

Promoting Sustainable Development In Small Island Developing States By Innovative Capital Raising Solutions: Case Study Of Fiji

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Fiji – a small island developing state in the South Pacific – presents challenges for sustainable development. Fiji acceded to the Millennium Development Goals (the MDGs) but progress in the attainment of the goals was limited. Most enterprises in Fiji remain capital constrained Micro-and-Small enterprises (MSEs) and, to a lesser extent, Small-and Medium-sized enterprises (SMEs). One of the new Sustainable Development Goals (SDGs), which replaced the MDGs in 2015, explicitly targets this sector.

In this article, we consider SDG development in Fiji in light of financing gaps in the country. The key focus of our analysis is on how these financing gaps may be closed. We seek to provide means of achieving SDG8 (which seeks to “promote inclusive and sustainable economic growth, employment, and decent work for all”) by law reform in order to show how law reform can contribute to sustainable development. More specifically, we examine the Fijian Companies Act 2015 to highlight ways in which the fund raising provisions of that Act could facilitate MSE/SME access to capital.

INTRODUCTION

Beginning in the mid-1990s, a wave of company and securities regulation law reform flowed from New Zealand across the South Pacific. The model for reform was the Companies Act 1993 (NZ) and, to a lesser extent, the now repealed Securities Act 1978 (NZ). The Kingdom of Tonga was the first to adopt a version of the New Zealand Companies Act in the Companies Act 1995 (Tonga). Papua New Guinea looked to the New Zealand model in the Companies Act 1997 (PNG) and the Securities Act 1997 (PNG). Four other jurisdictions followed New Zealand: Samoa;¹ Niue;² the Solomon Islands,³ and, the Republic of Vanuatu.⁴ Some aspects of the New Zealand design architecture were especially influential such as the placing of machinery provisions in schedules, the abolition (in PNG and Tonga) of the private company/public company distinction and the carving out of securities regulation into a discrete statute following the example of the Securities Act 1978 (NZ) in PNG and Samoa.⁵

¹ Companies Act 2001 (Samoa) and Securities Act 2006 (Samoa).

² Companies Act 2006 (Niue).

³ Companies Act 2009 (Solomon Islands).

⁴ Companies Act 2012 (Vanuatu).

⁵ In New Zealand, there is no distinction between different types of companies as regards the registration process, legal status and internal governance rules. Reporting requirements for companies differ according to size and fund raising activities. These innovations have two major consequences whose significance is not well

After the global financial crisis, however, New Zealand replaced its securities regulator and created new financial markets law.⁶ An important policy driver in the Financial Markets Conduct Act 2013 (NZ) (FMC Act) was the New Zealand government's, "Business Growth Agenda" which we view as a "rediscovery" of the importance of the small and medium sized enterprise (SME) sector of the economy as a contributor to economic growth and private sector employment. This policy agenda explains new concessions for SME capital raising in the FMC Act including equity crowdfunding.⁷

Given the background to company and securities law reform in the South Pacific sketched out above, one might have expected the new Companies Act 2015 in Fiji to draw heavily on regional best practice such as the introduction of community companies in the Companies Act 2009 (Solomon Islands) and New Zealand innovations such as crowdfunding in the FMC Act. This did not occur. Indeed, the private/public company has been preserved which implies a significant design issue if Fiji transitions to an electronic companies' registry.

Above all, the sequencing of this law reform initiative is sub-optimal. First, a secured transactions/personal property securities regime with an electronic registry was required before the new company legislation so that company charges would appear on the secured transaction register thereby removing the need for company charge provisions in the Companies Act. Second, design of an electronic company registry should have proceeded in parallel with design of the 2015 Act in order to gain the significant efficiencies that come with an electronic registry. However, while we think there are numerous problematic aspects of the new Fijian Companies Act, our principal focus is on the new provisions for fundraising.

understood. First, they facilitate significant efficiencies in establishing and maintaining an electronic company register because only one set of rules applies to company formation and maintenance. Second, abolition of the distinction between private and public unlisted companies negates any strict prohibitions on the issuing of shares by private companies and is therefore accessible to SMEs. As a result, shares can be issued provided disclosure is made and that disclosure can be customized. So, for example, equity crowd funding (ECF) in New Zealand has highly tailored disclosure rules that are not tied to company type: see Alma Pekmezovic and Gordon Walker, "Equity Crowdfunding in New Zealand" (2015) 33 C&SLJ 62-69. By contrast, the proposed ECF regime in Australia is predicated upon public company status: see Gordon Walker, Alma Pekmezovic and Annabelle Walker, "Equity Crowdfunding in Australia" (2016) 34 (3) C&SLJ 243-250.

⁶ See, Phillip Maume and Gordon Walker, "A New Financial Markets Law for New Zealand" (2011) 29 C&SLJ 455. It seems clear that New Zealand's financial markets law was a precedent for the 2014 capital market reform Bills in Papua New Guinea.

⁷ Policies focusing on the SME sector of the economy have proliferated internationally since the global financial crisis: see generally, Alma Pekmezovic and Gordon Walker, "The Global Significance of Crowdfunding: Solving the SME Funding Problem and Democratizing Access to Capital" (2016) 7 (2) *William & Mary Business Law Review* 347-458; Lachlan Burn and Ed Greene, "What are capital markets and what are they for?" (2016) 11 (3) *Capital Markets Law Journal* 340 at pp 344-346.

The Companies Act 2015 (Fiji) came into effect in Fiji on 1 January 2016. The principal fund raising mechanism contained in this Act is the prospectus; concessions or exemption for small-scale fundraising in the new legislation are limited and are modeled largely on the repealed Securities Act 1978 (NZ). The absence of such concessions is surprising since there is a leading regional precedent on the point - the Papua New Guinea Capital Markets Bill 2014 where Sch. 7 provides numerous exemptions – and – further afield - in New Zealand, the FMC Act 2013. The limited exemptions for small-scale fund raising in Fiji demonstrates a mismatch between the new capital raising regime and the nature and needs of the majority of businesses in Fiji – micro and smaller enterprises (MSEs) and (to a lesser extent) SMEs who each face well-known capital formation barriers.⁸ For the purposes of this article, however, we conflate these categories since we are not so much concerned with definitional issues surrounding the size of these categories but rather the financing needs of the MSE/SME sector as a whole. Accordingly, following the World Bank terminology, we use the term, Micro, Small, and Medium Enterprises (MSME) to refer to both sectors.

The scheme of this article is as follows: first, in order to place the relevant provisions of the new Fiji Companies Act in a larger context, we describe financing constraints in small island developing states. Second, we link these constraints to the new Sustainable Development Goals (SDGs) – in particular, SDG8 that seeks to promote inclusive and sustainable economic growth, employment, and decent work for all. Third, we review the repealed fundraising regime in Fiji. Finally, we analyze the new capital-raising regime in Fiji in light of the preceding discussion and make suggestions for law reform.

