any comment by the Minister in relation to the draft business plan; and
- (c) must give the Minister a copy of the business plan within 10 working days of approving or adopting it.

Process for amendment of business plan

29. A public enterprise may amend its business plan at any time provided the board—

- (a) must give the Minister a final draft of the amendment not less than 2 months before the board approves or adopts it;

- (b) must not approve or adopt the amendment without first taking into account any comment by the Minister in relation to the draft amendment; and
- (c) must give the Minister a copy of the amendment within 10 working days of approving or adopting it.

PART 6—PRINCIPLE OF RESPONSIBLE MANAGEMENT

Division 1—Appointment of board of directors

Board of directors

30.—(1) A public enterprise must have a board of directors.

(2) The board must be appointed by the Minister in writing subject to the approval of the Prime Minister.

(3) The Minister—

- (a) before appointing a person as a director, must be satisfied that the person to be appointed has the skills, knowledge and experience to assist the public enterprise in achieving its primary objective; and
- (b) must not appoint a person if the Minister has any reason to believe that he or she is not a fit and proper person to be appointed.

(4) In relation to any matter that is not provided for by this Act, a person appointed as a director holds office on the terms and conditions set out in his or her written appointment.

(5) The names of directors of a public enterprise must be publicly available.

Eligibility for appointment

31.—(1) A person is eligible for appointment to a board if he or she is eligible under the Companies Act 2015 to be appointed as a director of a company.

(2) A person is not eligible for appointment if—

- (a) the person is a Minister or a member of Parliament;
- (b) subject to section 68(2), the person is a civil servant in the ministry or department in the civil service with direct regulatory or operational responsibility for the principal business of the public enterprise;
- (c) the person ceases to be eligible under the Companies Act 2015 for appointment as a director of a company;
- (d) the person is convicted of an offence punishable by a term of not less than 12 months;
- (e) the person is convicted of an offence involving dishonesty; or
- (f) in any jurisdiction, the person is banned from acting as a director of a body corporate.

Chairperson and deputy chairperson

32.—(1) The Minister must appoint a director to be the chairperson of the board.

(2) The board must appoint a director to be the deputy chairperson of the board.

Term of office

33.—(1) Subject to sections 34 and 68(1), a director holds office for—

- (a) a term of 3 years from the date of appointment; or
- (b) any shorter term that is specified in the director’s written appointment.

(2) A director may be reappointed.

When director ceases to hold office

34. A director ceases to hold office when he or she—

- (a) has served the term of his or her appointment;
- (b) resigns in accordance with section 35(1);
- (c) is removed by the Minister in accordance with section 35(2); or
- (d) ceases to be eligible for appointment to the board.

Resignation and removal

35.—(1) A director may resign by giving written notice to the Minister.

(2) The Minister may, subject to the approval of the Prime Minister, at any time and for any reason, remove a director by giving that director written notice of removal.

Defect or irregularity in appointment

36. Anything done by or in relation to a person purporting to act under an appointment to the board is not invalid merely because—

- (a) the occasion for the appointment had not arisen;
- (b) there was a defect or irregularity in relation to the appointment;
- (c) the appointment had ceased to have effect; or
- (d) the occasion to act had not arisen or had ceased.

Division 2—Conduct of directors and employees

Honesty and good faith

37. A director, in discharging or exercising functions, duties and powers as a director, must—

- (a) act honestly;
- (b) act in good faith and for a proper purpose;
- (c) act with reasonable care and diligence; and
- (d) comply with the code of conduct of the public enterprise.

Ensuring business success

38. A director must take all reasonable steps to ensure that the public enterprise achieves its primary objective.

Due compliance

39. A director must take all reasonable steps to ensure that the public enterprise complies with—

- (a) any applicable written law; and
- (b) its constitution.

Avoiding insolvency

40.—(1) A director must take all reasonable steps to ensure that the public enterprise does not incur a debt if incurring the debt—

- (a) results in the public enterprise becoming unable to pay all its debts as and when they become due and payable; or
- (b) creates or is likely to create a substantial risk that the public enterprise will be unable to pay all its debts as and when they become due and payable.

(2) In this section, “debt” includes a contingent financial obligation such as a guarantee.

Improper use of position or information as director or employee

41.—(1) A director or employee of a public enterprise must not improperly use—

- (a) his or her position as a director or an employee; or
- (b) information obtained as a result of that position.

(2) Improper use of position or information includes using that position or information to—

- (a) gain a personal advantage or an advantage for another person; or
- (b) cause detriment to the public enterprise or another person.

(3) The prohibition in subsection (1) on improper use of position or information continues after a person ceases to be a director or employee of a public enterprise.

(4) A person who contravenes subsection (1), or is party to a contravention of subsection (1) is liable to compensate the public enterprise for any loss it suffers as a result of the contravention.

(5) In this section, “advantage” and “detriment” are not limited to financial advantage or detriment.

Disclosure of interest

42.—(1) A director must disclose to the board any interest of the director, including the interest of a related party as set out in section 43, that may conflict with the proper performance of his or her duties and functions as a director of the public enterprise.

(2) A director must disclose the interest as soon as he or she becomes aware of it.

(3) A director must not act as a director or vote in relation to any matter in which he or she has an interest unless—

- (a) the director has disclosed the interest to the board; and

- (b) subject to any applicable written law, the board has consented to the director acting or voting.
- (4) For the purposes of this section, it does not matter—
- (a) whether an interest is direct, indirect, pecuniary or non-pecuniary; or
 - (b) when the interest was acquired.

When interest of related party counts as director's interest

43.—(1) For the purpose of section 42(1), a director is taken to have the interest that a related party has.

