This paper presents work in progress under the Employment and Labour Market Studies in the School of Economics at USP. Comments, criticisms and enquiries should be addressed to the author.

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Employment Relations Bill
An Analysis

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Employment and Labour Market Studies Program
EU/USP HRD Project No. 8 ACP RPA 009
Department of Economics, University of the South Pacific,
Suva, Fiji Islands,
May, 2006
6.2  Payment of Wages  
6.2.1  Wages Statement  
6.2.2  Wages and Time Record  
6.2.3  Payment to Worker’s Family  
6.2.4  Authorised Deductions from Wages  
6.2.5  Remuneration other than Wages  
6.2.6  Interest on Wage Advances  
6.3  Wages Councils  
6.3.1  Power of Minister to Establish Wages Council  
6.3.2  Making of Wages Council Order  
6.3.3  Variation and Revocation of Wages Council Order  
6.3.4  General Provisions on Wages Councils  
6.3.5  Power to Fix Remuneration  
6.3.6  Effect and Enforcement of wages regulation orders  
6.3.7  Notices  
6.4  Other Comments  
6.4.1  Permits to infirm and incapacitated persons  
6.4.2  Payment of wages in lieu of cash  
6.4.3  Employers not to receive premiums  
7  Holidays and Leave  
7.1  Paid annual holiday mandatory  
7.2  Paid annual holiday  
7.3  Public holidays  
7.3.1  Payment for Public Holidays  
7.4  Sick Leave  
7.4.1  Medical Officers Certifying Sick Leave  
7.5  Bereavement Leave  
7.6  Record of Leave and Entitlement  
7.7  Other Provisions  
8  Hours of Work  
9  Equal Employment Opportunities  
9.1  Objectives  
9.2  Sexual Harassment  
9.3  Discrimination in Employment Matters  
9.4  Exceptions  
9.4.1  Authenticity and privacy  
9.4.2  Counsellor  
9.4.3  Religion  
9.4.4  Religious of ethical belief  
9.4.5  Disability  
9.4.6  Age  
9.4.7  Employment of a political nature  
9.4.8  Family Status  
9.4.9  Underground work for females  
9.4.10  Qualification on exceptions  
10  Employment of Children  
10.1  Prohibition of Child Labour  
10.2  Trade union rights  
10.3  Certain restriction on employment of children  
10.4  Children not to be employed against wishes of parent or guardian  
10.5  Hours of work for children
15.4 Access to Workplaces 71
15.5 Liability in Contract 72
15.6 Proceedings by and against Trade Unions 72

16 Collective Bargaining 73
16.1 Current Provisions 73
16.2 Every Registered Union Can Engage in Collective Bargaining 74
16.3 Good faith in bargaining for collective agreement 74
16.4 Code of good faith 75
16.5 Collective Agreement Bargaining 75
16.6 Procedures 75
16.6.1 Deduction of union fees 76
16.6.2 Multiplicity of Unions 77
16.7 Other Matters 77

17 Employment Disputes 78
17.1 Procedure for Settling Disputes 78
17.2 Institutions for Settling Disputes 79
17.3 Decisions by the Chief Executive Officer 80
17.4 Decision by the Employment Relations Tribunal 80
17.5 Appeals 81

18 Strikes and Lockouts 82
18.1 Objective of the Legislation 82
18.2 Secret Ballot a Prerequisite to Strike 82
18.3 Notice Prerequisite for Lockout 83
18.4 Unlawful Strikes or Lockouts 83
18.5 Lawful Strikes or Lockouts on Grounds of Safety or Health 84
18.6 Effect of Lawful Strikes or Lockouts 84
18.7 Power of the Minister to Declare Strike or Lockout Unlawful 85
18.8 Court May Order Discontinuance of Strike or Lockout 85
18.9 Wages During Lockouts 85
18.10 Record of Strikes and Lockouts 85
18.11 Prohibition or Expulsion of Members 85

19 Essential Service Industries 86
19.1 Objective 86
19.2 Strikes in Essential Services 88
19.3 Lockouts in Essential Services 89
19.4 Offences for Breaches of Service Affecting Essential Services 89
19.5 Requirements for Mediation Services 89
19.6 Minister to Refer Strike/Lockout in Essential Services to the Court 90

20 Institutions 91
20.1 Mediation Services 91
20.1.1 Reference to mediation services 91
20.1.2 Procedures for Mediation Services, and Settlements 92
20.1.3 Confidentiality 92
20.1.4 Code of Ethics 93
20.2 Employment Relations Tribunal 93
20.2.1 Membership 93
20.2.2 Functions and Jurisdiction of the Tribunal 93
20.2.3 Procedures 94
20.3 Employment Relations Court 95
20.3.1 Priority of wages 96
20.4 Incidental matters 96
20.5 Employment Grievance Remedies
20.6 Evidence and Proceedings
20.6 Costs
20.8 Rules of the Tribunal and Employment Relations Court
20.9 Appeals
   20.9.1 CEO’s Decision
   20.9.2 RTU’s Decision
   20.9.3 Minister’s Decision
   20.9.4 Tribunal’s Decision
   20.9.5 Court’s Decisions
21 Offences and Immunities
   21.1 Offences
      21.1.1 Offence to delay or obstruct officer
      21.1.2 Offence to make a false entry in records
      21.1.3 Offence on failure to pay wages as required
      21.1.4 Offence by employer not allowing worker to take his property
      21.1.5 Offence by worker relating to money owed to employer
      21.1.6 Offences where strikes or lockouts are unlawful
      21.1.7 Misuse of money or property of a trade union
      21.1.8 Failure to give notice or produce document (Trade Union)
      21.1.9 Offences by company or corporation
      21.1.10 Intimidation or annoyance
      21.1.11 Peaceful picketing and prevention of intimidation
      21.1.12 General penalty
      21.1.13 Exemption of employer on conviction of actual offender
   21.2 Immunities
      21.2.1 Removal of liability for interfering with a persons business
      21.2.2 Prohibition of action of tort
      21.2.3 Protection against civil and criminal proceedings
      21.2.4 Conspiracy in disputes
   21.3 Time for instituting proceedings for offences
   21.4 Fixed penalties
   21.5 Comments
      21.5.1 Penalty Rates
      21.5.2 Lack of Offences
22 Miscellaneous Provisions
   22.1 Regulations
   22.2 Repeals, Consequential Amendments and Savings (s265)
23 Trade Union Positions
   23.1 Common Union Positions
      23.1.1 Right to Strike
      23.1.2 Essential Services
      23.1.3 Involvement of Government in TU Matters
      23.1.4 Redundancy
   23.1 Major Differences between Unions
   23.3 The FTUC Position on the ERB
   23.4 The FICTU Position on the ERB
24 Ownership of the ERB
   24.1 Ownership by Unions
   24.2 Ownership by Employers
   24.3 Ownership by Government
List of Tables

Table 1.1: ERB and its Links with Existing Labour Laws
Table 2.1: Definitions
Table 2.2: Grounds for Discrimination Disallowed

List of Charts

Chart 13.1: Employment Grievance Process
Chart 17.1: Resolution of Employment Dispute
Employment Relations Bill:  
An Analysis

Objective

The objectives of this report are to:

a) Review the proposed Employment Relations Bill;
b)Ascertain the aspects of the Bill which are mere consolidation, and those which are new proposals;
c)Examine whether the draft bill will sufficiently address the challenges of the labour market in the country at this juncture in Fiji's economic history.
d)Draw conclusions on the likely impact of the Employment Relations Bill on the labour market; and
e)Establish the likely degree of 'ownership' of the proposed legislation amongst various stakeholders.

Summary

S.1 The Employment Relations Bill, hereafter referred to as ERB, was tabled in the House of Representatives on 26 September 2005. However, the Bill could not be enacted due to the dissolution of the Parliament for fresh elections in March 2006.

S.2 The Bill aims at consolidating 6 existing labour legislation and making numerous new provisions on industrial relations; the new provisions are on fundamental rights and principles at work; equal employment opportunities; redundancy for economic, technological or structural reasons; employment grievances; good faith bargaining; and institutions necessary for good faith bargaining to work.

S.3 While the provisions in the Bill are a significant advance over existing provisions in labour laws, there are certain major shortcomings of the Bill. Stakeholders have also expressed concerns at some of the provisions.

S.4 The shortcomings in the Bill are highlighted in shaded boxes in this report. These are as shown in the following table:

<table>
<thead>
<tr>
<th>Issues/Shortcomings</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusion of disciplined forces</td>
<td>8</td>
</tr>
<tr>
<td>Equal treatment of Formal and Informal Sectors/SMEs</td>
<td>8</td>
</tr>
<tr>
<td>Lack of clarity of definitions for: duress, employer, executive committee, forced labour, medical officer, officer, strike, worker</td>
<td>9</td>
</tr>
<tr>
<td>Health as a basis of disallowing discrimination in recruitment, training, promotion, termination</td>
<td>11</td>
</tr>
<tr>
<td>A lack of a statement of fundamental principles of employment in the private sector</td>
<td>12</td>
</tr>
<tr>
<td>Lack of any provision on freedom from harassment, workplace bullying and unfair dismissal</td>
<td>13</td>
</tr>
<tr>
<td>Multiplicity of advisory bodies for the Minister</td>
<td>14</td>
</tr>
<tr>
<td>Lack of a clear mandate and strength of the Employment Relations Advisory Board</td>
<td>15</td>
</tr>
<tr>
<td>Lack of effective provisions on Labour-Management Consultation Committee</td>
<td>16</td>
</tr>
<tr>
<td>Conflict of interest of labour officers</td>
<td>18</td>
</tr>
<tr>
<td>Lack of adequate definition of ‘indirect interests’</td>
<td>18</td>
</tr>
<tr>
<td>Lack of clarity on S22 (contracts of service)</td>
<td>20</td>
</tr>
<tr>
<td>Impact of the Bill on cost of transactions</td>
<td>21</td>
</tr>
<tr>
<td>Termination of indefinite contracts – lack of any provision on natural justice</td>
<td>21</td>
</tr>
<tr>
<td>Lack of clarity employment certificate</td>
<td>22</td>
</tr>
<tr>
<td>Lack of provision for payment for piecework extending for more than one month.</td>
<td>23</td>
</tr>
<tr>
<td>HIV/AIDS testing</td>
<td>26</td>
</tr>
<tr>
<td>‘Employer unable to fulfill the contract’ as a ground for termination of contract</td>
<td>27</td>
</tr>
<tr>
<td>Capacity of children to enter into contracts</td>
<td>27</td>
</tr>
<tr>
<td>Lack of clarity on cash payment of wages</td>
<td>29</td>
</tr>
<tr>
<td>No provision for overtime wage rates</td>
<td>30</td>
</tr>
<tr>
<td>No provision of circulating wages council orders to employers</td>
<td>34</td>
</tr>
<tr>
<td>No provision on permits to infirm and incapacitated persons</td>
<td>34</td>
</tr>
<tr>
<td>No provision for payment to workers on shift work, if the shift falls in the declared public holiday</td>
<td>36</td>
</tr>
<tr>
<td>Possibility abuse of sick leave provisions</td>
<td>36</td>
</tr>
<tr>
<td>No protection against possibility of abuse of bereavement leave provisions</td>
<td>37</td>
</tr>
<tr>
<td>No clear definition of managerial or executive positions and its impact on working hours</td>
<td>38</td>
</tr>
<tr>
<td>No clarity on special qualifications</td>
<td>38</td>
</tr>
<tr>
<td>Impact of ‘place of origin’ of a worker as a prohibited ground for screening workers</td>
<td>39</td>
</tr>
<tr>
<td>Lack of a definition of ‘participation in a strike’</td>
<td>40</td>
</tr>
<tr>
<td>Lack of any provision on prohibition of discrimination in rates of remuneration for social markers other than gender (e.g. ethnicity, religion, etc)</td>
<td>40</td>
</tr>
<tr>
<td>Lack of a serious provision on empowering disabled workers</td>
<td>42</td>
</tr>
<tr>
<td>Age as a basis for lower pay</td>
<td>42</td>
</tr>
<tr>
<td>Prohibition of females from underground work in mines</td>
<td>43</td>
</tr>
<tr>
<td>Place of religious or ethical beliefs in employment and the labour market</td>
<td>43</td>
</tr>
<tr>
<td>Lack of a prescription for conditions for the employment of children at night</td>
<td>47</td>
</tr>
<tr>
<td>Lifting of penalty from parents/guardians of children in employment</td>
<td>47</td>
</tr>
<tr>
<td>Lack of provisions on maternity related absences of single days (e.g. medical checkup)</td>
<td>50</td>
</tr>
<tr>
<td>Lack of clarity on where whether the payment for maternity leave is an allowance or a wage</td>
<td>50</td>
</tr>
<tr>
<td>Improper drafting of provision on termination for employee on maternity leave</td>
<td>52</td>
</tr>
<tr>
<td>Lack of provision on leave conditions for cases of stillborn children, or miscarriages</td>
<td>53</td>
</tr>
<tr>
<td>Lack of clarity on whether an employee can take a matter to the Tribunal or the Employment Court directly</td>
<td>56</td>
</tr>
<tr>
<td>Unfair Dismissal</td>
<td>57</td>
</tr>
<tr>
<td>No provision on timeline for registration of a trade union</td>
<td>59</td>
</tr>
<tr>
<td>Freedom to establish trade unions on basis of religion or ethnicity</td>
<td>61</td>
</tr>
<tr>
<td>Disallowing foreign citizens working in Fiji for holding union positions</td>
<td>62</td>
</tr>
<tr>
<td>Prohibition of trade union officials from assisting other unions</td>
<td>62</td>
</tr>
<tr>
<td>Lack of provision for public access of union financial records and membership roll</td>
<td>63</td>
</tr>
<tr>
<td>Extension of the period for submission of audited financial statement by 5 months to September</td>
<td>63</td>
</tr>
<tr>
<td>Lack of a provision requiring Union constitutions to specify mode of establishment of union executive committee</td>
<td>65</td>
</tr>
<tr>
<td>Lower degree of protection of union funds from abuse</td>
<td>66</td>
</tr>
<tr>
<td>Union turf wars</td>
<td>67</td>
</tr>
<tr>
<td>No protection against abuse of unions for political purposes</td>
<td>68</td>
</tr>
</tbody>
</table>
S.5 The Bill was approved by the Labour Advisory Board, which is a key tripartite institution in Fiji. Thus, this could be taken as the endorsement of the Bill by the trade unions, employers organizations, and the government. The trade unions, however, have expressed dissatisfaction on provisions on the right to strike, list of industries on essential services, government involvement, and redundancy and termination provisions. In addition, there are diametrically opposed positions taken by the two major union groups on the law on trade union recognition. Employers have expressed concern on the leave provisions in the ERB; the ban on medical examination to establish status of HIV/AIDS, sexually transmitted diseases and pregnancy; and immunity provisions for trade unions, union official and members.

S.7 The Employment Relations Bill is an innovative legislation proposed for the regulation of employment relations in the country. Its approach is generally progressive. If enacted, the proposed law would create a much better industrial relations climate in the country.

S.8 The ERB requires a major change in the outlook of trade unions and unionists, as well as employers if the law is to succeed. The burden on the employers, unions and individual employees placed by the ERB is enormous. For the respective parties to live up to the expectations made of them by the ERB, there is a need for a considerably more efficient and responsive institutional environment, particularly at the state level.

S.9 Without a change in the modus operandi of unions and employers, as well as without efficient and responsive state institutions, there is a significant likelihood that the ERB may see a gradual withering away of the significance of trade unions in Fiji, with the possible consequence that an environment may be created where there would emerge a relatively unregulated labour market. The latter may be a fertile ground for the germination of considerable trade/employment disputes and industrial strife.
Introduction

1.1 Background

Between 1990 and 1992, the then interim regime put in place numerous decrees amending key aspects of labour legislation in Fiji.1 With the reconvening of the Parliament in 1992, the government decided to review all labour laws. In 1991, the Employment Contracts Act was enacted in New Zealand. This legislation stressed individual employment contracts between workers and employers over collective bargaining between trade unions and employers. Fiji aimed to follow a similar route. The review of labour legislation in Fiji was aimed towards meeting this objective.

By 1996, an industrial relations bill was drafted by an ILO consultant engaged by the Ministry of Labour and Employment Relations. The original draft was based on the New Zealand legislation. This draft was circulated for discussion amongst stakeholders. The response was not positive, particularly from the trade unions. The new government elected in 1999 preferred an industrial relations framework which emphasized tripartism and involvement of stakeholders. This was in line with the newly adopted Constitution, which provided for the rights of workers and employers to organize and bargain collectively. The instability created by a terrorist uprising (May 2000-September 2001) saw no progress on the legislation.

In July 2002, the new Cabinet decided that all labour Legislation in Fiji be reviewed in consultation with the social partners and stakeholders.2 Subsequently, in September 2002, the first draft of the Industrial Relations Bill was circulated to all the government ministries and 17 social partners, NGOs and interest groups for comments. A Labour Advisory Board Subcommittee, comprising representatives of workers, employers and government, was formed to scrutinize the Bill. The Committee decided that it scrutinize the draft bill to initially arrive at agreement on those provisions on which commonality existed among all the parties, and then deal with areas of disagreement. The sections of the draft relating to trade disputes and individual employment grievance created major points of contention. One major contention was that the original draft could even be in conflict with the ILO Conventions on labour standards. In March 2003, the Bill was forwarded to the ILO Office for its comments and advice on whether the provisions of the Bill were consistent with the ILO Conventions. The ILO responded promptly, upon which another round of the LAB Sub-Committee discussions took place. By April 2003, a consolidated draft, including the areas of agreement and the areas of continuing disagreement was produced to provide the basis for further consultation.

The government also organized an internal consultation through a workshop of all managers of key government ministries. The Ministry of Labour held separate meetings with workers’ representatives and employers’ representatives to advance the draft further. In August 2003, the draft, incorporating the comments, was submitted to an ILO-funded consultant with the objective of helping with the drafting of the bill. The consultant, Ratu Joni Maduraiwiwi, had previously worked as the Permanent Arbitrator in Fiji, thus was thoroughly familiar with the key issues.

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which the Bill aimed to address. His report was submitted to the Labour Minister in September 2003. Following this, further rounds of consultation took place with the stakeholders. In March 2004, the new draft was circulated to 11 stakeholders and NGOs for comments. Various sections within the government also began scrutinising the new draft. Meetings with stakeholders continued, with the outcome that there began to emerge some agreement on some of the hitherto contentious issues. A new draft, titled Employment Relations Bill, was prepared by September 2004 and again circulated to the stakeholders. This third draft was also submitted to the Cabinet Sub-Committee on Legislation.

By February 2005, there was agreement amongst most stakeholders and the government on most of the matters contained in the third draft of the bill. In February a 2-day Labour Advisory Workshop endorsed an improved draft for wider consultation with the public through a ‘roadshow’ in February and March 2005. The Cabinet Sub-Committee on Legislation also finalized its policy position on the proposed legislation. The final draft was presented to the Cabinet in May 2005 which approved the Bill, with minor amendments, for tabling in the House of Representatives. The Employment Relations Bill, hereafter referred to as ERB, was tabled in the House of Representatives on 26 September 2005. The Bill was committed to the Parliamentary Sector Committee on Economic Services for scrutiny with the Committee required to report to the House of Representatives in April 2006. However, the Parliament was dissolved for elections in March, thereby throwing the Bill back to the Bill’s sponsor, the Ministry of Labour. The Ministry now intends to table the Bill again in the Parliament this year.

1.2 Objectives

The Bill aims to provide a legislative framework for various aspects of industrial relations in the country. The Bill’s description states that it aims to:

- a) creating minimum labour standards that are fair to workers and employers alike, and to build productive employment relationships;
- b) help prevent and eliminate direct and indirect discrimination in employment on the basis of race, colour, gender, sexual orientation, age, physical or mental disability, HIV/AIDS status, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- c) provide a structure of rights and responsibilities for parties engaged in employment relations to regulate the relationship and encourage bargaining in good faith and close observance of agreements as well as effective prevention and efficient settlement of employment related disputes;
- d) establish mediation services, employment relations tribunal and an employment relations court to carry out their powers, functions and duties;
- e) encourage consultation between labour and management in the workplace for better employment relations; and
- f) comply with international obligations and giving effect to the Constitution (Amendment) Act 1997.