FINANCING CONSTRAINTS IN SMALL ISLAND DEVELOPING STATES

⁸ This assertion requires some qualification. Definitions of MSEs and SMEs vary internationally and data on the number of MSEs and SMEs in Fiji are scant. Accordingly, we infer that the majority of companies are MSEs and SMEs from various data sources. First, according to the *Annual Report 2014* of the South Pacific Stock Exchange (SPSE), there were 18 listed entities in that year, the top five of which accounted for 81.11 per cent of market capitalization. If we assume that, consistent with international data, listed entities account for about 1 per cent (more or less) of all companies, then about 97-99 per cent of all companies are MSEs or SMEs. Second, we note that according to the Fiji Bureau of Statistics, approximately half of the Fijian population of 873, 210 reside in rural areas. This also suggests (but does not prove), a preponderance of MSEs and SMEs in such areas. The international evidence on the point is unequivocal and is supported by a study of MSEs in Fiji: see Parmendra Sharma and Neelesh Gounder, “Obstacles to Bank Financing of Micro and Small Enterprises: Empirical Evidence from the Pacific with some Policy Implications” (2012) 19 (2) *Asia-Pacific Development Journal* 349-375. Sharma and Gounder observe that the SME sector in Fiji is small implying that MSEs are most prevalent: *ibid.* 352. Barry Whiteside, Governor of the Reserve Bank of Fiji, has stated that the SME sector accounts for about 12 per cent of economic activity as compared to SMEs in other developing countries where they contribute as much as 40-60 per cent of GDP: see Barry Whiteside, “Assisting and developing small businesses in Fiji” (Suva, 14 April 2012).

Access to capital is critical for developing countries to achieve sustainable economic growth. In 2002, the World Summit on Sustainable Development identified access to capital and “an enabling environment for investment” as one of the core preconditions for sustainable development.⁹ A number of studies, however, document that access to capital and lack of an enabling environment for investment are major constraints in developing countries.¹⁰

SMEs face special financing hurdles. SMEs make up a large part of the private sector and account for a significant share of employment in most countries; yet they are more constrained in their access to capital than are large firms.¹¹ As for MSMEs, more than 200 million of them lack access to traditional finance worldwide.¹² As a result, MSMEs fail to grow beyond a certain size and transition to the next size category. These financing constraints predominate in developing countries, with SME loans constituting 13 percent of GDP in developed countries compared to 3 percent in the developing world.¹³ Amongst developing countries, Small Island Developing States (SIDS) comprise one of the most vulnerable groups; according to the UNDP, some fifty-two countries and ‘associate states’¹⁴

⁹ UN World Summit for Sustainable Development: Plan of Implementation, World Summit for Sustainable Development, vol. UN Doc. A/CONF.199/L.1.available at:

http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf

¹⁰ World Bank, “Small and Medium Enterprises (SMEs) Finance”(Press Release, 2015) available at:

<http://www.worldbank.org/en/topic/financialsector/brief/smes-finance>. See also Thorsten Beck, “Financing

Constraints of SMEs in Developing Countries: Evidence, Determinants, and Solutions” (2007) available at

https://pure.uvt.nl/ws/files/1107677/Financing_Constraints_of_SMEs.pdf. See also Thorsten Beck and A.

Demirgüç-Kunt, “Small and medium-size enterprises: Access to finance as a growth

Constraints” (2006) 30(11) *Journal of Banking and Finance* 2931-2943. Thorsten Beck, “Financing constraints of SMEs in developing countries: Evidence, determinants and solutions” (2007) available at:

https://pure.uvt.nl/ws/files/1107677/Financing_Constraints_of_SMEs.pdf.

¹¹ Thorsten Beck et al., *Is Small Beautiful? Financial Structure, Size and Access to Finance 2* (World Dev., Working Paper No. 5806, 2011) [<https://perma.cc/B2PY-HALS>].13–14; Burn and Greene, op. cit.

¹² The World Bank Group states: “There are 420–510 million micro, small, and medium enterprises worldwide, of which 360–440 million are in emerging markets. When asked to list their main constraints to growth, access to finance tops the list for entrepreneurs in lower-income countries. Globally, fewer than 30 percent of these firms use external financing, of which half are underfinanced. The total unmet need for credit among MSMEs in emerging markets is estimated at US\$2.1-2.5 trillion, approximately 14 percent of the GDP of these countries.” Rep. of the Comm. of Experts on Sustainable Dev. Fin., at 25, U.N. Doc. A/69/315 (2014),

http://www.un.org/ga/search/view_doc.asp?symbol=A/69/315&Lang=E [perma.cc/JQT6-VUWH].

¹³ Oya Pinar Ardic et al., *Small and Medium Enterprises: A Cross-Country Analysis with a New Data Set 5* (World Bank, Working Paper No. 5538, 2011), <https://openknowledge.worldbank.org/> [<https://perma.cc/CGX8-RBX4>].

¹⁴ These include American Samoa, Anguilla, Aruba, Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of the Northern Mariana Islands, Curaçao, French Polynesia, Guadeloupe, Guam, Martinique, Montserrat, New Caledonia, Puerto Rico, Turks and Caicos Islands, and the United States Virgin Islands.

are SIDS.¹⁵ The SIDS are mainly located in the Caribbean (23 states) and the Pacific (20 states); the rest are scattered across the rest of the world.¹⁶

The Barbados Programme of Action (BPOA) adopted in 1994,¹⁷ complemented by The Mauritius Strategy of Implementation (MSI) of 2005¹⁸ and the MSI+5 Outcome document,¹⁹ acknowledged that SIDS are confronted by challenges similar to those of developing countries generally. However, owing to their small size, remoteness, narrow resource and export base, these countries have their own peculiar vulnerabilities and characteristics.²⁰ In fact, SIDS constitute a special case for sustainable development.²¹ They produce less than one percent of worldwide wealth and face unique challenges because of their small size. Small size results in, amongst other things, higher macroeconomic volatility, high production and distribution costs, various administrative capacity constraints, limited delivery of public goods, as well as minimal diversification against external shocks such as global commodity price shocks (particularly food and fuel), climate change²² and natural disasters.²³

¹⁵ UNDP, “Small, So Simple? Complexity in Small Island Developing States” (2014) 5 available at http://www.undp.org/content/dam/undp/library/capacity-development/English/Singapore%20Centre/GPCSE_Complexity%20in%20Small%20Island.pdf.

¹⁶ These countries are located in Africa, the Indian Ocean, Mediterranean and South China Sea.

¹⁷ *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April-6 May 1994* (United Nations publication, Sales No. E.94.I.18 and corrigenda), chap. I, resolution 1, annex I. available at: <http://www.un.org/documents/ga/conf167/aconf167-9.htm>

¹⁸ *Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, 10-14 January 2005* (United Nations publication, Sales No. E.05.II.A.4 and corrigendum), chap. I, resolution 1, annex I. available at: <http://unohrrls.org/UserFiles/File/SIDS%20documents/mauritius.pdf>

¹⁹ A/RES/65/2 - Outcome document of the High-level Review Meeting on the implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States (2010) available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/2&Lang=E.