- (2) In relation to a director, a related party is any of the following—
- (a) a director's spouse or child;
 - (b) a corporation or company (other than the public enterprise) of which the director is also a director or executive officer;
 - (c) a subsidiary of a corporation or company (other than the public enterprise) of which the director is a director or executive officer;
 - (d) a corporation or company of which the director's spouse or child is a director or executive officer;
 - (e) a corporation or company of which the director or the director's spouse or child owns or controls the exercise of votes attached to shares that together exceed the prescribed percentage of the shares of the corporation or company;
 - (f) a person who, with the director, is a party to a contract, arrangement or understanding, whether formal or informal, written or verbal, enforceable or unenforceable for—
 - (i) acquiring, holding, selling or otherwise dealing in shares or other securities in concert; or
 - (ii) exercising voting rights in a specified body corporate in concert.

Register of interests

44. A public enterprise must maintain a register that records all disclosures of interests made by a director or employee of the public enterprise under section 42 or 47.

Code of conduct

- 45.—**(1) The board must—
- (a) establish and approve a code of conduct governing the directors and employees of the public enterprise; and
 - (b) at least once every 3 years, review the content and operation of the code of conduct.
- (2) The code of conduct must—
- (a) provide for the matters set out in section 46; and

(b) be consistent with this Act and any other written law.

Content of code of conduct

46. A code of conduct for a public enterprise must provide *inter alia* for the following matters—

- (a) standards of conduct for directors and employees;
- (b) active promotion of ethical behaviour and facilitation of reporting of unlawful or unethical behaviour;
- (c) circumstances in which directors and employees may accept gifts and other benefits, including reporting and recording those gifts and benefits;
- (d) use by directors and employees of the resources of the public enterprise, including phones, vehicles and other property;
- (e) regulation of business travel, including its cross-over with personal travel;
- (f) regulation of conflicts of interest, including procedures for identification, reporting and resolving conflicts of interest;
- (g) management of breaches of the code of conduct, including the monitoring of compliance and reporting of breaches;
- (h) use and disclosure of information by directors and employees;
- (i) reduction or elimination of improper influence on directors and employees in their position as a director or employee of the public enterprise; and
- (j) trading in and holding of shares, securities or other financial instruments by directors and employees.

Conduct of employees

47.—(1) An employee of a public enterprise must comply with the code of conduct of the public enterprise as it relates to employees.

(2) A public enterprise must take all reasonable steps to ensure that each of its employees discloses to the public enterprise any interest of the employee that may conflict with the proper performance of his or her duties and functions as an employee of the public enterprise.

Division 3—Management

Board meetings

48.—(1) The board must meet—

- (a) at least once every 2 months, unless otherwise approved by the Minister; and
- (b) at any other time that the board considers necessary for the efficient management of the business and affairs of the public enterprise.

- (2) The quorum for a board meeting is a majority of the directors holding office.
- (3) A board meeting must be chaired by—
 - (a) the chairperson;
 - (b) in the chairperson's absence, the deputy chairperson; or
 - (c) in the absence of the chairperson and deputy chairperson, a director appointed by the directors present.

Procedure at board meetings

49.—(1) Except as provided under its constitution or any written law that establishes an entity that is a public enterprise, the board decides a matter by a majority of the directors present and voting.

(2) The chairperson of the meeting has a deliberative vote and, if necessary, a casting vote.

(3) Except as provided by this Act, the board may regulate its proceedings.

(4) A public enterprise must keep written minutes of—

- (a) all board meetings; and
- (b) all meetings of committees of the board.

Resolution in lieu of meeting

50.—(1) The board may pass a resolution without a meeting if—

- (a) the board has previously—
 - (i) agreed that it may from time to time pass a resolution without a meeting; and
 - (ii) determined the method for a director to assent to the resolution;
- (b) all the directors entitled to vote on the resolution assent to the resolution; and
- (c) notice of the resolution, including its terms, has been given to each director or reasonable efforts have been made to give that notice.

(2) A resolution *in lieu* of a meeting is passed when the last director has assented to the resolution.

Chief executive officer

51.—(1) The board of a public enterprise must appoint a suitably qualified person as the chief executive officer of the public enterprise.

(2) The chief executive officer is responsible and accountable to the board for the management of the business and affairs of the public enterprise.

(3) The public enterprise must employ the chief executive officer under a contract of employment that provides *inter alia* for—

- (a) a specified proportion of the chief executive officer’s remuneration to be payable or a specified benefit to become due to the chief executive officer, only if—
 - (i) the chief executive officer achieves specified performance criteria; and
 - (ii) the public enterprise achieves specified commercial outcomes; and
- (b) an annual review of the chief executive officer’s performance.

Delegations

52.—(1) The board may by resolution delegate in writing any of its powers and functions except the power to delegate, to any of the following—

- (a) a committee of the board;
- (b) a director;
- (c) the chief executive officer;
- (d) an employee of the public enterprise.

(2) The chief executive officer may delegate in writing any of the chief executive officer’s powers and functions except the powers and functions delegated to the chief executive officer under subsection (1) and the power to delegate, to an employee of the public enterprise.

(3) A delegation is subject to any condition specified in the written delegation.

(4) A delegated power or function must be exercised or performed in accordance with the written delegation.

(5) A delegation may be varied or revoked at any time and does not prevent the board or the chief executive officer from exercising or performing the delegated power or function.

Restrictions on indemnity by public enterprise for directors and executive officers

53. A public enterprise must not—

- (a) exempt a director or an executive officer of the public enterprise from a liability owed to it by the director or executive officer in that capacity;
- (b) indemnify a director or an executive officer of the public enterprise or of its subsidiary in respect of a liability owed to the public enterprise or the subsidiary by the director or executive officer in that capacity; or
- (c) except as permitted by section 55, indemnify a director or an executive officer of the public enterprise or its subsidiary in respect of a liability owed to a person other than the public enterprise or the subsidiary of the public enterprise.