The Bill is divided into 22 parts and 265 sections. Table 1.1 shows the components of the bill, and their links to the various existing labour legislation.
Table 1.1: ERB and its Links with Existing Labour Laws

<table>
<thead>
<tr>
<th>Parts of the ERB</th>
<th>Existing Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part 2: Fundamental Rights and Principles at Work</td>
<td>New</td>
</tr>
<tr>
<td>Part 3: Employment Relations Advisory Board</td>
<td>Employment Act</td>
</tr>
<tr>
<td>Part 4: Appointments, Powers And Duties of Officers</td>
<td>Employment Act</td>
</tr>
<tr>
<td>Part 5: Contracts of Service</td>
<td>Employment Act</td>
</tr>
<tr>
<td>Part 6: Protection of Wages</td>
<td>Employment Act, Wages Council Act</td>
</tr>
<tr>
<td>Part 7: Holidays and Leave</td>
<td>Employment Act</td>
</tr>
<tr>
<td>Part 8: Hours of Work</td>
<td>Daylight Savings Act, Shop (Regulation of Hours &amp; Employment) Act, Public Holidays Act</td>
</tr>
<tr>
<td>Part 9: Equal Employment Opportunities</td>
<td>New</td>
</tr>
<tr>
<td>Part 10: Children</td>
<td>Employment Act</td>
</tr>
<tr>
<td>Part 11: Maternity Leave</td>
<td>Employment Act</td>
</tr>
<tr>
<td>Part 12: Redundancy For Economic, Technological or Structural Reasons</td>
<td>New</td>
</tr>
<tr>
<td>Part 13: Employment Grievances</td>
<td>New</td>
</tr>
<tr>
<td>Part 14: Registration of Trade Unions</td>
<td>Trade Unions Act, Industrial Associations Act</td>
</tr>
<tr>
<td>Part 15: Rights and Liabilities of Trade Unions</td>
<td>Trade Unions Act</td>
</tr>
<tr>
<td>Part 16: Collective Bargaining</td>
<td>Trade Unions (Recognition) Act</td>
</tr>
<tr>
<td>Part 17: Employment Disputes</td>
<td>Trade Disputes Act</td>
</tr>
<tr>
<td>Part 18: Strikes And Lockouts</td>
<td>Trade Disputes Act</td>
</tr>
<tr>
<td>Part 19: Protections of Essential Services, Life And Property</td>
<td>Trade Disputes Act</td>
</tr>
<tr>
<td>Part 20: Institutions</td>
<td>New</td>
</tr>
<tr>
<td>Part 21: Offences</td>
<td>Various Acts</td>
</tr>
<tr>
<td>Part 22: Miscellaneous (Immunities, Regulations, etc)</td>
<td>Various Acts</td>
</tr>
</tbody>
</table>

The ERB is aimed at replacing the following 6 existing laws:

a) Employment Act.  
b) Trade Unions Act.  
c) Trade Unions (Recognition) Act.  
d) Trade Disputes Act.  
e) Wages Council Act, and  
f) Public Holidays Act.

Two major laws relating to industrial relations which would need to be amended with the passing of the ERB are:

a) Workmen’s Compensation Act (minor amendments)
b) Sugar Industry Act (major amendment with respect to industrial relations in the sugar industry)

The laws which would remain unaffected in essence with the passage of the ERB are:
   a) Workmen’s Compensation Act (essence of the law remains unaffected)
   b) TPAF Act
   c) Ionising Radiation Act
   d) Factories Act, and
   e) Health and Safety at Work Act
   f) Daylight Savings Act,
   g) Shop (Regulation of Hours and Employment) Act
   h) Industrial Association Act.

There are several new or substantially new, provisions in the Bill. These relate to:
   a) fundamental rights and principles,
   b) equal employment opportunities,
   c) good faith bargaining/negotiation/dispute resolution,
   d) employment of women and children (substantially amended)
   e) employment grievances,
   f) new institutions (mediation services, employment tribunal, and employment court), and
   g) redundancy.
Preliminary: Applications of the Law, and Fundamental Rights of Workers and Employers

2.1 Application and Exclusion

The provisions of the proposed law are to apply to ‘all employers and workers in workplaces in Fiji’, including government, government entities, local authorities, statutory authorities, and the sugar industry. Domestic workers are also included in the proposed law.

Members of the Republic of Fiji Military Forces, Fiji Police Force and Fiji Prisons Service are excluded from the application of the proposed bill.

Comments: The reasons for the exclusion of the ‘disciplined forces’ from the provisions of the proposed law need to be examined. While there may be a stronger case for disallowing ‘strikes’ or ‘lockouts’ in these institutions, the provision of the mechanisms for other aspects of employment, including disallowing discrimination, in the proposed law may be usefully applied to all the agencies of the disciplined forces.

Another question that arises is whether ‘prisons services’ should be regarded as ‘disciplined services’ under the new notion of essential services (see Chapter 19). If Prisons Service were to be categorized as an essential service, it would eliminate the reasons for excluding prison services from the ambit of the proposed law. The ILO also informed the Parliament’s Sector Committee examining the ERB that it supported the lifting of the exclusion of prison services employees from the ERB.

The third matter is that the ERB treats all employers alike. In Fiji, there are different categories of employers. A very large number of employees – amounting to 63% of all employed persons in the country – are employed in enterprises in the informal sector. Formal sector employment is only around 132,000 out of an estimated labor force of 353,000 in 2006.

A legislation that aims to cover workers in the informal sector, without any enabling national legislation to cover the informal sector, is bound to remain ignored to that extent. While the most appropriate course of action would be to formalize the informal sector, labour legislation ought to reflect the pace of such formalization rather than move ahead of the pace at which the informal sector is formalized.

2.2 Definitions

The ERB defines numerous terminologies used in the bill. It contains numerous new terminologies which are not present in existing labour laws. Table 2.1 lists some of the more important terminologies which are present in the ERB which are not found in current legislation.
### Table 2.1: Definitions

<table>
<thead>
<tr>
<th>Terms</th>
<th>Law</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child</td>
<td>ERB; EA</td>
<td>Different definitions</td>
</tr>
<tr>
<td>Commercial Undertaking</td>
<td>EA</td>
<td>Not defined in ERB</td>
</tr>
<tr>
<td>Confinement</td>
<td>EA</td>
<td>(In relation to maternity leave) not defined in ERB</td>
</tr>
<tr>
<td>Contract of Service</td>
<td>ERB; EA</td>
<td>Different definitions</td>
</tr>
<tr>
<td>Disabled Person</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Discrimination</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Dismissal</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Dispute</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Duress</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Employee</td>
<td>EA</td>
<td>Different definitions</td>
</tr>
<tr>
<td>Employment Contract</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Employment Dispute</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Employment Grievance</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Family</td>
<td>ERB; EA</td>
<td>Different definitions</td>
</tr>
<tr>
<td>Forced Labour</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Indirect Discrimination</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Part-Time Worker</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Redundancy</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Remuneration</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>ERB</td>
<td>Not present in current laws</td>
</tr>
<tr>
<td>Trade Union</td>
<td>ERB; TDA; TURA</td>
<td>Different definitions</td>
</tr>
</tbody>
</table>

**Comments:** The following definitions need to be re-visited:

**Duress:** duress is defined only in relation to trade union membership. It also needs to be defined in relation to waiving any of the rights of a worker under this and other labour laws.

**Employer:** An employer is defined as one who has a contract of service with a worker. However, there is no provision in the section dealing with employment contracts, to deem a worker working for an individual/organisation without a contract as working on a contract of service. The definition of employer, therefore, needs to be amended to make ‘agreement to pay wages for work performed’ as the operative criteria for the definition rather than defining it with reference to a contract of service.

**Executive Committee:** Trade Unions are institutions founded on democratic principles. As long as this principal is accepted, the definition of ‘Executive Committee’ should provide for an elected body. A likely suggestion is: ‘executive committee’ means body elected by the membership that is established under the constitution of a union to manage the affairs of the trade union.

**Forced Labour:** Forced labour is defined to exclude ‘any work or service which forms part of the normal civic, traditional or religious obligations’. This would open the possibility of exploitation of employees by civic, traditional or religious institutions. The exclusion of work performed for normal civic, traditional or religious obligations is not necessary.

**Medical Office:** this term is redundant as the terminology used in the ERB is ‘registered medical practitioner, which is defined in the Bill.

**Officer:** Following the comment of ‘executive committee’ above, this term also needs to include the requirement of election. The suggestion is that ‘Officer of a trade union’ be defined as an elected member of the executive committee or an elected officer of a branch of the trade union…’
Strike: strike is defined very widely to include matters other than discontinuation of work. Discontinuation of work should be distinguished from other forms of withholding expansion of labour, like go-slow, or work-to-rule. By creating such distinction, a middle ground tool than an extreme one of withholding labour, arises, which would reduce the potential for trade disputes. Another problem with the definition is that in certain circumstances under the Health and Safety at Work Act, cessation of work is necessitated by law. But under the ERB provisions, this will be tantamount to a strike. It is suggested that a proviso of the following form be added to the definition of ‘strike’: ‘provided that a cessation of work or any disruption to work as provided for under the Health and Safety at Work Act, shall not be deemed to be a strike.

Worker: the definition excludes those working on a fee or a commission, like sales agents, insurance agents, and generally those who perform labour for a remuneration but where the remuneration takes the form of a fee or a commission. This limits the scope of the ERB, and potentially opens up the case for evasion of labour legislation by transferring work from contracts of service to contracts for service.

2.3 Fundamental Rights and Principles at Work

This section provides for the protection of fundamental rights of individuals to work, based on the provisions of the Constitution. Five fundamental rights and principles are listed: these are on forced labour, discrimination, positive discrimination, gender wage equality, and trade union freedom.

2.3.1 Freedom from Slave Labour

S24(1) of the Constitution states: ‘A person must not be held in slavery or servitude and must not be required to perform forced labour.’ S6(1) of the ERB provides that no person shall be required to perform forced labour. Forced labour, however does not include any work or service which forms part of the normal civic, traditional or religious obligations. This opens the possibility of abuse, exploitation, and evasion of labour laws by civic, traditional or religious institutions.

Comment: The definition of forced labour needs to be re-examined and the exclusion provided for work for normal civil, traditional or religious obligations lifted.

2.3.2 Freedom from Discrimination

S38 of the Constitution provides for equality of treatment. No person can be ‘unfairly discriminated against, directly or indirectly’ on the basis of ‘actual or supposed personal characteristics or circumstances’, including specific grounds as listed in Table 2.2.

The ERB adds the following additional grounds for disallowing discrimination: social origin, religion, marital status, pregnancy, family responsibilities, state of health, HIV status and trade union membership/activity. While the Bill does not list belief, age, economic status, birth and primary language as possible grounds for disallowing discrimination, the constitutional provisions would take precedence. In total, therefore, the laws would provide for at least 21 grounds, as listed in the first column in Table 2.2, for disallowing discrimination.
Table 2.2: Grounds for Discrimination Disallowed

<table>
<thead>
<tr>
<th>Primary Feature</th>
<th>ERB</th>
<th>Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>S6(2)</td>
<td>Actual or supposed personal characteristics or circumstances (s38), including:</td>
</tr>
<tr>
<td>Race</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Ethnic Origin</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Colour</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Place of Origin (national extraction)</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Social Origin</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>Primary Language</td>
<td>N Y</td>
<td></td>
</tr>
<tr>
<td>Religion</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>Birth</td>
<td>N Y</td>
<td></td>
</tr>
<tr>
<td>Gender</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Economic Status</td>
<td>N Y</td>
<td></td>
</tr>
<tr>
<td>Marital Status</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>N Y</td>
<td></td>
</tr>
<tr>
<td>Disability</td>
<td>Y Y</td>
<td></td>
</tr>
<tr>
<td>Opinions (political)</td>
<td>N Y</td>
<td></td>
</tr>
<tr>
<td>Beliefs</td>
<td>N N</td>
<td></td>
</tr>
<tr>
<td>Pregnancy</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>Family Responsibilities</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>State of Health</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>HIV Status</td>
<td>Y N</td>
<td></td>
</tr>
<tr>
<td>Trade Union membership/activity</td>
<td>Y N</td>
<td></td>
</tr>
</tbody>
</table>

One possible controversial ground for disallowing discrimination in recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment relationship, concerns state of health. Physical and mental health is a crucial element of a person’s ability to perform at workplace. If employers are disallowed to screen workers on the basis of health, it could possibly impact on their productivities and thus viability. There is also a legal dimension to this ground. Whether disallowing health as a ground to screen workers would expose an employer to litigation in cases of serious adverse consequences on the health of a fellow worker, including death, arising out of continuing employment, needs to be examined.