²⁰ See generally <https://sustainabledevelopment.un.org/topics/sids>

²¹ High-level Political Forum on Sustainable Development, “Small Island Developing States Face ‘Unique’ Sustainability Challenges Requiring ‘Special’ Attention to Meet Post-2015 Agenda Goals, High-level Forum Hears” (1 July 2015) available at: www.un.org/press/en/2015/ecosoc6706.doc.htm

²² Rising sea level is a large threat for Kiribati, Marshall Islands, and Tuvalu. The UN Framework Convention on Climate Change, adopted in 1992, recognizes the special vulnerability of SIDS to the adverse impacts of climate change.

²³ Samuel Bates and Valerie Angeon, “Promoting The Sustainable Development of Small Island Developing States: Insights from Vulnerability and Resilience Analysis” (2015) *Region et Development N 42-2015* at 22. See also IMF, “Macroeconomic Developments and Selected Issues in Small Developing States” (May 2015) available at: <http://www.imf.org/external/np/pp/eng/2015/030915.pdf>.

DIFFERENCES BETWEEN SMALL ISLAND STATES AND PACIFIC SMALL ISLAND STATES

Factors constraining the Pacific SIDS include large developmental needs (in terms of financial and human capital),²⁴ geographic remoteness,²⁵ climate-change related impacts (such as rising sea levels),²⁶ resource scarcity, limited access to international capital markets, and large dispersion.²⁷ The majority of Pacific island states consist of hundreds of islands scattered in an area in the Pacific Ocean occupying 15 percent of the earth's surface.²⁸ The average population is half the average of other small states outside the Pacific region.²⁹ A 2015 report published by the IMF highlights the lack of public spending efficiency in small Pacific states and higher fixed government costs in the delivery of public services relative to other states.³⁰ Higher fixed government costs arise because public services exist despite small population size – a problem compounded by remoteness and large dispersion.³¹

Most Pacific small states are heavily reliant on aid. World Bank data on aid flows shows Fiji received USD90.9 million of Official Development Assistance (ODA) in 2013.³² Other Pacific Island countries such as the Marshall Islands, Micronesia and Palau are reliant on so-called “Compact grants” from the U.S., which will expire in 2023/24.³³ The other major aid donors in the region are Australia and New Zealand.³⁴

Aid dependency combined with low access to credit by the private sector constitutes a significant impediment to economic growth in the Pacific. Access to credit is more limited in Pacific small island states than other SIDS and most Pacific small states remain stuck on a

²⁴ Human development indicators are among the lowest in the Asia and Pacific region. Thus, of the 12 countries in Asia-Pacific with the lowest rank on the human development index, 6 are small states, and 3 are microstates. For a discussion see, IMF, “Asia and Pacific Small States: Raising Potential Growth and Enhancing Resilience to Shocks” (February 2013) 9 available at: <http://www.imf.org/external/np/pp/eng/2013/022013a.pdf>.

²⁵ Remoteness increases transport costs and geographic isolation from regional trading partners. The Pacific Islands are by far the most remote countries in the world, according to various indicators. For a discussion see, IMF, above n 23, 4.

²⁶ See generally Michael B. Gerrard, and Gregory E. Wannier (eds). *Threatened Island Nations. Legal Implications of Rising Seas and a Changing Climate*, Cambridge: Cambridge University Press, 2013. See also M. Dell, B. Jones and B. Olken, “What Do We learn from the Weather? The New Climate-Economic Literature” (2014) 52(3) *Journal of Economic Literature* 740–798.

²⁷ IMF, above n 23, 25.

²⁸ Ibid 4.

²⁹ Ibid. Tuvalu and Palau are the smallest IMF members in terms of population.

³⁰ Ibid 28. See also IMF, above n 23, 1.

³¹ Ibid.

³² See generally World Bank, AidFlows Data, available at: <http://data.worldbank.org/data-catalog/aidflows>

³³ IMF, above n 23, 11. These countries signed the bilateral Compact of Free Association agreement with the United States.

³⁴ Ibid.

low growth trajectory.³⁵ According to the IMF, GDP growth of Pacific island countries has averaged at 2 percent – compared to 6 percent in Asian low-income countries, 4 percent in the ECCU countries, and 4.5 percent in other small states.³⁶ Hence, Pacific island states have underperformed in comparison to other small states. Amongst the Pacific Island states, the microstates, i.e. states with populations below 200,000, face the greatest financing challenges. Such states include Kiribati, Marshall Islands, Micronesia, Palau, Samoa, Tonga, and Tuvalu.³⁷

The Case of Fiji: Fiji’s Progress towards the MDGs

Fiji is one of the more developed Pacific Island economies. It has achieved significant improvement in economic growth in recent years (4.7% in 2013, 5.3% in 2014 and 4.0% in 2015 respectively).³⁸ This improved economic development was effected mainly by wide-ranging structural reforms, including reforms in public financial management and in state-owned enterprises.³⁹ In addition, Fiji achieved considerable progress towards the achievement of the Millennium Development Goals (MDGs), in particular the MDGs relating to universal primary education, reducing child mortality, improving maternal health, and ensuring environment sustainability.⁴⁰

A 2004 MDG Report found that Fiji exhibited progress in achieving six out of the eight MDG goals, and unlike other Pacific Islands, was on track to achieve some of these goals.⁴¹ Thus, the 2004 MDG Report stated that by 2015, Fiji was going to either “probably” or “potentially” meet its stated MDG targets, with the exception of Goal 6 (combating HIV/AIDS and other diseases) and Goal 1 (eradicating extreme poverty and hunger) which

³⁵ Ibid, 7.

³⁶ Ibid, 18.

³⁷ Ibid, 4.

³⁸ See ADB, “Fiji: Economy” available at <http://www.adb.org/countries/fiji/economy> (last accessed 2 August 2016). Fiji’s economy suffered a significant setback in February 2016 when a category 5 cyclone struck the country. The resulting damage and losses – estimated to exceed roughly 11% of the country’s GDP – is likely to constrain economic growth in 2016, with economic growth forecasts lowered to 2.7%, down from a pre-cyclone forecast of 4.0%. In 2017, Fiji’s economy is expected to rebound to 4.5%.

³⁹ ADB, “Fiji- Building Inclusive Institutions for Sustained Growth” (2015) iii available at <http://www.adb.org/sites/default/files/publication/172688/fiji-building-inclusive-institutions-sustained-growth.pdf> (last accessed 4 August 2016).

⁴⁰ The MDGs included eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowering women, reducing child mortality, ensuring environmental sustainability, and developing a global partnership for development. See generally <http://www.unmillenniumproject.org/goals/> for an overview and discussion of each MDG.