Restrictions on indemnity by subsidiary of public enterprise for directors and executive officers

54. A subsidiary of a public enterprise must not—

- (a) exempt a director or an executive officer of the subsidiary from a liability owed to the subsidiary by the director or executive officer in that capacity;
- (b) indemnify a director or an executive officer of the subsidiary in respect of a liability owed by the director or executive officer in that capacity to—
 - (i) the subsidiary;
 - (ii) another subsidiary of the public enterprise; or
 - (iii) the public enterprise;
- (c) indemnify a director or an executive officer of the public enterprise or of another subsidiary of the public enterprise in respect of a liability owed by the director or executive officer in that capacity to—
 - (i) the subsidiary;
 - (ii) the other subsidiary; or
 - (iii) the public enterprise; or
- (d) except as permitted by section 55, indemnify a director or an executive officer of the subsidiary in respect of a liability owed to a person other than the public enterprise or the subsidiary of the public enterprise.

Permitted indemnity of liability owed by director or executive officer to third person

55. A public enterprise or the subsidiary of a public enterprise may indemnify a director or executive officer of the public enterprise or the subsidiary in respect of a liability owed by the director or executive officer to a person other than the public enterprise or the subsidiary if—

- (a) the Minister has given his or her prior approval;
- (b) the liability arose out of an act or omission of the director or executive officer in that capacity; and
- (c) the act or omission was done in good faith and with due care.

PART 7—PRINCIPLE OF TRANSPARENT PERFORMANCE

Division 1—Financial transparency

Financial records

56.—(1) A public enterprise, and each subsidiary of a public enterprise if any, must keep written financial records that—

- (a) correctly record and explain its transactions and financial position and performance;
- (b) enable financial statements to be prepared and audited in accordance with the Financial Management Act 2004; and

- (c) enable other reports to be prepared as required by this Act.
- (2) The records required by subsection (1)—
 - (a) must be kept for at least 7 years after the dates of the transactions to which they relate;
 - (b) must be kept at the principal place of business of the public enterprise; and
 - (c) may be kept in electronic form if they are readily retrievable and convertible into a physical form.

Financial statements

57.—(1) The board must ensure there is prepared, for each financial year, financial statements for the group consisting of the public enterprise and its subsidiaries if any.

(2) The financial statements and the notes to them must together include all information that is necessary to ensure that the financial statements give a true and fair view of the financial position of the public enterprise and the group consisting of the public enterprise and its subsidiaries if any.

- (3) Without limiting subsection (2), the financial statements must consist of—
 - (a) a balance sheet, profit and loss statement and other financial reports for the year as required by and consistent with applicable accounting standards;
 - (b) notes to the financial statements as required by applicable accounting standards; and
 - (c) a declaration by the directors declaring whether, in their opinion—
 - (i) there are reasonable grounds for believing that the public enterprise and its subsidiaries if any will be able to pay their debts as they become due and payable; and
 - (ii) the financial statements and the notes to them comply with the requirements of this Act.

(4) In this section, “subsidiary” does not include a joint venture.

*Division 2—Operational transparency**Annual report*

58. A public enterprise must prepare and submit an annual report in accordance with the Financial Management Act 2004.

Minister must table annual report in Parliament

59. The Minister must table the annual report of a public enterprise in Parliament in accordance with the Financial Management Act 2004.

PART 8—PRINCIPLE OF MONITORED PERFORMANCE

Division 1—Minister’s oversight

Role of Minister

60.—(1) For each public enterprise that is a company, the Minister may exercise all the powers and rights that a shareholder has in relation to the public enterprise under this Act, any other written law or the constitution of the public enterprise.

(2) Subsection (1) is subject to any other provision in this Act.

Resolutions of wholly-owned public enterprise are effected by Minister

61.—(1) For the purposes of this Act, any other written law or the constitution of a public enterprise, a resolution of the shareholders of the public enterprise means, in the case of a public enterprise that is wholly-owned by the State, a resolution effected by the Minister under subsection (2).

(2) The Minister effects a resolution by—

- (a) recording the terms of the resolution in a document; and
- (b) signing the document.

(3) Any requirement that a resolution of the shareholders of the public enterprise be lodged with a body or officer is satisfied by lodging the resolution effected by the Minister.

(4) Notice of a resolution effected by the Minister is not required.

(5) This section applies notwithstanding anything to the contrary in any written law or the constitution of the public enterprise.

Minister may require disclosure by public enterprise

62.—(1) The Minister may in writing direct a public enterprise to disclose specified information or documents relating to the affairs of the public enterprise or its subsidiary.

(2) The public enterprise must disclose the information or documents to the person or persons specified in the direction, which may include—

- (a) the Minister; or
- (b) the public.

(3) The Minister must—

- (a) consult the board before giving a direction under subsection (1); and
- (b) before giving the direction, take into account any matter raised by the board.

(4) Subject to the terms of the Minister’s direction, a public enterprise may impose conditions on the use of information disclosed under this section, including restrictions on its further disclosure.

(5) Compliance with a direction under subsection (1) does not give rise to any civil or criminal liability.

*Division 2—Public enterprise monitoring**Public enterprise monitoring functions*

63. The Ministry must provide financial, commercial and public policy analyses and advice to the Minister on all matters related to the operation, performance and governance of public enterprises.

Public enterprise monitoring may require disclosure

64.—(1) To enable the Ministry to provide advice to the Minister on all matters related to the operation, performance and governance of public enterprises, the permanent secretary of the Ministry may, by notice in writing to a public enterprise, require the public enterprise to disclose to the Ministry—

- (a) any specified document in the possession or control of the public enterprise; or
- (b) specified information about the public enterprise and its affairs and activities,

related to the operation, performance and governance of the public enterprise.