**Comment:** Health as a basis of disallowing discrimination in recruitment, training, promotion, termination, etc., needs to be re-examined for possible legal and financial impact on the employer.

The Constitution (s38(8)) also provides for a limit to freedom from discrimination if it involved application of the customs of Fijians or Rotumans or of the Banaban community in terms of ‘holding, use or transmission of, or to the distribution of the produce of, land or fishing rights’.

Holding, use, transmission or distribution of the produce of land or fishing rights deal with expansion of labour power. The Constitutional intention seems to be to disallow any erosion of
cultural norms and practices of ethnic Fijians, Rotumans or Banabas. To this extent, it is vital that labour laws make specific provision on the various types of labour practices which would fall under this category. This would avoid any future possible confusion.

**Comment:** To avoid doubts created by the Constitutional position on the limits to freedom from discrimination, the ERB should make specific provision on various types of labour practices that are permissible under s38(8) of the Constitution, and those that are disallowed.

### 2.3.3 Positive Discrimination: Possibilities and Limits

The Constitution allows for positive discrimination. S38(3) states that disallowing discrimination ‘does not preclude any provision, programme, activity or special measure that has as its object the improvement of conditions of disadvantaged individuals or groups’, including those who are disadvantaged on the grounds listed above. S44 of the Constitution requires the Parliament to make provision for programs designed to achieve for all groups or categories of persons who are disadvantaged effective equality of access to, inter alia, education and training and participation in all levels and branches of service of the State (including local authorities). But a program so established can not, directly or indirectly, deprive any person not entitled to its benefits of any position or seniority in the service of the State.

The Constitution (s140) makes specific provisions for employment in the civil service and lists four basic principles for recruitment to or promotion within a state service:

a) government policies should be carried out effectively and efficiently and with due economy;

b) appointments and promotions should be on the basis of merit;

c) men and women equally, and the members of all ethnic groups, should have adequate and equal opportunities for training and advancement;

d) the composition of the state service at all levels should reflect as closely as possible the ethnic composition of the population, taking account, when appropriate, of occupational preferences.

While employment in state services is provided for, there is no similar provision for employment in the private sector. The private sector exists and grows on the basis efficiency and effectiveness. All aspects of employment within the private sector revolve around production and distribution of goods/services on the basis of efficiency. Whether any law on employment should recognize this aspect of employment as the over-riding principle of employment in private sector needs to be considered.

**Comment:** Whether the fundamental principles of employment in the private sector need to be stated in the ERB, should be discussed with stakeholders.

### 2.3.4 Freedom of Trade Unions

The ERB provides workers freedom of association. S6(5) states: ‘A worker is not obliged to join a trade union’. S6(6) states: ‘No employer may make it a condition of employment that a worker must not be or become a member of a trade union, and no written law shall prohibit a worker from being or becoming a member of a trade union.’
### 2.3.5 Freedom from Harassment, Workplace Bullying and Unfair Dismissal

The ERB, and existing labour legislation, do not recognize that freedom from harassment, workplace bullying and unfair dismissal is a fundamental right and principal at work. It is now increasingly being recognized internationally that workplace bullying and harassment is now well ingrained in a large number of workplace institutions. On unfair dismissal, while there are provisions in the ERB which could be used to address unfair dismissal, recognition of freedom from unfair dismissal is a crucial right of a worker in modern societies.

**Comments:** That the Bill provide for freedom from:
- (a) workplace harassment
- (b) workplace bullying, and
- (c) unfair dismissal

as fundamental right and principles at work.
3 Employment Relations Advisory Board

3.1 Objectives

Along similar lines as the provisions of the Employment Act (s3), the ERB creates an Employment Relations Advisory Board (ERAB). This body is to advise the Minister for Labour on all matters pertaining to employment relations. The primary function of the ERAB is the same as the function of the Labour Advisory Board (LAB) under the Employment Act. The ERB lists the specific functions of the ERAB as:

a) to consider and advise the Minister on employment related matters including issues of policy as well as matters provided for by this Act and any other written law;

b) to inquire into and report to the Minister on employment related matters referred to it by the Minister;

c) in liaison with the Ministry, to facilitate the making of regulations, codes of practice and guides relating to matters covered by this Act for the Ministers consideration;

d) to advise the Minister on consultation and cooperation between labour and management and how this process may be promoted and strengthened;

e) to advise the Minister on International Labour Organisation instruments; and

f) to perform other functions under this Act or any other written law.

Comments: S53(2) of the ERB empowers the Wages Council to consider any matter affecting the general conditions of employment of workers, and to make a report to the CEO who shall, after receiving the report of the council, make a report to the Minister for his consideration. The issue that arises is whether the ERAB is the primary/sole advisory body to the Minister, or whether the intention is to create a multiplicity of advisory bodies. The latter would dilute the effectiveness of advisory bodies and would gradually diminish the significance of the ERAB as well as the other bodies. It is important to create a clear structure of seeking and receiving advice for the Minister.

A comparative analysis of the provisions on the Employment Relations Advisory Board of the ERB and the existing provisions, is provided below.

3.2 Composition

ERB (s8, 10, 11): The ERAB is to be appointed by the Minister for Labour. It is to consist of public officers as representatives of the Government, representatives of employers, representatives of workers, and other persons. In appointing such members the Minister ‘must appoint such persons who, in the opinion of the Minister, have experience and expertise in the areas covered by the functions of the Board or in employment relations, industrial, commercial, legal, business or administrative matters’. For employers’ and workers’ representatives, the Minister is required to invite bodies representing employers and workers, respectively, to make nominations and appoint the members from such nominees. The CEO of Labour is the chairperson of the Board.

In making appointments to the Board, the Minister may take into account the principles of equality set out in s38 of the Constitution, necessary for the effective operation of the Board. Members of the Board of advisors are entitled to allowances. A member of the Board holds office
for the period, not exceeding 2 years but is eligible for re-appointment. The Minister may terminate the appointment of a member for misbehaviour, bankruptcy or for other good reasons.

*Existing Law:* Employment Act has similar provisions.

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**Comments:** For the ERAB to be taken seriously, it needs a clear mandate and strength. The ERB ought to specify the number of members which the ERAB would have. This will eliminate any potential abuse of ministerial powers by varying the membership numbers of the ERAB.

There is also no mandatory minimum number of meetings. S12 states that such number of meetings are to be called as are necessary for the performance of the ERAB’s functions and exercise of its powers. While there is merit in keeping open the upper number of meetings, not specifying any minimum number of meetings per year may indicate a lack of any serious role of the ERAB.

### 3.3 Functions and Procedures

**ERB** (s9, 12): To carry out its functions, the ERAB may invite any person it considers appropriate to act as an advisor to the Board in its deliberations. The ERB lists 6 points elaborating on the powers of the Board to invite persons to serve as advisors to the Board or establish sub-committees. [Five of these six are redundant as the Board is empowered to regulate its own procedures (s8(7))]. The Board is to meet as necessary for the performance of its functions and the exercise of its powers. Meeting procedures specified include the quorum (50% of the members), and decision making (determined by a majority vote of the members present) where the Chairperson has a casting vote in case of equality of votes.

*Existing Law:* The Employment Act provides for the LAB to regulate its own affairs.

**Comments:** S9(3) is misplaced under the functions and powers of the Board, and should be taken out. There is a misfit in S9, however. S9(3) states: ‘To facilitate and implement the process under subsection (1)(d), consultation committees must be established by employers employing more than 20 workers to practice the principles set out in Schedule 1, provided that where there are worker and employer committees already in place they may perform such role.’ S1(d) refers to the function of the board ‘to advise the Minister on consultation and cooperation between labour and management and how this process may be promoted and strengthened’. The process of establishment of consultation committees of employers and employees in organizations is not an appropriate function of the Employment Relations Advisory Board. While s9(6) gives the Board the ‘powers necessary to carry out its functions’ conferred on it by the Act, it is not clear if this power extends to getting an operational budget appropriated specifically for the Board, or even to hire its own staff. Given other provisions on budgeting and state employment, it is likely that the ERAB was not intended to have a separate and independent statutory-body type existence. Given that the ERAB does not have any staff of its own, operational matters dealing with consultative committees are matters for the implementing authority of the law rather than for an advisory board.

### 3.4 Annual Reports

**ERB** (s13): The ERAB is required to prepare an annual report for the Minister, who, in turn, is required to include the report in the Ministry’s annual report

*Existing Law:* There is no such requirement in the EA. The annual reports now provide no detail on the operation of the LAB except for the list of members.
Comments: The requirement makes the board more broadly accountable to the public and is a positive development.

3.5 Further Comments: Labour Management Consultation and Cooperation

A key objective of the ERB is to, as the preamble to the Bill states, encourage consultation between labour and management in the workplace for better employment relations. Towards this end, the Bill requires the establishment of labour-management consultation committees by employers in establishments with more than 20 workers. Schedule 1 of the ERB provides the guidelines for labour-management consultation and cooperation. It requires:

a) The employer to provide a clear sense of purpose which workers can identify with; show commitment to the promotion of consultation and cooperation; middle and lower management, executives and supervisors to support consultation and cooperation programmes; and participate in greater information sharing with their workers, such as the general economic performance and outlook of the industry, performance, output, productivity and their long-term plans.

b) A two-way process of effective communication at all levels in the organization.

c) The union leaders and workers to be committed to better labour-management cooperation and greater consultation.

d) Greater emphasis on education and training at all levels, including induction and orientation programmes to help them understand the corporate philosophy and help to establish communication between the management and the new workers.

e) Management and unions to discuss and consult each other on any matter which directly, or indirectly affects the interest and welfare of workers in the organization, for example, safety and health, productivity improvements, social and recreational activities, staff development, operational procedures, and worker-management relations.

f) Sharing of the gains from higher productivity resulting from such cooperation, with the workers (for example, through profit sharing or sharing of productivity gains, and better benefits for workers).

g) At the national level, the Government, employers and trade unions to set the framework for close tripartite cooperation and consultation.

h) At the enterprise level the spirit of tripartite ought to be translated into close cooperation and consultation.

While labour-management cooperation and consultation is a cornerstone of the Bill, there is no mechanism which can encourage, develop and sustain such cooperation. The Bill requires the ERAB to oversee the establishment of such consultation committees. S9(4) empowers the ERAB to appoint a subcommittee comprising Government, employer, union and community representatives to oversee and monitor the establishment of labour-management consultation committees.