⁴¹ See ADB, *The Millennium Development Goals in Pacific Island Countries: Taking Stock, Emerging Issues, and the Way Forward* (2011) available at: <http://www.adb.org/sites/default/files/publication/29077/mdg-pacific.pdf>

could not be assessed. In June 2013, the Small Island Developing States (SIDS) leaders, including Fiji, confirmed their ongoing commitment to the achievement of the MDGs during the SIDS regional meeting in Fiji.⁴² However, by 2015, Pacific island nations (PINs) had failed to achieve most of the MDGs. Countries in the Melanesian region (excluding Papua New Guinea) registered off track or mixed progress on most of the goals, while Fiji and Vanuatu were on track towards reducing child mortality (MDG 4) and displayed more positive progress in promoting gender equality and empowering women. Nevertheless, poverty remains a significant concern in both countries. According to the second MDG Report produced for Fiji, poverty has increased from about 25 percent in 1990 to 40 percent in 2008⁴³

Fiji's failure to make better progress towards poverty reduction may be explained by reference to several factors including: (a) intermittent political instability which has reduced investment, exports, and employment growth, (b) poor governance, and in particular corruption, which has impeded socio-economic national development initiatives, and (c) the global financial crisis which affected the flow of remittances to Fiji.⁴⁴ Although Fiji became a party to the United Nation Convention against Corruption in 2008, further progress is required to ensure compliance with the Convention. In addition to these growth constraints, Fiji exhibits: (i) weaknesses in the regulatory ecosystem for registering, starting, and operating new businesses; (ii) deficiencies in existing infrastructure and related services, particularly the inadequate upgrading and maintenance of roads and the capacity shortage at its main ports, and, (iii) uneven access to productive assets, particularly to land and finance, owing in part to the customary ownership of land in Fiji. We address the latter point in a later section.

At the Third International Conference on Small Island Developing States (SIDS) held in Apia in September 2014, Fiji – along with other SIDS – affirmed its commitment to the sustainable development agenda and the importance of taking measures to advance the new internationally agreed sustainable development goals (SDGs). The outcome document of the conference – the SIDS Accelerated Modalities of Action (SAMOA) Pathway⁴⁵ – stressed the

⁴² UNDP, “The Pacific’s progress on the MDGs“(2015) available at:

<http://www.fj.undp.org/content/fiji/en/home/post-2015/mdgoverview.html>

⁴³ Fiji, Ministry for National Planning, MDGs, 2nd Report, 1990-2009 report for the Fiji Islands (September 2010) 9-10.

⁴⁴ Ibid 10. This UN Convention is available at: <https://www.unodc.org/unodc/en/treaties/CAC/>

⁴⁵ Sustainable development: follow-up to and implementation of the SIDS Accelerated Modalities of Action (SAMOA) Pathway and the Mauritius Strategy for the Further Implementation of the Programme of Action for

importance of sustainable development and called on the United Nations, international and regional financial institutions, and other multilateral development partners to continue to support SIDS in their efforts to implement national sustainable development strategies.

While this is a welcome development, implementing the post-2015 development agenda successfully will require Fiji and other SIDS to build upon the achievements of the MDGs and take stock of the lessons learned from the MDG implementation process. The eradication of poverty including extreme poverty – a key focus of the MDGs – is likely to be one of the greatest challenges for the region. However, the new SDG policy framework and SDGs such as SDG8, are especially difficult to achieve in the SIDS context in light of the financing gaps these countries face.⁴⁶ In the future, it will be crucial to identify institutional means for reducing financing constraints in low-income countries.

The 2030 Agenda: How can Fiji realign its development path to meet the new Sustainable Development Goals?

The new SDGs came into effect in September 2015.⁴⁷ They replace the MDGs and, unlike the MDGs, apply to all countries including developed and developing countries, regardless of their level of development. The SDGs are more complex than the MDGs and significantly expand the scope of the former goals. The focus is not simply on development but sustainable development or “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁸ Another definition used in the 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific defines sustainable development as:

...the process of progressive change in the quality of life of human beings, which places them as the center and primary subjects of development, by means of economic growth with social equity and transformation of production methods and consumption patterns, sustained by the ecological balance and life support systems of the region. This process implies respect for regional, national and local ethnic and cultural

the Sustainable Development of Small Island Developing States (14 December 2015) available at:

http://www.un.org/ga/search/view_doc.asp?symbol=A/70/472/Add.2&Lang=E

⁴⁶ Jeffrey D. Sachs, “Goal-based development and the SDGs: implications for development finance” (2015) 31(3-4) *Oxford Review on Economic Policy* 268.

⁴⁷ The SDGs are available at <https://sustainabledevelopment.un.org/post2015>. See also United Nations, “Transforming our world: the 2030 agenda for sustainable development” (2015) available at:

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

⁴⁸ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

diversity, and full public participation, peaceful coexistence in harmony with nature, without prejudice to and ensuring the quality of life of future generations.⁴⁹

The concept integrates economic and social developmental as well as environmental protection. In addition to being a guiding principle in the SDGs, the notion of “sustainable development” is part of the “object and purpose” of a growing number of international treaties, and thus relevant to the interpretation of these instruments.⁵⁰ The term appears often in economic, social and environmental treaties, which make explicit reference to developed and developing countries.⁵¹

According to some commentators, the new SDG agenda is likely to displace current country groupings such as developed or developing countries with new country classifications according to variables such as: per-capita income levels (low, middle, or high-income countries), specific conditions (e.g. post-conflict, small-island, or landlocked) or specific problems (e.g. highly polluting, ecological footprint).⁵²

The new SDGs are broadly formulated and consist of 17 goals (16 substantive goals and one 17th goal which calls for the “means of implementation” to achieve the 16 goals) and 169 targets.⁵³ Thus, SDG 1 calls for the end of extreme poverty and builds on the poverty-reduction efforts of the MDGs, while SDG 2 focuses on hunger eradication. Development under the new SDG agenda will commence once extreme poverty is eradicated. Other substantive goals include universal health coverage (SDG 3), universal quality education (SDG 4), ending gender discrimination (SDG 5), universal access to water (SDG 6), access to modern energy (SDG 7), sustainable infrastructure (SDG 9), environmental sustainability (SDGs 11-15, e.g. reducing exposure to climate-related extreme events; combatting climate

⁴⁹ The 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific 18 February 2002, available at:

http://www.cep.unep.org/services/nepregseas/Convention_English_NEP.doc

⁵⁰ See D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005) 168.

⁵¹ See M.C. Cordonier Segger and A. Khalafan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford: Oxford University Press, 2004) 31. Examples of treaties which use the notion of “sustainable development” include the 1992 UN Convention on Biological Diversity, the 200 Cartagena Protocol, the 1992 UN Framework Convention on Climate Change, the 1997 Kyoto Protocol, as well as the 2000 Cotonou Partnership Agreement between the European Union and the African Caribbean and Pacific Countries-

⁵² See Adolf Klobe-Lesch, “The G20 and the Sustainable Development Goals (SDGs): Reflections on Future Roles and Tasks” (August 2015, Third Annual G20 Think Tank Summit “Global Governance and Open Economy) available via Sustainable Development Solutions Network Germany: https://www.die-gdi.de/fileadmin/user_upload/pdfs/dauerthemen_spezial/20150730_Klobe-Lesch_The_G20_and_the_Sustainable_Development_Goals.pdf at 2.