(2) A public enterprise must comply with a notice under subsection (1) within 10 working days of receiving it.

Ministry must report on each public enterprise

65. For each public enterprise, the Ministry must within 4 months after the end of the financial year of the public enterprise submit to the Minister a report on the performance of the public enterprise.

PART 9—MISCELLANEOUS

Regulations

66. The Minister may make regulations to prescribe matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and generally for achieving the purposes of this Act including—

- (a) prescribing additional matters that must be contained in the statement of corporate intent, or excluding one or more matters set out in section 23(1);
- (b) prescribing matters in relation to the remuneration of directors appointed under section 30;
- (c) prescribing the percentage of share ownership or control for the purposes of section 43(2)(e);
- (d) prescribing activities of a public enterprise that require the prior approval of the Minister; and
- (e) prescribing offences and penalties not exceeding—
 - (i) in the case of an individual, a fine of \$10,000 or imprisonment for a term of 5 years or both; or

- (ii) in the case of a body corporate, a fine of \$100,000.

Repeal

67. The Public Enterprise Act 1996 is repealed.

Transitional provisions

68.—(1) A person who, at the commencement of this Act, is a director or an employee of an entity listed in Schedule 1 continues in office or employment on the terms on which he or she was appointed as a director or engaged as an employee.

(2) Any civil servant who is a director at the commencement of this Act continues his or her directorship until the expiration or revocation of such appointment and, subject to any written law, he or she is eligible for reappointment to the board notwithstanding that the civil servant's ministry or department has direct regulatory or operational responsibility for the principal business of the public enterprise.

(3) Notwithstanding the repeal of the Public Enterprise Act 1996, any reorganisation of a Government entity under the Public Enterprise Act 1996 that exists at the commencement of this Act continues in accordance with the provisions governing reorganisation in the Public Enterprise Act 1996 until the reorganisation of the Government entity is complete.

(4) Notwithstanding the repeal of the Public Enterprise Act 1996, any reporting that is required to be made by a public enterprise under the Public Enterprise Act 1996 for a financial year that has commenced before the commencement of this Act, must be made or continue to be made in accordance with the Public Enterprise Act 1996 for that financial year.

Consequential amendments

69. The Acts listed in Schedule 2 are amended as set out in that schedule.

SCHEDULE 1
(Section 8(1))

PUBLIC ENTERPRISES

1. Airports Fiji Pte Limited
2. Energy Fiji Limited
3. Fiji Broadcasting Corporation Pte Limited
4. Fiji Hardwood Corporation Pte Limited
5. Fiji Meat Industry Board
6. Fiji Public Trustee Corporation Pte Limited
7. Fiji Rice Pte Limited
8. Food Processors (Fiji) Pte Limited
9. Post Fiji Pte Limited
10. Unit Trust of Fiji (Management) Limited
11. Yaqara Pastoral Company Pte Limited

SCHEDULE 2
(Section 69)

CONSEQUENTIAL AMENDMENTS

Audit Act 1969

1. The Audit Act 1969 is amended by—
 - (a) deleting section 16; and
 - (b) in section 17—
 - (i) deleting subsection (2); and
 - (ii) renumbering subsection (1) as section 17.

Biosecurity Act 2008

2. The Biosecurity Act 2008 is amended by—
 - (a) in section 8—
 - (i) in subsection (3)(a), deleting “Public Enterprise Minister, in consultation with the Minister and the Minister for Finance, and with the endorsement of the Prime Minister” and substituting “Minister responsible for public enterprises in writing subject to the approval of the Prime Minister”; and
 - (ii) in subsection (7)(b), deleting “the Public Enterprise Act 1996” and substituting “this Act”;
 - (b) deleting section 9(4)(b) and substituting the following—

“(b) prepare an organisation and staffing plan.”;
 - (c) in Schedule 1 in Part A—
 - (i) in paragraph 2, deleting “30 days”;
 - (ii) deleting paragraph 3 and substituting the following—

“3. The Minister may, subject to the approval of the Prime Minister, at any time and for any reason, remove a member of the Board by giving that member written notice of removal.”; and
 - (iii) in paragraph 4, deleting “applicable to boards of commercial statutory authorities appointed under the Public Enterprises Act 1996” and substituting “as approved by the Minister”; and
 - (d) deleting “Public Enterprise Minister” wherever it appears and substituting “Minister responsible for public enterprises”.

Companies Act 2015

3. The Companies Act 2015 is amended by—

(a) in section 3, deleting the definition of “Government entity” and substituting the following—

““Government entity” means—

(a) a statutory authority or a division, branch or other part of a statutory authority, by whatever name called; or

(b) a public enterprise as defined in section 2 of the Public Enterprises Act 2019 or part of a public enterprise;”;

(b) in sections 279(d)(iii) and 543(2)(f), deleting “Corporation Limited” and substituting “Corporation Pte Limited”.

Copyright Act 1999

4. The Copyright Act 1999 is amended in section 2(1) in the definition of “State” by deleting paragraph (b) and substituting the following—

“(b) a company that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019;”.

Employment Relations Act 2007

5. The Employment Relations Act 2007 is amended by—

(a) in section 4—

(i) after the definition of “fortnight”, inserting the following new definition—

““government company” means a company where all of the stock or shares in the capital of the company is or are beneficially owned by the State, whether such shares are held in the name of a Minister, public officer, nominee of the State or otherwise;”;

(ii) in the definition of “public authority”, deleting “commercial statutory authority or a government commercial company” and substituting “public enterprise as defined in section 2 of the Public Enterprises Act 2019”; and

(b) in section 185—

(i) in the definition of “employer”, deleting paragraph (d) and substituting the following—

“(d) a company that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019;”;

- (ii) in the definition of “essential service and industry” or “essential services and industries”, deleting paragraph (d) and substituting the following—

“(d) a company that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019;” and

- (iii) in the definition of “worker”, deleting paragraph (d) and substituting the following—

“(d) a company that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019;”.