The ERAB, and any likely sub-committee of the ERAB, are not institutions which operate on a full-time basis. The scope of work required is significant; to establish, develop and sustain labour-management cooperation in Fiji would require skilled personnel working on this on a full-time basis.

It is, therefore, recommended that the ERB create a direct and clear responsibility for the establishment and functioning of the labour-management cooperation and consultation committees in all establishments employing more than 20 workers. The institution responsible should be accountable to the Minister through the ERAB and the CEO.
4

Appointments, Powers and Duties of Officers

Under s15, the Chief Executive Officer of the Ministry of Labour, ‘and other public officers’ will be responsible for the administration of the proposed law. While the bill does not specify who the other public officers are, it requires the CEO to ‘provide a certificate of designation to an officer appointed for the purposes’ of the law. This may rule out civil servants outside the Ministry of Labour from indulging in labour relations matters.

S15(3) empowers the members of the public affected by this law to demand the identity certificate from the officer.

4.1 Powers of CEO

Under s17, the Chief Executive Officer can, in writing, require an employer to provide written information necessary for the effective administration of the law. Such information may include returns and statistics on employment and other related matters. Employers contravening this requirement would commit an offence.

The CEO (and his authorized officers) may also, subject to any directions by the Director of Public Prosecutions, institute proceedings in the Employment Relations Tribunal in respect of prescribed offences, and may prosecute such proceedings. They may also appear in the Tribunal on behalf of a worker or institute civil proceedings on behalf of a worker against the worker’s employer on matters relating to the employment of the worker.

The CEO, and authorized officers, have the power to:

a) enter, inspect and examine a workplace where or about which a worker is employed or where there is reason to believe that a worker is employed;
b) require an employer to produce any worker employed by the employer and any documents or records which the employer is required to keep under this law or any other documents or records relating to the employment of the worker;
c) interview the employer or a worker on a matter connected with employment or this law, and may seek information from any other person whose evidence is considered to be necessary; or

d) inquire from an employer or a person acting on the employers behalf regarding matters connected with the carrying out of this law (s19(1));
e) copy or make extracts from a document or records in the possession of an employer which relate to a worker;
f) issue a demand notice or fixed penalty notice requiring compliance with the provision.

The officers may also:
a) advise and assist employers and workers on particular or general employment relations matters under this law;
b) provide information, advice, awareness or training to employers and workers or their organizations on matters under this law; or

3 Unless otherwise indicated in this document, ‘CEO’ refers to the Chief Executive Officer of the Ministry responsible for Labour.
c) formulate enterprise or national policies, codes and strategies on employment relations matters.

The CEO and/or labour officers/inspectors are amply empowered to implement the proposed law and to ensure adherence to the provisions of the proposed law.

Comparable powers and responsibilities are provided to the CEO and labour officers/inspectors in the Employment Act (s5-12).

**Comment:** There is a potential conflict of interest in labour officers who would advice, assist, train, etc workers and/or employers under s17, and then maintaining the power to enter, inspect, examine and do all that is necessary to prosecute parties for breach of the labour laws. The inspection/enforcement powers ought to be separated from the advocacy powers. In the absence of such separation, the enforcement roles would tend to be subverted to the advice/training, etc role since the advisory function builds a rapport between the officers and other parties, while enforcement is based on a strong will to detach the enforcement officer from the offending party. Such separation is made more necessary since Fiji is a small society where personal relationships have a significant influence on administrative decision-making.

The Employment Act, however, provides wider powers to the CEO and/or labour inspectors/officers. First, they could take and/or remove samples of materials, etc., from workplaces. This power is not extended to the officers in the ERB. This is possibly for the reason that samples deal largely with worker health and safety, which are dealt in the Health and Safety at Work Act and not the ERB.

Secondly, the Employment Act empowers the labour officers to also seek documentation or records relating to the Fiji National Provident Fund Act. The ERB is silent on this.

**Comment:** Are the Labour Officers to continue to police offences relating to the payment of provident fund under the proposed law? This issue needs to be clarified.

The officers are required to treat as confidential the source of a complaint bringing to his or her notice a defect or breach of legal provisions relating to conditions of work and the protection of workers while engaged in his or her work. They must also give no indication to the employer or the employer’s representative whether a visit or inspection was made in consequence of the receipt of a complaint from within the organisation or workplace.

**Comment:** This provision protects whistle-blowers. It is a positive measure. Such a provision was not present in the Employment Act.

Other good governance provisions require that the CEO and labour officers/inspectors not have any ‘direct or indirect interest’ in a workplace under his or her supervision, or not make use of or reveal, including after leaving Government service, any manufacturing or commercial secrets, working processes or confidential information which may come to his or her knowledge in the course of his or her duties (s20(1)).

**Comment:** ‘Indirect interests’ in c20(1)(a) needs to be defined. Would it also include holding of shares in listed or unlisted companies? Would it include any interest which a spouse or offspring or either of the parents have in a business? The good governance provision could possibly lead to the development of a code of practice for staff of the Ministry of Labour.
Comment: Where such practices would be normal in advanced nations, or in organizations that are professionally run, Fiji needs such provisions since governance is weak in the country. The ‘good-governance’ provisions are positive additions to labour laws.
5

Contracts of Service

5.1 Introduction

The ERB provides for the making of employment contracts between employers and workers. Similar provisions are present in the Employment Act (s13-49). The ERB provisions, however, are much clearer than the provisions in the Employment Act, though, as would become obvious as discussion in this chapter proceeds, not entirely satisfactory.

The proposed law (s22) requires that ‘[n]o person may employ a worker and no worker may be employed under a contract of service except in accordance’ with this law.

**Comment:** S22 may be interpreted as requiring that a contract of service be in accordance with the requirements of the ERB. The issue is whether an employment could be taken without a written or oral contract of service. The ERB nowhere states clearly that all employment need to have a valid contract of service. While it may be presumed that when an ‘employer’ and a ‘worker’ enter into a work agreement, it would comprise a contract of service. However, contract is a legal concept, which has numerous fundamental requirements, all of which may not be satisfied in every employment situation. The ERB ought to specifically state that waged work ought only be performed under a contract of service.

A contract of service may be an oral contract or a written contract, except where a written contract is required by this or any other law.

A particular section in the ERB needs explanation; this is s23(4), which states:

If a worker falls within the description of worker to whom an employment contract applies, the workers terms and conditions of employment must include terms and conditions of employment contained in the employment contract while it is in force except where the terms and conditions of employment in that employment contract are less beneficial to the worker than those applicable under subsection (3).

Subsection 3 deals with the terms of a contract, which ‘must be such terms as are agreed between the parties or which apply by virtue of custom or practice or which are implied by law’. S23(4), therefore, needs to be redrafted so that its intentions come out clearly.

**Recommendation:** S23(4) needs to be redrafted so that its intentions come out clearly.

It ought to be stated that the provisions on employment contracts are badly drafted and confusing. It seems that the intention of the sections are the following:

1. contracts for periods longer than one month of employment are to be in writing.
2. contracts for periods of up to a month could be oral.

If these are so, then these objectives should be stated at the start of the section rather than be buried in different sections. If this is done, then some of the comments made below, for example, on termination (s29), could possible be redundant.

A comparative analysis of the provisions in the ERB and the existing provisions on employment contracts is undertaken below.
5.2 Content

**ERB** (s24): It is a duty of the employer to either provide work to the worker of the type specified in the contract, or, if there is no work, pay the worker the wages at the same rate as if the worker had performed the work specified under the contract.

**Existing Law:** Employment Act is silent on this.

**Comments:** A significant number of jobs are dependent on factors beyond the direct control of the employer, for example, markets for the product, lack of input supply, machinery breakdown, etc. In such cases, the issue is whether an employer has the obligation to provide work even when production is not possible. Under the ERB provisions, employers would possibly build such eventualities in contracts to protect them, which would raise the costs of transactions (for example lawyers’ fees).

5.3 Death of a Worker

**ERB** (s25): An employer is required to ‘as soon as practicable, and in any event not more than 14 days after the death’, pay or deliver to ‘the spouse’, or in the absence of a spouse, the dependants (if over 18) or their legal guardians (if under 18), or nominees if no dependants, the sum due.

**Existing Law:** The EA requires an employer to ‘as soon as practicable after the death’, pay or deliver to ‘any district officer or labour officer’ all wages and sums due to the deceased employee.

**Comments:** The EBR provisions are more convenient to workers’ spouse/dependants.

5.4 Wages on Detention/Imprisonment

**ERB** (s26): An employee is not entitled to a pay during the period of detention/imprisonment.

**Existing Law:** Employment Act has the same provision.

5.5 Contract Period

**ERB** (s27-8): The period of contract is the period for which wages are payable under the contract. But no wage period can be more than the period of one month. Each party to a contract is presumed to have entered into a contract for an indefinite duration, except if a contract:

- a) states it is a contract for one fixed period which is expressed to be not renewable;
- b) a contract is for a fixed task; or
- c) it is a daily contract where the wages are paid daily

**Existing Law:** Employment Act (s22-23) has similar provisions, but the equivalent of s28 is subject to provisions on termination of a contract. A contract can specifically be expressed to be terminable without notice.

**Comments:** The ERB makes no reference to a contractual provision where contracts can be terminated without notice. S27 and s28 appear to be in conflict. S28 provides that a contract is presumed to be for an indefinite duration, while s27 provides that a contract is deemed to be for the period with reference to the wage payment period. S37 requires that any contract for a duration longer than 1 month needs to be in writing. S27 and s28 need to be redrafted to simplify the requirements, especially in light of the provision in s37.
5.6 Termination of Contracts

*ERB* (s29): The ERB provides for the way in which contracts of service for different durations can be terminated.

*Existing Law:* Employment Act (s20-49) has similar provisions.

*Comments:* The ERB provides for the way of termination, but not the conditions of termination of an indefinite contract. This makes the worker extremely vulnerable. This is probably the most significant weakness of the ERB in terms of worker’s rights. This issue is whether an employer could terminate the employment of a worker without any valid reason related to job performance. It is recommended that the ERB require the employer to put in place a process, where reasons for termination, e.g. incompetence, are discussed with the worker. The ILO’s Convention No. 158 (Termination of Employment Convention 1982) could provide a guide to possible drafting of the provisions on termination of contracts. This Convention obliges ratifying States to establish, in conformity with the instrument, the grounds upon which a worker can be terminated from employment. Employment may not be terminated by the employer unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking. Grounds such as union membership, filing a complaint against the employer, acting as a worker representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, social origin, absence from work during maternity leave, or temporary absence for illness are not valid grounds for termination. The Convention establishes the procedural requirements for termination. While Fiji has not ratified this Convention yet, it is important that provision be made in the ERB to provide for the rules of natural justice to apply in relation to termination of a worker’s contract.