⁵³ See Sachs, above n 46, 273-274.

change through low-carbon energy systems as addressed by SDG 13), and reduced inequalities (SDG 10). These broad goals link with specific targets.

Sustainable Development Goal 8 specifically addresses the importance of sustainable economic growth, and refers to the importance of promoting development-oriented policies that support entrepreneurship and encourage the formalization and growth of micro-, small- and medium-sized enterprises (MMSEs).⁵⁴ The achievement of SDG 8 will require effective domestic resource mobilization (DRM) and extensive private sector investment. Thus, another way of framing the central thesis of this article is to ask whether past or present capital raising legislation in Fiji supports SDG Goal 8. The answer, as we shall see, is no.

Capital Raising Regime in Fiji before January 2016

Unit Trusts Act 1978 (Cap. 228)

This Act was repealed on 1 January 2016 by virtue of s 752 of the Companies Act 2015. It made provision for the creation of unit trusts, i.e. any scheme or arrangement that was made for the purpose of providing facilities for the participation as beneficiaries under a trust “by subscribers or purchasers as members of the public” in income or gains arising from the money, investments and other property subject to the trust. Unit trusts were administered by a manager and a trustee and both roles were subject to terms and conditions as to approval. Section 8 contained a prospectus requirement. This required that a statement setting out the matters required in the schedule issue within the three years preceding any invitation to subscribe for an interest in the unit trust (a form of “shelf registration”). Section 8 (3) stated that the prospectus provisions of the former Companies Act (Cap 247) attached to every such statement thereby incorporating the relevant liability provisions contained in that Act.

Companies Act (Cap 247)

This Act followed the UK Companies Act 1948 and the New Zealand Companies Act 1955. The private/public company distinction appeared throughout. Private companies were prohibited from making an offer to the public to subscribe for shares. Public companies could make such offers and a basic prospectus regime based on disclosure appeared in Part III of the Act (ss 41-56) and, in the case of foreign companies, Part X, Div. 2. The prospectus

⁵⁴ See SDGs generally, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E at para [8.3].

provisions of the Companies Act had to be read in light of the Capital Markets Decree 2009 – see below. Cap 247 was repealed by s 752 of the Companies Act 2015.

Capital Markets Decree 2009 (CMD)

This decree repealed the Capital Markets Development Authority Act 1996. The CMD was administered by the Reserve Bank of Fiji (RBF), which had responsibility for securities exchanges and the central depository, securities industry licenses, securities transactions and registers, the issue of securities and enforcement. As to the issuance of securities, Part VII, s 24 of the CMD tasked the RBF to examine proposals for new issues or offers to the public. Section 24 (3) listed the matters the RBF must have regard to and, by this means, Fiji introduced merit regulation of prospectuses. The prospectus itself was lodged with the Registrar of Companies and a set of prospectus requirements appeared in ss 25-27 of Part VII. Surprisingly, nowhere in the CMD was there mention of the Companies Act (Cap 247) provisions regarding prospectuses and there was no explicit repeal of those sections (ss 41-56 of the Companies Act) in the CMD. The RBF retained the power to suspend or cancel prospectuses. The Decree was repealed by s 752 of the Companies Act 2015.

Problems with the Prior Regime

We now summarize capital raising law in Fiji law before 1 January 2016. The unit trust regime was dated and its disclosure regime wholly inadequate. Capital raising under the former Companies Act consisted of a disclosure regime administered by the Registrar of Companies that sat alongside a merit based disclosure regime in the CMD. It is unclear how these two regimes were supposed to operate in tandem since there had been no repeal of the relevant Companies Act provisions. The shift from a disclosure-based regime to a merit-based regime in the CMD was unexplained.

Merit regulation has been abandoned in favor of disclosure-based regulation in the majority of developed countries. Merit regulation involves civil servants making judgements as to the “merits” of a proposed public offering of securities. In a disclosure-based regime, the focus is on the adequacy of disclosure. For example, when engaging in review of registration statements, the U.S. Securities Exchange Commission (SEC) does not engage in a substantive “merits review” of an offering statement – the SEC does not ensure that an offering is fair, just and equitable. Rather, its main role under federal securities law is to require the accurate disclosure of material information. As indicated, the key problem with merit-based regimes is

that the judgment of civil servants substitutes for that of the market and this may lead to rent-seeking behavior. Furthermore, merit review has been criticised for impeding capital formation and disproportionately raising compliance costs for SMEs.⁵⁵ A modern disclosure based regime makes extensive provision for information disclosure to investors thereby enabling investors, their advisers and investment professionals to make a judgment on the merits of the offering.

Under the former regime, fund raising by prospectus was out of reach for all but a minority of companies because of transaction costs. This is because the laws on fund raising were not designed for the Fijian context; they were transplanted from elsewhere with no thought or tailoring to the economic realities of Fiji. It is also doubtful whether the rationale and purpose of the borrowed model was ever properly understood – see, for example, the shift to merit-based review of prospectuses.

The Companies Act 2015

As stated, this Act came into effect on 1 January 2016. (It was later amended by the Companies (Amendments) Act 2016.⁵⁶) Regulatory competence and oversight is split between the Registrar of Companies (RoC) and the Reserve Bank of Fiji (RBF): see s 13. The RBF is responsible for Parts 22-28 and Part 42 of the Act. These Parts of the Act are as follows:

- Part 22: Takeovers
- Part 23: Regulation of Securities Exchanges and Central Depository
- Part 24: Regulation of Securities Industry Licenses
- Part 25: Transactions in Listed Securities
- Part 26: Capital Raisings
- Part 27: Debentures (the issuance of debt securities)
- Part 28: Managed Investment Schemes
- Part 42: Insider Trading

⁵⁵ Therese Maynard, “The Future of California's Blue Sky Law” (1997) 30 *Loy. L.A. L. Rev.* 1573, 1586.

⁵⁶ Regulations made pursuant to the Companies Act 2015 include: the Companies Regulations 2015; Companies (Transitional) Regulations 2015; Companies (High Court) Rules 2015 and the Reserve Bank of Fiji (Capital Markets and Securities Industry) Regulations 2015.

Parts 43 (Offences) and 44 (Investigations and Information-Gathering) of the Act are the responsibility of the RBF “in conjunction with the Registrar in accordance with s 630 (5)”, however, that sub-section is silent as to the requisite procedure.

As a generalization, the RoC is tasked with those matters that traditionally fall under the purview of a company registry (company incorporation and the like), while the RBF is tasked with oversight of matters that would be handled by a securities regulator with the exception of takeovers. (Elsewhere, of course, a specialized Panel deals with takeovers.)

Section 13 grants certain general powers and functions to the RBF. Two of these powers are noteworthy. First, s 13 (1) (i) empowers the RBF to promote the development of the securities markets in Fiji including research and training. This implies that any law reform in these areas is the province of the RBF. Second, s 13 (1) (ii) gives the RBF the power and function to enter into memoranda of understanding or other agreements with international and national agencies. This power implies, inter alia, that it is the RBF which would enter into agreements with organizations such as the International Organization of Securities Commissions (IOSCO) and sharing of information agreements with national agencies such as the Financial Markets Authority (FMA) in New Zealand and the Australian Securities and Investments Commission (ASIC) in Australia.