Fiji National Provident Fund Act 2011

6. The Fiji National Provident Fund Act 2011 is amended in section 4(1) in the definition of “public official” in paragraph (c) by deleting “commercial statutory authority or a Government company (both as defined in the Financial Management Act 2004 (except the Board))” and substituting “statutory authority that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019 or a Government company as defined in section 2(1) of the Financial Management Act 2004”.

Fiji Public Trustee Corporation Act 2006

7. The Fiji Public Trustee Corporation Act 2006 is amended by—

- (a) in section 2—

- (i) in the definitions of “Board of Directors” and “Chief Executive Officer”, deleting “Fiji Public Trustee Corporation Limited” and substituting “Corporation”; and

- (ii) in the definition of “Corporation”, deleting “Corporation Limited” and substituting “Corporation Pte Limited”;

- (b) deleting section 3 and substituting the following—

“Inconsistency with Public Enterprise Acts

3.—(1) In the event of any inconsistency between a provision of this Act and the Public Enterprise Act 1996, if the provision relates to the reorganisation of the Office of the Public Trustee, the Public Enterprise Act 1996 shall prevail.

(2) In the event of any inconsistency between a provision of this Act and the Public Enterprises Act 2019—

- (a) if the provision relates to the administration of the Corporation, the Public Enterprises Act 2019 shall prevail; or

- (b) if the provision relates to any aspect of the administration and management of trust funds or property, or the performance of any obligation as trustee, the provision of this Act shall prevail.”;

- (c) in Part 2, deleting the heading and substituting “The Corporation”;

- (d) in section 5—
- (i) in subsection (3)—
 - (A) deleting “in accordance with the Public Enterprise Act 1996” wherever it appears; and
 - (B) in paragraph (a), deleting “and any other relevant law” and substituting “in accordance with any other written law”;
 - (ii) in subsection (5)(d), deleting “Public Enterprise Act 1996” and substituting “Public Enterprises Act 2019”; and
 - (iii) deleting “Fiji Public Trustee Corporation Limited” wherever it appears and substituting “Corporation”;
- (e) deleting section 7 and substituting the following—
- “Chief Executive Officer*
7. Sections 51 and 52 of the Public Enterprises Act 2019 apply to the Corporation.”;
- (f) deleting section 9 and substituting the following—
- “No State liability*
9. In accordance with section 12 of the Public Enterprises Act 2019, the State shall not be liable for any act or omission of the Corporation.”;
- (g) deleting section 11;
- (h) in section 20(3), deleting “in accordance with section 69 of the Public Enterprise Act 1996”;
- (i) in section 31(1), deleting “in accordance with section 60 of the Public Enterprise Act 1996.”;
- (j) deleting section 34(1) and substituting the following—
- “(1) The Corporation shall comply with Parts 5 and 7 of the Public Enterprises Act 2019.”;
- (k) in section 36(1)—
- (i) in paragraph (a) after “;”, inserting “and”; and
 - (ii) deleting paragraphs (b) to (e) and substituting the following—

“(b) any applicable written law.”;
- (l) in section 43—
- (i) in subsection (1), deleting “From” and substituting “Subject to subsection (1A), from”; and
 - (ii) after subsection (1), inserting the following new subsection—

“(1A) From 1 January 2019, all references to the Public Trustee in any contract, instrument, register, other public or private document,

court proceedings or law shall, unless the context otherwise requires, be read and construed as a reference to Fiji Public Trustee Corporation Pte Limited.”;

- (m) in sections 4(b) and 37, deleting “Fiji Public Trustee Corporation Limited” and substituting “Corporation”; and
- (n) in sections 10, 15(1), 41 and 42, deleting “Fiji Public Trustee Corporation Limited” wherever it appears and substituting “the Corporation”.

Fijian Competition and Consumer Commission Act 2010

8. The Fijian Competition and Consumer Commission Act 2010 is amended in section 4(1) by—

- (a) in the definition of “government agency”, deleting “, within the meaning of the Public Enterprise Act 1996,”; and
- (b) after the definition of “government agency”, inserting the following new definitions—

““government company” means a company where all of the stock or shares in the capital of the company is or are beneficially owned by the State, whether such shares are held in the name of a Minister, public officer, nominee of the State or otherwise;

“government entity” means—

- (a) a government company or part of a government company;
- (b) a statutory authority or a division, branch or other part of a statutory authority, by whatever name called;
- (c) a ministry or department or a division, branch or other part of a ministry or department, by whatever name called; or
- (d) a public enterprise as defined in section 2 of the Public Enterprises Act 2019 or part of a public enterprise or subsidiary of a public enterprise;”.

Financial Management Act 2004

9. The Financial Management Act 2004 is amended by—

- (a) in section 2(1)—
 - (i) deleting the definitions of “commercial statutory authority” and “Government commercial company”; and
 - (ii) in the definition of “statutory authority”—
 - (A) in paragraph (b)(ii), deleting “; or” and substituting “,”; and
 - (B) deleting paragraph (c); and
- (b) deleting sections 41 and 53.

Foreign Investment Act 1999

10. The Foreign Investment Act 1999 is amended in section 3(1) in the definition of “national enterprise” by deleting “a government entity as described in the Public Enterprise Act 1996” and substituting “any Government company or statutory authority, both as defined in section 2 of the Financial Management Act 2004”.