5.7 Notice Requirements

*ERB* (s29(2)): Termination notice is to be in writing.

*Existing Law:* Employment Act (s24(2)); termination notice could be in writing or given orally.

*Comments:* Oral notice provision is eliminated in the ERB.

5.8 Employment Certificate

*ERB* (s30(6)): Upon termination of a worker’s contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service.

*Existing Law:* Employment Act has no such requirement or provision.

*Comments:* The notice provision aims to provide a worker with certification of work experience, which may be helpful to him/her in search of other jobs. However, the employer may state in the letter the circumstances in which the worker’s job was terminated. This would undermine the rationale for the employment certificate provision. The ERB ought to provide a proforma for the certificate which must be adopted by all employers.
5.9 Piece or Task Work

**ERB** (s31): A contract of service may be made under which a task or piecework is to be performed for an agreed remuneration, and the contract is terminated upon the execution of the task or piecework.

**Existing Law**: Employment Act (s26) has similar provision, but additionally provides for:

a) if task not completed, then payment in proportion to the task completed, and

b) for piece work, the employee is entitled to be paid wages at the end of each calendar month in proportion to the amount of work which he has performed during such month, or on completion of the work, whichever date is the earlier.

**Comments**: ERB has no provision for payment for task not completed, or for piecework extending for more than one month.

5.10 Wages when due

**ERB** (s32): As per the contract, or for daily contracts where by agreement or custom, wages are due at intervals (not exceeding 1 month), at such intervals

**Existing Law**: The Employment Act has a similar provision, but has additional provisions on wage payments for task or piece work (s26). S30 provides for wage payment in case of contract termination on ‘quantum meruit’ basis.

5.11 Summary Dismissal

**ERB** (s33): Grounds for summary dismissal are

(a) where a worker is guilty of gross misconduct;

(b) for willful disobedience to lawful orders given by the employer;

(c) for lack of skill or qualification which the worker expressly or by implication warrants to possess;

(d) for habitual or substantial neglect of the workers duties; or

(e) for continual or habitual absence from work without the permission of the employer and without other reasonable excuse.

**Existing Law**: Employment Act has same grounds provided for, but for (a), ‘misconduct’ rather than ‘gross misconduct’ is provided for.

**Comments**: The ERB provides for a higher degree of proof of misconduct than what the existing laws require. The ERB has an additional provision on need for, at the time of dismissal, a written notice stating the reason for the summary dismissal to be given.

Overall, however, the reasons for summary dismissal are all contestable by a worker. Contests could be costly to both parties and could result in union action and/or work disruption. If the objective is to create a more harmonious work environment, a process for addressing the reasons listed as grounds for summary dismissal, need to be provided for. Numerous collective agreements contain such clauses. But not all work is regulated by collective agreements. The ERB could address this problem and create a better working environment.
5.12 Right to Wages on dismissal for lawful cause

*ERB* (s34): Wages are to be paid to the date of dismissal.

*Existing Law*: Employment Act has same provision.

5.13 Presumptions in Oral Contracts

*ERB* (s35): An oral contract is deemed to be a contract for the period by reference to which wages are payable under the contract but in any case shall not extend for longer than one month from when it was made. An oral contract terminates on the last day of the contract period, or in the case of a daily contract at the end of the day.

*Existing Law*: Employment Act (s22) has same provisions.

5.14 Written Contracts

5.14.1 Application

*ERB* (s36-7): Written contracts are needed for:
1. a contract that is made for a duration in excess of one month;
2. a foreign contract of service or as specified in the Regulations; or
3. a contract made between an employer within the Fiji Islands and a foreign worker to be performed within the Fiji Islands. Any foreign contract of service is to be submitted by the employer to the CEO labour for attestation before it is signed by the worker. An employer who fails to submit for attestation any foreign contract of service commits an offence. On conviction there is a fine up to $20,000 or to a maximum term of imprisonment or 4 years or both. In addition, no person is to recruit any person for employment under any foreign contract of service unless the person is authorised in writing by the CEO Labour. Contravention creates an offence of same order as above.

Contracts of apprenticeships entered under the TPAF Act are excluded from these requirements.

*Existing Law*: Employment Act has same provisions on apprenticeship. But written contracts are required where the contract:
1. is made for a period of or exceeding six months or a number of working days equivalent to six months; or
2. stipulates conditions of employment which differ materially from those customary in the district of employment for similar work; or
3. is a foreign contract of service.

*Comments*: The ERB reduces the term for which written contract is required from 6 months to 1 month. The ERB also adds requirement of written contract for a contract made between a Fiji employer and a foreign worker to be performed within Fiji. In ERB, contravention creates an offence (Employment Act created no offence for the breach of this provision).

5.14.2 Form and Content of Contracts

*ERB* (s): Particulars needed in written contracts are:
   a) Name of employer
b) Name of Worker  
c) Nature of Work  
d) Hours of Work  
e) Wages/Salary  
f) Holidays and Leave  
g) Discipline and Grievance Procedure  
h) Entitlements  
i) Conduct  
j) Signed by (the 2 parties)

**Existing Law:** Employment Regulations provide for the content of the contracts to be in English, and that there be certain details in the contract, which include those which are imported into the ERB as well as the following additional details (which are excluded in ERB requirements):

- Employee address
- Details of recruiter (name, place, date) if recruited through a recruiter
- Duration of Contract
- Times when wages become due
- Medical certification
- Attestation Provisions

**Comments:** Additional details needed in written contracts under the ERB, which are not present under the current requirements, are on holiday and leave; and discipline and grievance procedures.

### 5.14.3 Attestation

**ERB (s264(1a)):** Minister is empowered to make regulations on requirements for attestation of contracts.

**Existing Law:** Under the Employment Act each contract is to be attested by the district officer, labour officer or other officer authorised by the CEO Labour (s35).

**Comments:** Attestation requirements are too onerous. The ERB places any possible attestation requirement and procedures at the discretion of the Labour Minister

### 5.14.4 Medical Examination

**ERB (s38):** It is prohibited and constitutes an offence where a contract of service specifies that a worker must undergo a medical examination or that a medical examination is required in the course of a worker’s employment, for the medical examination to comprise or include screening for HIV/AIDS status, sexually transmitted diseases or pregnancy.

**Existing Law:** Under the Employment Act (s36), every employee who enters into a contract is to be examined by a medical officer, and this is to be done, as far as possible, before the contract is attested. Any employee who has been rejected after such examination as is hereinbefore mentioned as physically unfit for the work contemplated by the proposed contract, shall be returned to the place of engagement at the expense of the employer should the employee wish to return. The CEO may exempt from the requirement of medical examination for employees entering into contracts for employment in any agricultural undertaking not employing more than twenty-five employees; or employment in the vicinity of the employee's home on work which is not of a dangerous character or likely to be injurious to the health of the employees.
5.14.5 Transfer to Another Employer

**ERB (s39):** The transfer of a written contract from one employer to another must be done with the consent of the worker.

**Existing Law:** Employment Act (s39) has same requirement, but with the additional provision: it requires endorsement of the transfer by an attesting officer, who is required to ascertain that the employee has freely consented to the transfer and that his consent has not been obtained by coercion or undue influence or as the result of misrepresentation or mistake.

**Comments:** In the ERB, there is no role of the attesting officer to consent to the transfer.

5.14.6 Termination of Contracts

**ERB (s40-1):** A written contract is terminated by:

a) the expiry of the term for which the contract was made; or

b) by the death of the worker before the expiry of the term for which the contract was made; or

c) if the employer is unable to fulfill the contract, or owing to any sickness or accident the worker is unable to fulfill the contract, the contract may be terminated, subject to conditions safeguarding the right of the worker (to wages earned, and benefits).

**Existing Law:** Employment Act (s41) has similar provisions, but termination by mutual consent is explicitly included. This is a redundant provision as all contracts can be terminated by mutual agreement.
**Comments:** The ground ‘employer is unable to fulfill the contract’ is a ground which needs to be qualified, for example, the inability to fulfill the contract needs to be verified by the CEO and/or labour inspectors. In the absence of such protection, workers’ jobs would be exposed to termination for the arbitrarily stated reason that the employer can not fulfill the contract. Employers, on the other hand, are well covered by the ERB.

### 5.14.7 Repatriation

**ERB (s41):** The only specific requirement on repatriation is when a contract is terminated by the death of a worker. If termination is by death of a worker, the repatriation of the deceased worker locally will be the responsibility of the worker’s employer. But a failure to abide by this provision does not constitute an offence.

**Existing Law:** Employment Act (s42-3, 85) has extensive requirements on repatriation of an employee and/or the employee’s family, on expiry of contract, and on termination of contract. It placed the responsibility on the employers for the return of employees to the place of their recruitment. Failure to abide by the requirements constitutes an offence.

**Comments:** The ERB has no such provision. While under the immigration procedures (under the Immigration Act), repatriation of foreign workers would be covered, repatriation of local workers to their places of residence is not covered. This diminishes the legal rights of workers within Fiji.

### 5.15 Other Comments

#### 5.15.1 Children

The ERB makes no provision on the capacity of children to enter into employment contracts. The Employment Act (s37) makes specific provisions on the capacity of children to enter into employment contracts. It states that a child is not capable of entering into a contract, except for a young person (15-18 yrs) who could enter into employment in an occupation approved by a district officer or labour officer which is not injurious to the moral or physical development of non-adults. The ERB defines a child as someone under the age of 18, but establishes the minimum age of employment as 15 years, though it allows for children as young as 13 years to enter into employment under certain circumstances (ERB, s93). It is, therefore, presumed that children between 13 and 18 years old are capable to entering into employment contracts. The ERB, therefore, has reduced the age at which children could enter into contracts from 18 years to 13 years. This poses two problems:

i. Under general common law in Fiji, children under 14 years are deemed incapable of entering into contracts. By remaining silent on capacity to enter into contracts, the ERB accepts the minimum age for entering into commercial contracts as 14 years, which is the cut-off age for the definition of a child in the *Interpretation Act*. Yet it allows for children who are between 13 and 14 years to enter into commercial contracts. The issue is whether the ERB aims to reduce the age at which a child could enter into a commercial employment contract to 13 years. This needs to be examined.

ii. Law aside, there is a practical consideration of whether children under 18 have the capacity to understand the legalities which accompany employment contracts. There is no case law record in Fiji on this to come to a final conclusion. However, this is an issue that needs examination. One possible solution would be for the provision of legal assistance to persons under the age of 18 years desirous of entering into employment contracts.
5.15.2 Care and Welfare

The Employment Act (s82-3) has provisions for the employers to supply water and be responsible for the medical needs of workers and their families if they reside on the property of the employer with the consent of the employer. The ERB has no such provision of general application for all employment contracts.
6 Protection of Wages

6.1 Objectives

The objective of the provisions on protection of wages are:
(a) to ensure the payment of wages at set intervals is safeguarded; that authorised deductions are effected, and that the relevant details required by law are provided; and
(b) to establish Wages Councils covering certain industries to regulate remuneration and conditions of employment in those industries.