Capital Raisings under Part 26 of the Companies Act 2015

The new Act preserves the private/public company distinction.⁵⁷ A private company is prohibited from making an “offer to the public” of shares.⁵⁸ Part 26 of the Companies Act 2015 provides the new regime for capital raising in Fiji. It is divided into four sub-parts:

- Division 1 contains a prohibition on offers.
- Division 2 deals with offers to the public.
- Division 3 covers offers to existing members by a public company.
- Division 4 contains general provisions covering capital raisings.

Part 26 of the Act provides the general framework for capital raisings – s 281 of the Act states that no offers of securities, whether for sale or issue, are permitted except in

⁵⁷ Section 15.

⁵⁸ Section 16 (c).

accordance with Part 26 of the Act. Thus, Part 26 comprises a self-contained regime for fund raising.

Obligation to publish a prospectus

Section 283 contains a general obligation to publish a prospectus whenever an offer of securities is made “to the public”. Section 283(2) defines the term to mean an offer of securities to: any section of the public, however selected; individual members of the public, however selected and any section of the public or individual members of the public, who have approached the company to acquire securities. The obligation to publish a prospectus is, thus, a central requirement under the Act; it imposes significant transaction costs (the regulatory compliance burden) on companies seeking to raise capital.

The “offer to the public” test comes from United Kingdom law and has been abandoned in all major common law jurisdictions whose fund raising law derived from the United Kingdom because of inherent difficulties. The test appeared in the repealed Securities Act 1978 (NZ) and the current Fijian test is an almost direct copy of that test. Case law and commentary on the former New Zealand section (s 3 of the Securities Act 1978) demonstrated that the test was fraught with difficulties.⁵⁹ These difficulties were well-known and, to this extent, it is surprising that the drafters copied the former New Zealand test. It should be repealed – see further below.

A further complication arises from the fact that the definition of an “offer to the public” in the s 2 definition section differs from that contained in s 283. In the s 2 definition, certain offers are excluded from the definition of an offer to the public. One of these does not appear in the s 283 (3) exclusions, namely, “a personal offer that is made to not more than 10 members of the public or if the personal offer is made to more than 10 members of the public, the offer is made with a view to it being accepted by not more than 10 members of the public in any 6 month period”.

On the face of it, however, s 281 overrides the words of the definition section since it states that no offer of securities whether for sale or issue is permitted except in accordance with Part 26. Section 282 states that a private company must not offer securities for issue to the public. Part 26, Division 2, then appears to set up a self-contained regime since it states that “except

⁵⁹ See, for example, the discussion in G. Walker and M. Fox, “Closing the Loop: SMEs and Securities Regulation in New Zealand” [1999] *NZLJ* 275.

as otherwise permitted by this Part, an offer to the public of securities may only be made under a prospectus”. Certain exemptions (“as otherwise permitted”) then follow – see below.

On one view, Part 26 negates the 10 members of the public exemption in the s 2 definition. The other view is that the exclusion in the definition section is additional to the exclusions in s 283 (3). If so, why was it not included in the s 283 (3) exclusions? We think this exclusion in the definition section must be read down for the reasons outlined above and because of the purpose of Part 26 of the Act. The purpose of Part 26 is investor protection achieved via disclosure. The “10 members of the public” exclusion raises non-trivial investor protection problems since there would be no need for any kind of disclosure document to be produced to members of the public because none of the provisions of Part 26 apply. This cannot have been the intention of the legislation.

Exemptions from the Obligation to Publish a Prospectus

Section 283 does not apply to certain exempt offers. Thus, some exemptions to the general requirement to publish a prospectus are permissible. These exemptions are listed in s 283(3) of the Act. Only two of these exemptions are of use to SMEs. These are the so-called “20/12” exemption and the exemption for sophisticated investors.

The Companies Act exempts offers of securities which are “personal offers” to fewer than 20 investors who acquire securities for a total consideration of a maximum of \$1 million in a 12 month period: s 283(3)(a). This exemption is aimed at facilitating private placements. This exemption is a version of the so-called “20/12” rule in the cognate Australian law.

Further, the obligation to publish a prospectus does not apply to offers of securities where the minimum amount payable on acceptance of the offer by the person to whom the offer is made is \$200,000. Here, the legislature has taken into account the fact that different requirements ought to apply to sophisticated investors purchasing securities for a relatively substantial amount. Investors to whom an offer of at least \$200,000 is made are presumed to have a higher level of expertise than other categories of investors. In passing, note that (strictly speaking) it is the investor who makes the offer to the company to subscribe for shares. The so-called “offer” by the company is simply an invitation to treat.

There is a set of other exemptions. Thus, the Companies Act contains an exception for an offer of securities made through the holder of a securities industry license to qualified or professional investor – i.e. persons who have received a certificate from the licensee stating

that the licensee is satisfied on reasonable grounds that the person has previous experience in investing in securities. The licensee must have received the certificate no more than 6 months before the offer. These investors do not require protection due to their level of expertise, and ability to assess, amongst other things, the merits of the offer, the value of the securities, the risks involved in accepting an offer, as well as better access to information: see, generally, s 283(3)(c).

Exceptions for Certain Issuances

The obligation to publish a prospectus does not apply to offers to the public for certain types of securities. The exemptions refer to situations where the securities are offered in connection with certain transactions. For example, the obligation to publish a prospectus does not apply where the securities are offered in connection with a takeover. Section 283(3) (f) states that an exemption applies if an offer is made as consideration under a Registered Bidder's Statement. In such case, the statement would contain information about the offer in the takeover that can be regarded as equivalent to the information which would have been contained in a prospectus. Similarly, an exemption applies where an offer is made to a related body corporate of an entity in which the securities are being offered: s 283(3) (d). In such case, investors are presumed to have information about the related body corporate.

An exemption applies when an offer is made to an officer of an entity in which securities are being offered: s 283(3) (e). Again, the offer need not be accompanied by a prospectus because the officer already has information about the entity in question.

The Companies Act provides an exemption for offers made in the ordinary course of trading on a securities exchange: s 283(3) (g). In this instance, investors have already been supplied with the necessary information at an earlier point, eliminating the need for additional disclosure via a costly prospectus. Section 283 does not apply to debt securities where there is an issue of debt securities by a financial institution licensed under the Banking Act 1995.

Lastly, an exemption applies to the issue of life insurance policies by insurance companies licensed under the Insurance Act 1998: s 283(3) (h). Such policies are subject to separate requirements.

The obligation to publish a prospectus is not applicable where an offer of securities to the public is made by the government, a government entity, the Reserve Bank or under relevant regulations made pursuant to the Companies Act: s 283(4).

Prospectus Content Requirements

The minimum content requirements for every prospectus are set out in s 284. Every prospectus must be in writing and dated, meet the minimum content requirements laid down in s 3 of the Act, and be registered by the Reserve Bank.