International Seabed Mineral Management Act 2013

11. The International Seabed Mineral Management Act 2013 is amended in section 21 by—

- (a) in subsection (2), deleting “Government Company with limited liability for the purposes of the Public Enterprise Act 1996” and substituting “public enterprise under the Public Enterprises Act 2019”;
- (b) deleting subsections (4) and (5); and
- (c) after “Corporation” wherever it appears, inserting “Pte Limited”.

Maritime Safety Authority of Fiji Act 2009

12. The Maritime Safety Authority of Fiji Act 2009 is amended by—

- (a) in section 2—
 - (i) in the definition of “Board of Directors”—
 - (A) deleting “mean” and substituting “means”; and
 - (B) deleting “by the Minister”;
 - (ii) in the definition of “Member” after “;”, inserting “and”;
 - (iii) in the definition of “Minister”—
 - (A) deleting “relevant Minister as defined under section 78 of the Public Enterprise Act 1996 in this instance is the”; and
 - (B) deleting “; and” and substituting “.”; and
 - (iv) deleting the definitions of “commercial statutory authority” and “Public Enterprise Act 1996”;
- (b) in section 3, deleting “Maritime Safety Authority to operate as a commercial statutory authority” and substituting “statutory authority for maritime safety”;
- (c) in section 7, deleting “commercial” wherever it appears;
- (d) in section 8—
 - (i) in subsection (1) after “Minister”, inserting “responsible for public enterprises in writing subject to the approval of the Prime Minister”; and
 - (ii) in subsections (2) and (3) after “Minister” wherever it appears, inserting “responsible for public enterprises”;

- (e) in section 9 after “Minister” wherever it appears, inserting “responsible for public enterprises”;
- (f) deleting section 11 and substituting the following—
 - “Resignation and removal*
 - 11.—(1) A member may resign at any time by giving written notice to the Minister responsible for public enterprises.
 - (2) The Minister responsible for public enterprises may, subject to the approval of the Prime Minister, at any time and for any reason, remove a Member by giving that Member written notice of removal.”;
- (g) in sections 13(1) and 20(4) after “Minister”, inserting “responsible for public enterprises”;
- (h) in section 26, deleting “Notwithstanding section 84(a) of the Public Enterprise Act 1996, the” and substituting “The”;
- (i) in section 31—
 - (i) in subsection (3), deleting “relevant”; and
 - (ii) after “Minister” wherever it appears, inserting “and the Minister responsible for public enterprises”;
- (j) deleting sections 39(3), 44 and 46; and
- (k) in section 56, deleting “relevant”.

Meat Industry Act 1969

13. The Meat Industry Act 1969 is amended by—

- (a) in section 2 after the definition of “meat”, inserting the following new definition—
 - ““Minister” means the Minister responsible for agriculture.”;
- (b) in section 3(3) after “Minister”, inserting “responsible for public enterprises in writing subject to the approval of the Prime Minister”;
- (c) in section 4—
 - (i) deleting subsection (1) and substituting the following—
 - “(1) The quorum for a board meeting is a majority of the members holding office.”; and
 - (ii) in subsection (4), deleting “The” and substituting “Subject to the Public Enterprises Act 2019, the”;
- (d) in section 6(c), after “Minister” inserting “and the Minister responsible for public enterprises”;
- (e) in sections 7 and 10 after “Minister”, inserting “responsible for public enterprises”;

- (f) in section 11—
- (i) in subsection (1), after “Minister” inserting “or the Minister responsible for public enterprises”; and
 - (ii) deleting subsection (2) and substituting the following—

“(2) The audit provisions of the Financial Management Act 2004 apply to the Board.”; and

- (g) deleting section 12 and substituting the following—

“Annual report

12. Sections 58 and 59 of the Public Enterprises Act 2019 apply to the Board.”.

National Employment Centre Act 2009

14. The National Employment Centre Act 2009 is amended in section 5(1) by—

- (a) after the definition of “Fund”, inserting the following new definition—

““government company” means a company where all of the stock or shares in the capital of the company is or are beneficially owned by the State, whether such shares are held in the name of a Minister, public officer, nominee of the State or otherwise;”; and
- (b) in the definition of “public authority”, deleting “commercial statutory authority or a government commercial company” and substituting “public enterprise as defined in section 2 of the Public Enterprises Act 2019”.

Scrap Metal Trade Act 2011

15. The Scrap Metal Trade Act 2011 is amended in section 2 in the definition of “public infrastructure metal” by deleting “Government Commercial Company” and substituting “company that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019”.

Sea Ports Management Act 2005

16. The Sea Ports Management Act 2005 is amended by—

- (a) in section 6—
 - (i) in subsection (2), deleting “the Public Enterprise Act 1996” wherever it appears and substituting “any other written law”; and
 - (ii) in subsection (3)—
 - (A) in paragraph (a), deleting “Memorandum and Articles of Association” and substituting “articles of association”; and
 - (B) in paragraph (c), deleting “the Public Enterprise Act 1996” and substituting “this Act”;

- (b) in section 7—
- (i) in subsection (1)(b), deleting “in accordance with the Public Enterprise Act 1996”;
 - (ii) in subsections (2)(b) and (3), deleting “, the Public Enterprise Act 1996”; and
 - (iii) in subsection (6) after “section”, inserting “, except the power to delegate.”;
- (c) in section 9, deleting “In accordance with section 60 of the Public Enterprise Act 1996, the” and substituting “The”;
- (d) deleting section 16 and substituting the following—
- “Annual reports*
- 16.—(1) A port management company must prepare and submit an annual report to the Minister responsible for public enterprises within 9 months after the end of the financial year.
- (2) The Minister responsible for public enterprises must table the annual report in Parliament—
- (a) within one week of it being received by the Minister responsible for public enterprises; or
 - (b) if Parliament is not sitting in the last 3 days of that week and the report has not been tabled, within 3 sitting days of Parliament after the end of that week.”;
- (e) in section 24(3)(e), deleting “Ports Terminal Limited” and substituting “Fiji Ports Terminal Pte Limited”;
- (f) in section 55—
- (i) in subsection (3), deleting “From” and substituting “Subject to subsection (4), from”; and
 - (ii) after subsection (3), inserting the following new subsection—
- “(4) From 1 January 2019, all references to the Maritime and Ports Authority of Fiji in any contract, instrument, register, other public or private document, court proceedings or law shall, unless the context otherwise requires, be read and construed as a reference to Fiji Ports Corporation Pte Limited.”;
- (g) deleting sections 3 and 13; and
- (h) in sections 8(a) and 15(2), deleting “memorandum and”.