The Employment Act does refer to protection of wages, but there is no explicitly provided objective for such provisions. Explicit provisions are useful in interpreting the law in difficult circumstances.

6.2 Payment of Wages

ERB (s43): If the employer and the worker agree in writing, wages may be paid by cheque payable to the bearer on demand and drawn on a bank in Fiji, or the whole or a part of the wages may be paid into the bank account or credit union account standing in the name of the worker or jointly with one or more persons.

Existing Law: Employment Act (s50) requires that wages are to be paid in the currency which is legal tender at the place where the wages are paid. But, where the employer and the employee agree in writing wages may be paid by a cheque made payable to the bearer on demand and which is drawn on a bank in Fiji, or the whole or any part of the wages may be paid into a bank account or credit union account standing in the name of such employee or jointly with one or more person.

Comments: The ERB is silent on cash wage payment. It provides for payment by cheques where workers and employers agree in writing, but is silent on cases where there is no written agreement. Payment by cheques can provide a useful documentary evidence of payment of due wages. But cheque payment also involves additional costs to the employer in terms of bank fees and charges.

Recommendation: Cash payment provision, as present in EA, should be re-introduced to convenience workers. This will prevent time loss incurred in worker’s travel to banks to cash their wage cheques.

6.2.1 Wages Statement

ERB (s44): An employer is required to provide the worker with a written or electronic statement containing the following particulars in respect of the relevant wage period:
   a. workers name;
   b. nature of employment or job classification;
   c. days or hours worked at normal rates of pay;
   d. rate of wages;
   e. wage period;
   f. hours of overtime worked during a wage period and the rate of wages payable for the
Protection of Wages

overtime;
go. the gross earnings of the worker;
h. allowances or other sundry payments due to the worker;
i. deductions made from the gross earnings of the worker;
j. the net amount due to the worker after all deductions have been made in respect of each wage period;
k. employment number, Fiji National Provident membership number, taxation identification number or any other form of identification; and
l. any other prescribed information.

For wage payment for wages paid fortnightly or monthly, wage slips are required only on the conclusion of the first full wage period after the commencement of service with the employer; when there is a change in the particulars of the wage, and on termination of the contract of service.

ERB creates an offence for a breach of this provision.

Existing Law: Employment Act (s50) has similar provisions, but it excludes employers of domestic servants from this requirement.

Comments: The ERB provides for provision of wages slip in an electronic form.

Employers of domestic servants are also required to provide written or electronic wage slips.

While provisions are made for providing the hours of overtime worked, the ERB is silent on the rate of remuneration for overtime work. Currently in some industries the wage regulation orders prescribe the overtime wage rates. There is no such provision in the ERB. This needs to be provided for, either as a part of the legislation itself, or as a regulation.

### 6.2.2 Wages and Time Record

**ERB (s45):** An employer is required to keep a record (called the wages and time record) showing, for each worker:
a. name of the worker;
b. date of birth;
c. worker’s address;
d. kind of work on which the worker is usually employed;
e. employment contract under which the worker is employed;
f. the classification or designation of the worker according to which the worker is paid;
g. a daily attendance register incorporating the hours between which the worker is employed on each day, and the days of the workers employment during each week;
h. the wages paid to the worker each week and the method of calculation;
i. any payment made
j. other prescribed particulars.

The employer is also required to produce these records to a labour inspector for inspection as demanded by the officer.

ERB creates an offence for a breach of this provision.
Existing Law: Employment Regulations, Part IV provides for full wages and time record to be maintained by the employer, in English language.

Comments: The ERB (s264) provides for making of regulations on prescribing the records, registers, books, accounts and other documents to be kept and the information or returns to be rendered by employers and other persons in respect of workers including working children.

6.2.3 Payment to Worker’s Family

ERB (s46): A worker may, in writing, authorise another person to receive, and the employer to pay to the authorised person, the wages due to the worker.

Existing Law: Employment Act (s50) has the same provision.

6.2.4 Authorised Deductions from Wages

ERB (s47): The following deductions are allowed from wages:

a. an amount in respect of any tax or deduction imposed by law or ordered by a court;

b. with the written consent of the worker, an amount due by the worker as a contribution to a provident fund, school fund, pension fund, sports fund, superannuation scheme, life insurance or medical scheme, credit union, trade union, co-operative society or other funds or schemes of which the worker is a member. These sums must be paid to the appropriate authorities.

c. an over-payment made during the immediately preceding 3 months by the employer to the worker by the employers mistake;

d. at the written request of the worker in respect of articles or provisions purchased on credit by the worker from the employer; charges for the cost of accommodation, fuel or light supplied by the employer and used by the worker; or in respect of food or victuals cooked, prepared and eaten on the employers premises.

e. if an employer made a loan to the employee, the installments for any loan repayment at the times set out in the loan memorandum.

The ERB makes provisions on the proportion of wages which may be deducted, and other conditions for the deductions.

Total deductions must not be, in a wage period, more than 50% of the wages due to the worker in respect of the wage period except for housing purposes from an approved lender, the deductions permitted may be up to 75%.

Existing Law: Employment Act (s51) has similar provisions, but with the additional provision that deductions are permitted in respect of loss of or damage to any tools or other property of an employer caused by the neglect or default of such employee, provided that such deductions shall be made up to such maximum amounts, and in accordance with such terms and conditions as may be prescribed.

Comments: The ERB has provisions for deductions for loss or damage of tools or other property not provided for, nor any provision for regulations to be made providing for such deductions.

S47(3) is badly drafted and needs to be improved.
6.2.5 Remuneration other than Wages

**ERB (s48):** In addition to wages, by contract or agreement, a worker may receive other benefits permitted under a law or collective agreement for the worker’s services.

**Existing Law:** Employment Act (s52): By agreement/contract, an employee may be provided food, a dwelling place, or other allowances or privileges, in addition to money wages, as remuneration for his services, except intoxicating liquor by way of remuneration.

**Comments:** In the ERB, benefits permitted are those provided for in a law or collective agreement. In the Employment Act, even if there is no law or collective agreement, remuneration other than wages could be provided.

6.2.6 Interest on Wage Advances

**ERB (s49):** Interest or other charges on wage advances are not permitted. The ERB creates an offence for contravening this requirement.

**Existing Law:** The Employment Act (s53) has the same provision.

6.3 Wages Councils

Under existing law (*Wages Council Act*), wages councils have been established for 10 specific industries; these are: mining, hotel and catering trades, printing trades, manufacturing industry, garment industry, road transport, sawmilling, wholesale and retail, building and construction industry, and security industry. These councils regulate wages and working conditions in the respective industries. The ERB makes provisions for wages councils, which are substantially similar to the provisions in the Wages Council Act (WCA).

6.3.1 Power of Minister to Establish Wages Council

**ERB (s50):** On the recommendation of the ERAB, if the Minister is satisfied that no adequate machinery exists for setting effective remuneration of a class of workers, or that existing machinery is likely to cease to exist or is inadequate, the Minister may make a wages council order to establish a wages council.

**Existing Law:** Wages Council Act (s1-3) has same provisions.

6.3.2 Making of Wages Council Order

**ERB (s51):** Before making a wages council order, the Minister is required to publish in the Gazette a notice specifying the details on the proposed order and seeking objections to the proposed order. Procedures for submitting objections are listed. The options to the minister on receipt of objections are either to make an order based on the original proposal subject to minor amendments that do not effect the substance of the original proposed order; or, if the amendments are substantive, amend the proposed order which must be resubmitted to the objection process.

**Existing Law:** Under the WCA (s4), there is similar provision on the publication of draft order and process for objection. But the options to the Minister on receipt of objections include
referring the draft order to a commission of inquiry for inquiry and report, in which case the
Minister shall consider such report and may then, if he thinks fit, make an order either in terms of
the draft or with such modifications as he thinks fit.

*Comments:* The ERB provisions eliminate the provision of a commission of inquiry. While this
will speeden up the process, it also calls for a more thorough advise to the Minister on the Wages
Council Orders that the objections are not such that an inquiry would be necessitated.

### 6.3.3 Variation and Revocation of Wages Council Order

**ERB** (s52): The Minister may, on the recommendation of the ERAB, revoke or vary the class of
workers of a wages council. All variations should follow the objection process.

**Existing Law:** WCA (s5): The Minister could, after consultation with the LAB, abolish or vary the
field of operation of a wages council

*Comments:* The ERB reduces the discretion of the Minister in terms of both, the degree of powers
(consultation vs on recommendation), as well as scope of the powers (revoke/vary a class of
workers vs abolish/vary the field of operation).

### 6.3.4 General Provisions on Wages Councils

**ERB** (s53): The constitution of the Wages Council is listed in a schedule to the ERB; this deals
with membership, terms, appointments, and meeting procedures of a council. It also lists the
function of a wages council: A wages council shall, upon request by the Chief Executive Officer
or on its own motion, consider any matter affecting the general conditions of employment of
workers.

**Existing Law:** WCA (s6) has similar provisions.

### 6.3.5 Power to Fix Remuneration

**ERB** (s54): A wages council may submit to the Minister a proposed wages regulation order. The
processes to be utilized by a Council in establishing a proposal for the Minister is elaborated.
Once the Minister makes a wages council order, the remuneration (including leave and holiday
remuneration) is referred to as ‘statutory minimum remuneration’.

**Existing Law:** WCA (s8) provides for original jurisdiction of a Wages Council to make proposals
to the Minister

*Comments:* Under the ERB, the Council retains the original jurisdiction to examine the wages and
working conditions of a sector/class.

### 6.3.6 Effect and Enforcement of wages regulation orders

**ERB** (s55): The statutory minimum remuneration replaces any agreement for a lesser
remuneration. The ERB creates an offence for failing to comply with this law.

**Existing Law:** WCA (s9) has similar provisions.
6.3.7 Notices

**ERB** (s56): An employer is required to display a written notice in the workplace for the purpose of informing the workers of any proposed wages regulation order or any wages regulation order affecting them.

This section also creates an offence for breach of the section.

**Existing Law**: WCA (s13) has same provisions, but the WCA also requires the employer of any worker to whom a wages regulation order applies to keep such records in English as are necessary to show whether or not the provisions are being complied with as affects them, and the records shall be retained by the employer for three years.

**Comments**: WCA places a burden of proof of abiding by the wages order on the employer. The ERB is silent on this. Secondly, the requirement that employers display a wages order presumes employers can easily acquire a copy of such an order. This is not necessarily the case. The ERB should make provision for the respective wages council to maintain a full and complete list of all enterprises covered by the respective wages council, and to send any order made to them promptly.