The Reserve Bank may register a prospectus, or an offer document, as the case may be in accordance with ss 285 and 286 respectively: s 290. The Reserve Bank may refuse to register a prospectus or offer document if it does not comply with the Companies Act or any regulation. Further, it must refuse to register the document if it is of the opinion that the prospectus does not contain all information reasonably necessary for the investors to understand the nature and terms of the offer; or if the prospectus is false or misleading in a material way, or if omits any material information: s 290(3).

The Companies Act obliges each person who is named in the Prospectus as being a director or a proposed director of the company to consent in writing to the prospectus: s 284(d) (ii). Furthermore, the prospectus must contain all information including all documents and other matters as required by regulations. The prospectus must also be signed by the company issuing the prospectus and every director of the company at the date of the prospectus: s 284(e).

These requirements are intended to enable investors to make an informed assessment of the rights and obligations, the financial situation, the profits and losses of the issuer as well as the rights connected to the securities issued.

Validity of a Prospectus and Liability for Defective Information

A prospectus, once registered, is valid for 12 months. The same requirement applies for registered offer documents: s 287. The Reserve Bank accepts no liability for any statement contained or information omitted from a prospectus or offer document: s 289.

Limited Nature of Exemptions from the Obligation to Publish a Prospectus and the High Costs of Compliance

The exemptions provided by the Companies Act are limited in nature. Unless one of the exemptions, as outlined above, applies, a full prospectus is needed. This creates transaction costs for issuers and introduces inefficiencies hampering the process of raising funds in Fiji. In particular, the compliance costs associated with compiling a full prospectus are high. This

holds especially true for MSMEs as drafting a prospectus can be an expensive, complex and time-consuming exercise. Moreover, some of the costs are fixed and the overall costs that MSMEs incur are not proportionate with the sums raised by MSMEs. As a result, the costs of compiling a new prospectus have a disproportionate impact on MSMEs. Given the smaller size of MSMEs and the lower amounts raised by them, fewer regulatory requirements should apply to them.

Reform Options

The key conclusion thus far is the lack of provisions to ease fund raising for MSMEs in Fiji. MSMEs are effectively barred from accessing public markets except in limited circumstances. A number of law reform solutions are proposed and considered below:

1. Reforming the Secured Transactions Regime: Secured Transactions as a Domestic Resource Mobilization Tool

Land is often communally owned in Pacific island states and hence cannot be effectively used as collateral. This impedes bank lending in the region. The absence of collateral registries for the filing of secured interests in chattels also impedes access to credit.⁶⁰ Fiji does not have secured transactions legislation at present although an Asian Development Bank backed initiative to provide such legislation is in progress.⁶¹ Secured transaction law reform is critical for domestic resource mobilization.⁶²

Secured transactions legislation has been passed in several jurisdictions in the South Pacific. Vanuatu and the Solomon Islands were the first countries in the Southern hemisphere, other than New Zealand, to introduce personal property securities legislation. In 2008, both countries enacted secured lending reform. Electronic registries began operation under both Acts in 2009. Vanuatu's Personal Property Security Act 2008 and the Solomon Islands Secured Transactions Act 2008 have much in common, and few notable differences. Both reform traditional secured lending law in the following ways:

- Creating security interests is simpler, less expensive, and more flexible for all borrowers whether individuals or companies.

⁶⁰ See Gordon Walker and Alma Pekmezovic, "Legal Transplanting: International Financial Institutions and Secured Transactions Law Reform in South Pacific Island Nations" (2013) 25 (3) *NZULR* 560-586.

⁶¹ See Geraldine Panapase, "Bank sets reforms for loans", *The Fiji Times Online*, 28 February 2015.

⁶² See generally, Benito Arrunada, *Institutional Foundations for Impersonal Exchange: Theory and Policy of Contractual Registries* (Chicago: University of Chicago Press, 2013).

- Simplified “notice filing” registries are established which operate electronically and without intervention by a government registrar.
- Priority rules governing competing claims to collateral are established in a manner that responds to commercial needs rather than legal formality and technicality.
- Enforcement rules are simplified and in some cases made less expensive.

Other countries to follow suit include Palau, Tonga, Vanuatu, the Marshall Islands and the Solomon Islands. Tonga implemented its PPSA in November 2010.⁶³ Its secured transactions registry was launched in April 2011.

Table 1 provides an overview of Pacific jurisdictions which have implemented secured transaction law reforms.

⁶³ Personal Property Securities Act 2010 (Tonga).

Table 1: Overview of Secured Transactions Laws in the Pacific

Jurisdiction	Relevant Act	Federal or State Legislation	Filing Office (Websites)
New Zealand	Personal Property Securities Act 1999	National	Personal Property Securities Register http://www.ppsr.govt.nz/cms
Federated States of Micronesia	Secured Transactions Act 2006	National	Secured Transactions Filing Office http://securedtransactions.dea.fm/Public/AboutFilingOffice.aspx
Marshall Islands	Secured Transactions Act 2007	National	Republic of Marshall Islands Secured Transactions Filing Office https://stformi.com/
Vanuatu	Personal Property Securities Act 2008	National	Personal Property Securities Registry https://ppsr.vu/
Solomon Islands	Secured Transactions Act 2008	National	Secured Transactions Filing Office https://stfosi.com/
Tonga	Personal Property Security Act 2010	National	Personal Property Securities Registry https://ppsa.to/
Papua New Guinea	Personal Property Security Act 2011	National	Secured Transactions Registry
Australia	Personal Property Securities Act 2009 (Cth.).	Federal	Personal Property Securities Register http://www.ppsr.gov.au/Pages/ppsr.aspx
Palau	Secured Transactions Act 2012	National	Palau Secured Transactions Filing Office https://www.stforop.com/index.aspx

2. Introduction of “Community Companies”: Community Companies as a DRM Tool

A law reform solution which directly addresses the inability of some groups to use land as collateral is legal provision for community companies. The introduction of community companies can assist community groups in the management of their assets and businesses. The creation of these companies has a number of objectives, as follows:

- the introduction of a simple and inexpensive entity to incorporate and operate which has statutory support and creates very clear obligations for the parties involved;
- regular reporting of operations to the principal beneficiaries, i.e. the members of the community group;
- certainty for third parties who want to deal with the community group especially creditors, lenders and investors; and
- preservation and protection of the community assets for current and future beneficiaries.

Moreover, the establishment of the community company structures opens up greater opportunities for women to participate in business activities.⁶⁴ With limited resources, assets and access to finance, women can mobilize the community assets which they collectively own and manage in order to operate various business activities. This leads to benefits for many women and their households and facilitates business expansion through reduced risk.

Two jurisdictions which have adopted community companies are the Solomon Islands and Vanuatu. Thus, the Companies Acts for the Solomon Islands and Vanuatu introduce (for the first time in the South Pacific) the concept of a “community company.” This allows community groups, including women’s groups, to incorporate for the purposes of promoting

⁶⁴ An example of a type of Community Company is the International Fund for Agricultural Development in Gambia and Malawi which has been shown to be effective in linking women farmers to mainstream inputs and services. For discussion, see Janice Jiggins “How poor women earn income in sub-Saharan Africa and what works against them” (1989) 17(7) *World Development* 961. Community companies appear in Part 12 of the Solomon Islands Companies Act (2009), ss 165-169.

a community interest or objective. The use of these community companies should assist women in participating in the economy to a much greater extent than in the past.