Water Authority of Fiji Act 2007

17. The Water Authority of Fiji Act 2007 is amended by—

(a) in section 9—

- (i) in subsection (1), deleting “in consultation with the Minister responsible for public enterprises and the Minister responsible for finance” and substituting “responsible for public enterprises in writing subject to the approval of the Prime Minister”; and
- (ii) in subsection (5), deleting “applicable to boards of commercial statutory authorities appointed under the Public Enterprise Act 1996” and substituting “as approved by the Minister responsible for public enterprises”;

(b) deleting section 10 and substituting the following—

“Resignation and removal

10.—(1) A member of the Board may resign at any time by giving written notice to the Minister responsible for public enterprises.

(2) The Minister responsible for public enterprises may, subject to the approval of the Prime Minister, at any time and for any reason, remove a member of the Board by giving that member written notice of removal.”;

(c) in section 12(2)(b), deleting “Public Enterprise Act 1996” and substituting “Companies Act 2015”;

(d) in section 20—

- (i) deleting the heading and substituting “Annual reports”; and
- (ii) deleting subsections (2), (3) and (4);

(e) in section 22(1)(k), deleting “half-yearly and annual reports” and substituting “the annual report”;

(f) in section 25, deleting subsection (4) and substituting the following—

“(4) If the Government requires the Authority to undertake any work under subsection (1) and there is no agreement for the costs of undertaking the work, the Government shall pay the amount that the Minister responsible for finance calculates is the full cost, direct and indirect, to the Authority, after making such adjustments as are reasonable, including an adjustment for any ancillary or contingent benefits that accrue or are likely to accrue to the Authority as a result of it providing the work.”; and

(g) deleting sections 4 and 18(4).

March 2019

PUBLIC ENTERPRISES BILL 2019

EXPLANATORY NOTE

(This note is not part of the Bill and is intended only to indicate its general effect)

1.0 BACKGROUND

- 1.1 Fiji's public enterprises constitute a significant proportion of the country's economy, controlling between 12% to 17% of total fixed assets.
- 1.2 Fiji recognised the benefits and need for a public enterprise reform programme in the 1990s and introduced a public enterprise reform framework with the introduction of the Public Enterprise Act 1996. That Act was heavily focused on public enterprise formation, which was a key issue at the time. However, since 1996 the dynamics of the public enterprise portfolio have changed and the understanding of international best practice, public enterprise governance, monitoring, reporting and accountability has also developed.
- 1.3 Having assessed the Public Enterprise Act 1996 against international best practice and taking into consideration the changed dynamics of the public enterprise portfolio and the need to ensure public enterprises fully contribute to Fiji's economic growth and deliver services to the people of Fiji in the most efficient and cost-effective manner, it has been determined that a new Act is required to make Fiji's public enterprise legislation consistent with international best practice.
- 1.4 The Public Enterprises Bill 2019 (**'Bill'**) reduces the emphasis on public enterprise establishment and introduces provisions that clarify Ministerial responsibilities and accountabilities; define and strengthen directors' duties and responsibilities, improve transparency and accountability by strengthening public enterprises' forward planning requirements and their reporting against these planning documents; and enhances public enterprise monitoring. The Bill also requires public enterprises to adopt a code of conduct and standardises expectations dealing with conflicts of interest.
- 1.5 By enacting and commencing the Bill, Fiji's public enterprise legislation would be consistent with international best practice and, if fully implemented, would result in improved public enterprise financial and operational performance.

2.0 CLAUSES

- 2.1 There are 9 Parts and 69 clauses in the Bill.
- 2.2 Part 1 of the Bill contains clauses 1 to 5 and provides preliminary provisions. These provisions state the short title and commencement, define terms used in the Bill in the interpretation clause, state the purpose of the Bill, its application to other Acts and specify that the Bill will bind the State.
- 2.3 Part 2 of the Bill incorporates in clause 6 the five public enterprise principles, being commercial objective, measurable performance, responsible management, transparent performance and monitored performance that are expanded throughout the Bill. Clause 7 of the Bill states that the Bill must be applied in accordance with the public enterprise principles.
- 2.4 Part 3 of the Bill deals with the establishment of public enterprises. Clause 8 of the Bill defines what a public enterprise is while clause 9 of the Bill empowers the Minister, after approval of Cabinet, to designate an entity as a public enterprise where the Minister considers it is in the public interest that the entity is governed by the public enterprise principles.
- 2.5 Clause 10 of the Bill provides that the constitution of a public enterprise must be consistent with the provisions of the Bill while clause 11 of the Bill defines when an entity is controlled by the State; being controlled by the State is one of the requirements for a 'public enterprise' under clause 8 of the Bill. Clause 12 of the Bill makes it clear that acts or transactions undertaken by public enterprises cannot bind the State, unless the State agrees to be bound or it is expressly bound by a written law. Clause 13 of the Bill empowers the State to buy shares and other securities issued by public enterprises and clause 14 of the Bill specifies restrictions on how those shares and securities may be dealt with.
- 2.6 Public enterprises have the powers and capacity to undertake any act for the purposes of performing their functions as set out in clause 15 of the Bill. Clause 16 of the Bill requires that a public enterprise must not be a party to an agreement to form a joint venture that is inconsistent with the provisions of the Bill or the constitution of the public enterprise and clause 17 of the Bill ensures that subsidiaries must provide the public enterprise with all necessary information.
- 2.7 Part 4 of the Bill includes provisions that detail the principle of commercial objective. Clause 18 of the Bill defines the primary objective of every public enterprise, that is, to be a successful business. The primary objective is at the heart of the Bill; all decisions made by the public enterprise board must be consistent with the primary objective, directors must be selected who can assist the public enterprise achieve the primary objective and the performance of the public enterprise board will be measured against the attainment of the primary objective.

- 2.8 Clause 19 of the Bill introduces the concept of the statement of corporate intent which is expanded in clauses 22 and 23 of the Bill. Each public enterprise must strive to give effect to its statement of corporate intent and not do anything that is inconsistent with the statement of corporate intent.
- 2.9 Clause 20 of the Bill provides for non-commercial obligations, which are services or activities that the State requires public enterprises to undertake but which are not commercially justifiable. The clause establishes a process whereby the Government and a public enterprise can negotiate an arrangement in relation to a non-commercial obligation while clause 21 of the Bill sets out the requirements for a non-commercial obligation agreement.
- 2.10 Part 5 of the Bill deals with the principle of measurable performance and clause 22 of the Bill sets out the period that the statement of corporate intent must cover. Clauses 23 to 25 of the Bill set out the required content of the statement of corporate intent, the process through which the Minister must be consulted on its content and when the statement of corporate intent or any amendment must be approved or adopted by the public enterprise board. The statement of corporate intent is one of the primary accountability documents between the public enterprise board and the Minister, the other being the business plan which is set out in clause 26 of the Bill. The period that the business plan must cover, its content, the process through which the Minister must be consulted on its content and when the business plan or any amendment must be approved or adopted by the public enterprise board is detailed in clauses 27 to 29 of the Bill.
- 2.11 Part 6 of the Bill covers the principle of responsible management. Clause 30 of the Bill deals with the appointment of the public enterprise board; directors must be people who have the skills, knowledge and experience to assist the public enterprise achieve its primary objective. Clause 31 of the Bill sets out the eligibility criteria for public enterprise directors. In clause 32 of the Bill, the Minister appoints the chairperson and the public enterprise board appoints the deputy chairperson. Clause 33 of the Bill prescribes the term of office for directors, while clause 34 of the Bill specifies when a director ceases to hold office. Directors may resign at any time by written notice and the Minister may remove a director by written notice, subject to the approval of the Prime Minister as detailed in clause 35 of the Bill. Clause 36 of the Bill provides that anything done by or in relation to a person purporting to act under an appointment is not merely invalid due to a defect or irregularity in the appointment.
- 2.12 Directors' duties and responsibilities are specified in clauses 37 to 44 of the Bill. The Bill brings directors' duties in line with international best practice, requiring directors to act honestly and in good faith, with reasonable care and diligence and comply with the code of conduct required by clause 45 of the Bill. The Bill also requires directors to avoid insolvency, not to use public enterprise information for an improper purpose and to properly declare and register interests and to avoid conflicts of interest.

- 2.13 Clauses 46 and 47 of the Bill extend the application of the public enterprise's code of conduct and interest disclosure requirements to employees. Clauses 48 to 50 of the Bill deal with board administration matters such as frequency of meetings, quorum and passing resolutions.
- 2.14 The requirement to appoint and the basic requirements of the chief executive officer's contract are set out in clause 51 of the Bill and clause 52 of the Bill deals with the power of the public enterprise board to delegate and restrictions placed on that power. Clause 53 of the Bill specifies restrictions on the ability of the public enterprise to provide indemnities to directors and executive officers, while clause 54 of the Bill deals with restrictions on subsidiaries of public enterprises to provide indemnities to directors and executive officers. Conditions when indemnities are permitted are specified in clause 55 of the Bill.
- 2.15 Part 7 of the Bill deals with the principle of transparent performance. Clauses 56 and 57 of the Bill specify requirements dealing with public enterprises' financial records and financial statements. The requirement to produce an annual report is established in clause 58 of the Bill and the Minister must table the annual report in Parliament as required by clause 59 of the Bill.
- 2.16 Part 8 of the Bill covers the principle of monitored performance. Clause 60 of the Bill authorises the Minister to exercise the powers that shareholders have and in clause 61 of the Bill, to pass shareholder resolutions by recording those resolutions in writing for wholly-owned public enterprises. This provides for a more efficient method of passing shareholder resolutions for wholly-owned public enterprises without the loss of transparency and accountability. Clause 62 of the Bill empowers the Minister to direct public enterprises to disclose specified information after consulting with the public enterprise board.
- 2.17 Clause 63 of the Bill provides the functions of the Ministry responsible for public enterprises for the purposes of providing financial, commercial and public policy advice to the Minister. Clauses 64 and 65 of the Bill allow the permanent secretary for the Ministry to require a public enterprise to disclose information that will assist the Ministry to perform its functions under the Bill and provide reports to the Minister on the performance of public enterprises.
- 2.18 Part 9 of the Bill authorises the Minister in clause 66 of the Bill to make regulations for the purposes set out in that clause. Clause 67 of the Bill repeals the Public Enterprise Act 1996 while clause 68 of the Bill contains the transitional provisions. Clause 69 of the Bill notes that the Acts listed in Schedule 2 are consequently amended as specified in Schedule 2.

3.0 MINISTERIAL RESPONSIBILITY

- 3.1 The new Act comes under the responsibility of the Minister responsible for public enterprises.

A. SAYED-KHAIYUM
Attorney-General