Legislative Requirements applying to community companies

A community company is generally incorporated in the same way that other companies are incorporated, however, there are some fundamental aspects which distinguish it from other companies.

First, the company must be formed for a *community purpose*. The community purpose is outlined on the application for incorporation and the company must always act according to this community purpose. If the community company acts contrary to the stated community purpose, it will lose its legal status. Further, there are restrictions on the type of groups which may register as community companies – e.g. political parties. The shareholders will invariably be members of the community and in most cases they will be nominal shareholders whose principal responsibility will be to monitor more directly the activity of the directors. For example, the shareholders could be senior members of the community such as community elders, committee members, trustees etc. There are also some statutory restrictions on the payment of dividends and distributions to shareholders of community companies.

In addition to the community purpose requirement, it is a compulsory requirement for a community company to have a lock on the company assets. This *asset lock* prevents the assets of the community company from being sold. There are some statutory exceptions to this requirement but they generally apply where the assets are sold for their full market value or to another ‘asset locked’ entity such as another community company. In addition, the asset lock must be stated clearly in the rules which a community company is required to file when applying for incorporation and is subject to the same rules relating to amendment and change as other companies although the rules are not able to be changed to remove the mandatory statutory rule requirements. The ‘asset lock’ allows the assets to be used for the benefit of the community and ensures that they cannot be sold to third parties. Any person dealing with a community company must have notice of this requirement.

Further important features of a community company include the reporting requirements. The directors have to meet the statutory requirements regarding the keeping of financial records and there are compulsory requirements for an annual report which must outline how the

community interest has been advanced over the year together with details of how the stakeholders have been involved during the year. This report is part of the public record easily accessible at the company registry. There is also requirement for a short form audit report for community companies.

As all community companies are required to have rules, these may be altered in any way which the shareholders (as representatives of the community) require. This enables further restrictions to be placed on directors' behavior if deemed necessary.

The aim of these proposed reforms is to reduce the costs of financing and improve access to capital markets for MSMEs. As far as the fundraising regime is concerned, this can be achieved by reducing the administrative burden of compliance with the prospectus requirements and making the regulatory framework more flexible and appropriate for MSMEs. Such reforms will introduce more investment choices for investors. A secondary aim of the reforms is to better align Fijian company law with regional best practice. In subsequent paragraphs, we make suggestions for the improvement of fundraising laws in Fiji.

3. A “Small Business Access to Capital Bill”

This law reform solution requires the drafting of new legislation for small scale fund raising in Fiji. This course of action has several practical advantages. A short Bill addressing the MSME context would be prepared. A suggested working title is “Small Business Access to Capital Bill”. The operative provisions of this Bill would prevail over the prospectus provisions of the Companies Act 2015 thereby removing the necessity for amendment to that Act. The Bill would provide for an expanded list of safe harbors to the prospectus requirements of the Act. Political buy-in should be relatively easy to obtain by reference to the needs of MSMEs and the role of SMEs in private sector job creation. Indeed, we think a model version of such Bill could be enacted in other South Pacific island nations.

4. Amendments to the Companies Act 2015

An alternative law reform solution to that proposed immediately above requires a short amending Act to the Companies Act 2015. Here, the “offer to the public” test would be repealed and – following the Australian and New Zealand models – replaced with a “bright line” rule prohibiting all offers of securities for subscription in the absence of a prospectus. The prohibition will apply to all offers except where a safe harbor applies. An enhanced list of safe harbors (exemptions or exclusions) should be provided. These would include further

concessions to small-scale fund raising including crowdfunding where relevant precedents appear in the New Zealand and Malaysian legislation.⁶⁵ (A crowdfunding platform could be hosted by the South Pacific Stock Exchange.)

CONCLUSIONS

What will it take for Fiji to achieve the SDGs and, in particular, SDG 8 which focuses on sustainable economic growth? We have argued that the success of the new development agenda in states such as Fiji will depend on the ability of such states to enhance their DRM and implement legislative interventions to end the stagnation of MSMEs.

Small island development states face unique challenges in advancing their economic growth and addressing the challenge of lack of access to capital. SIDS should take innovative steps to further advance the growth of MSMEs by creating an enabling business environment for MSMEs and alleviating their financing constraints. An innovative capital-raising regime is crucial for SIDS to implement the Post-2015 Development Agenda.

Legislative action to enhance MSME access to capital holds particular importance. As we saw, the current capital markets regulatory framework in Fiji is inappropriate for MSMEs. Regulation should make it easier and cheaper for MSMEs in Fiji to raise capital. Owing to the high costs associated with preparing a prospectus, SMEs and new companies are deterred from seeking to raise funds via the capital-raising regime under Part 26 of the Act. Thus, the requirement to publish a prospectus is a significant impediment faced by SMEs wishing to raise capital. Further, we do not think that either the sophisticated investor or the 20/12 rule exemptions alleviate the problem in any material way.⁶⁶ Hence, for some types of securities issues, less comprehensive disclosure requirements should be introduced. MSMEs wishing to raise capital on the Fiji capital markets would benefit from additional exemptions to the obligation to publish a prospectus. The present regulatory framework under Part 26 creates incentives for issuers to issue securities with a high denomination per offer, namely above \$200,000. This, in turn, creates incentives for sophisticated investors to acquire securities, but does not encourage small and (retail) investors to enter the capital markets due to the high entry ticket.

⁶⁵ For a discussion generally, see Alma Pekmezovic and Gordon Walker, above n 7, 1-129.

⁶⁶ The monetary threshold on the sophisticated investor exemption is too high to make any material difference to the MMSE funding problem. As for the 20/12 rule: there is no meaningful way of ascertaining the effectiveness of this exemption since issuers who comply are not reported.

The law reform measures suggested in this paper should generate substantial savings for companies – and especially SMEs – wishing to raise capital in Fiji. This, in turn, will improve the functioning of the capital markets in Fiji and further align the offering process in Fiji with other jurisdictions such as Australia and New Zealand. Moreover, the creation of specific MSME-friendly exemptions should foster the creation of a growth market for SMEs.⁶⁷ Compliance costs and the prospectus requirements under the current capital raisings regime in Fiji are not suited for such firms.

The suggested reforms are also likely to reduce reliance by MSMEs on bank finance. SMEs will be able to choose financing via the public equity markets as a viable alternative to debt capital. This can be especially useful in times of crises when banks' ability to lend is reduced. The suggested reforms expand the available investment opportunities for investors. Investors will be able to access a broader set of financial instruments, and thereby, better diversify and manage their risks. Finally, these measures are likely to improve the overall functioning of capital market and make it more flexible.

⁶⁷ Consider here the new NXT market on the New Zealand Exchange (NZX).