6.4 Other Comments

The WCA has provisions on:

6.4.1 **Permits to infirm and incapacitated persons (s10)**: Provides for, on application by worker or employer, the CEO to grant a permit authorising the employment of a worker (who is affected by infirmity or physical incapacity which renders him incapable of earning the statutory minimum remuneration) at less than the statutory minimum remuneration, which rate would be deemed to be the statutory minimum remuneration for such a worker. This provision should again be made in the ERB.

While the ERB makes provisions on employment of persons with disabilities – see 9.4.5 – the provisions are not legally strong or adequately empowering disabled persons. Employers with less than 50 workers may wish to employ workers whose performance is affected by disability. But they may hesitate to give disabled persons a chance if they are required to pay full wages for work that is less than the able-bodied equivalent.

6.4.2 **Payment of wages in lieu of cash (s11)**: Payment of benefits or advantages in forms other than cash is permitted.

6.4.3 **Employers not to receive premiums (s12)**: The WCA makes it unlawful for an employer to receive directly or indirectly from a worker, or on his behalf or on his account, any payment by way of premium.

6.4.4 The WCA (s4,7) makes provision for the referral of the issues arising from submissions to the draft orders to a commission of inquiry for consideration. The ERB has no such provision. The provisions in the ERB are sufficient to address the issues which the inquiry body was empowered to do.

6.4.5 The WCA (s11) also defines how remuneration is to be computed. The definition of ‘wages’ in the ERB takes account of this.
7
Holidays and Leave

The ERB provides for a statutory amount of annual holidays and leave for workers. Under existing law, holidays and leave are covered in Employment Regulations, the Public Holidays Act, and some Wages Council Orders. Existing provisions are neither clear nor adequate in light of the varying standards established by Wages Councils.

7.1 Paid annual holiday mandatory

ERB (s58): An employer must give to a worker paid holidays, but may give paid annual holidays in excess of those required to be given by the proposal ER Act.

Existing Law: Employment Act (s11-12) has similar provisions.

7.2 Paid annual holiday

ERB (s59-64): After each year of employment with an employer, a worker is entitled to 10 working days holiday at normal pay, except if the worker was absent from work for more than 20 normal working days during that year other than for certified sickness, or is prevented from attending work by any other cause acceptable to the employer. Calculation of annual holidays, and other provisions are also made.

Existing Law: Employment Regulations (s11) has similar provisions.

Comments: The ERB has additional provision: that while paid annual holidays may be deferred and accumulated over a period not exceeding 4 years, at least one week’s leave must be taken after the completion of each year of service. Second, the ERB states that no leave earned can be forfeited. No penalty is created for a breach of these provisions.

Thirdly, there is no provision on whether workers on leave could undertake a different employment for a wage. The aim of a leave is to get the worker freshened up and rejuvenated. But if the worker, in search of additional income, undertakes another job while on leave, it would defeat the purpose of the leave.

7.3 Public holidays

ERB (s65-6): The following days must be kept as public holidays in all workplaces:
(a) New Years Day
(b) Good Friday;
(c) Easter Saturday
(d) Easter Monday;
(e) Prophet Mohammed’s Birthday;
(f) Ratu Sir Lala Sukuna Day;
(g) Queens Birthday;
(h) Youth Day;
(i) Fiji Day;
(j) Diwali;
(k) Christmas Day;
(l) Boxing Day.

The Minister may, by notice in the Gazette, appoint a special day or any part of a day to be kept as a public holiday in all workplaces.

*Existing Law:* S2, s6, and Schedule of the Public Holidays Act have similar provisions.

### 7.3.1 Payment for Public Holidays

*ERB* (s67): A worker must be paid in respect of each public holiday for the number of hours, excluding overtime, which the worker would normally have worked on that day had it not been a public holiday.

If a worker, other than a shift worker, works on a public holiday the worker must be paid the single rate in addition to the normal holiday entitlement.

However, to qualify for the pay, the worker must have worked for the employer during the last working day preceding the public holiday, and present himself or herself for work on the first working day after the public holiday.

*Existing Law:* There is no provision, other than that contained in some Wages Council Orders, on paid public holidays.

**Comments:** The ERB contains provisions on pay for public holidays. These were not present in the Public Holidays Act. The ERB makes no provision for payment to workers on shift work, if the shift falls in the declared public holiday. Would the worker get an additional day of leave, or would the worker be paid at the ‘overtime rate’?

### 7.4 Sick Leave

*ERB* (s68): A worker who has completed more than 3 months continuous service with the same employer but who is incapable of work because of sickness or injury, is entitled to paid sick leave of not less than 10 working days during each year of service.

Unused sick leave for each year automatically lapses in the next year.

Conditions for entitlement of sick leave are specified.

*Existing Law:* There is no provision in any legislation for sick leave. However, various wages council orders contain provisions for sick leave. But not all sectors of the economy are covered by wages councils. Alternatively, unions could negotiate for sick leave with employers, or individuals could negotiate with employers that sick leave provisions be made in their employment contracts.

**Comments:** The ERB provisions on sick leave are applicable to all employees and employers. However, there is a lack of clarity: provision is for 10 working days for each year of service. If a worker takes 10 days leave and then resigns or is terminated before the end of a year of service, would the employer be entitled to claim the proportionate wages paid?
7.4.1 Medical Officers Certifying Sick Leave

**ERB** (s68(4)): A registered medical practitioner who knowingly issues a medical certificate to a worker whom the registered medical practitioner knows is capable of work commits an offence as does the worker who sought the medical certificate.

**Existing Law:** No provision.

**Comments:** This is an additional good governance provision of creating an offence for medical officers knowingly providing false medical certificates, and on employees seeking false medical certificates.

7.5 Bereavement Leave

**ERB** (s69): A worker who has completed more than 3 months continuous service with the same employer is entitled to 3 days paid bereavement leave in a year, in addition to any other leave entitlement.

**Existing Law:** There is no provision for bereavement leave. Unions could, however, negotiate for inclusion of bereavement leave in collective agreements, and employees could negotiate for bereavement leave provisions in employment contracts.

**Comments:** The ERB makes provisions for bereavement leave to be applied across all sectors. But two key issues remain. First, the ERB is silent on the relationship of the deceased to the worker. The intention behind bereavement leave needs to be examined; if it is to avoid inconvenience to workers on death of their relatives, then the distance of the deceased to the worker needs to be specified. Second, documentation to be provided by the worker to qualify for a bereavement leave also needs to be specified.

7.6 Record of Leave and Entitlement

**ERB** (s70): Employers are required to keep a record showing in the case of each worker, the workers’ full employment details, all leave entitlements, leave taken, and leave pay made out. The ERB creates an offence for not observing any provision on leaves.

**Existing Law:** No provision, other than the requirement under the Employment Act for keeping records on maternity leave.

**Comments:** The ERB creates new provisions on leave records to be kept by employers. S70 of the ERB uses the term ‘all leave entitlements’, ‘leave taken’, and ‘leave pay’. One may construe this to include maternity leave as well. To avoid any doubt, s70 should specifically include that the record keeping requirement applies to maternity leave as well.

7.7 Other Provisions:

The Public Holidays Act has certain provisions on the treatment of bills, payments, notices, etc due on days which fall on public holidays. These matters are not specifically related to employment relations, thus there is no need for their inclusion in the ERB.
8

Hours of Work

Currently there is no national law on hours of work. In ten industries which are covered by wages councils, (mining, hotel and catering trades, printing trades, manufacturing industry, garment industry, road transport, sawmilling, wholesale and retail, building and construction industry, and security industry), hours of work are regulated. However, in other industries and sectors, there is no specific legal provision on hours of work. The *Shop (Regulation of Hours and Employment) Act* provides for opening of, and employment in, retail outlets. However, this legislation focuses on regulating retail outlet business hours rather than terms and conditions of employment, though the latter become an essential component of business trading hours.

The ERB provides for a national standard on hours of work. It requires that an employment contract fix at not more than 48 the maximum number of hours, excluding overtime, to be worked in a week by a worker bound by that contract (s72(1)). The parties must themselves fix the daily working hours so that those hours are worked on not more than 6 days of the week.

If the maximum number of hours, excluding overtime, fixed by an employment contract to be worked by a worker in a week is not more than 45, the parties to the contract must fix the daily working hours so that those hours are worked on not more than 5 days of the week (s72(3)).

The proposed legislation, however, excludes certain types of employment from the hours of work provisions. Managerial and/or executive positions are specifically excluded (s73(1)).

**Comment:** There is no clear definition of managerial or executive positions. To date, it has been accepted that workers whose remuneration is calculated on an hourly basis qualify for overtime work, and thus are regarded as falling in the maximum number of hours prescription, while the salaried workers fall outside this. However, there is no provision in the ERB giving specific form to this view. The ERB should at least define the terms ‘managerial or executive positions’.

The proposed law also does not apply to contracts of service fixing special remuneration for a worker on account of special qualifications, experience, or other qualities possessed by the worker (s73(2)). This exemption, however, may create problems in terms of enforcement since the grounds ‘special qualifications’, ‘special experience’, or ‘other qualities possessed by that worker’ are very wide and are not amenable to an easy but specific definition.

**Comment:** The provision exempting workers possessing special qualifications, experience or other qualities from the maximum hours of work requirements needs to be amended so as to provide clarity and certainty on what categories of workers would be involved. As it stands, the provisions could be amenable to abuse.
9

Equal Employment Opportunities

9.1 Objectives

The ERB aims to provide for equal opportunities in employment. Provisions on equal employment opportunities are new to labour market regulation in the country. The ERB provides for equal employment opportunities by:

(a) prohibiting discrimination on particular grounds of actual or supposed personal characteristics or circumstances;
(b) ensuring equal rates of remuneration for work of equal value; and
(c) specifying lawful discrimination (s74).

Some of the ERB provisions are on account of the Constitutional provisions, and some on account of the ILO Convention No. 111 (Discrimination Employment and Occupation, 1958), which is a fundamental ILO Convention.

Discrimination, whether direct or indirect, on the basis of actual or posed personal characteristics or circumstances are excluded. Included in personal characteristics and circumstances are: ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age, disability, HIV/AIDS status, social class, marital status (including living in a relationship in the nature of a marriage), employment status, family status, opinion, religion or belief.

The Constitution, however, provides for positive discrimination, which would over-ride the S75 provisions.

**Comment:** Place of origin of a worker is a prohibited ground for screening workers. In Fiji, there is a substantial and a rising number of workers whose place of origin is outside Fiji (foreign workers). Under the ERB provisions as they stand, employers would not be able to discriminate against hiring foreign workers. This could be a potentially damaging window for law suits from across the world. However, from the viewpoint of rapid globalisation and cross-border movement of people, this provision may be progressive. The state ought to provide a clear guidance on this, which ought to be included in the ERB.

Another issue is that of convicts who have served their terms. The ERB does not make discrimination against such persons an offence. It needs to be established whether this was a deliberate exclusion or an oversight by the drafters/proponents of the proposed law.

9.2 Sexual Harassment

The ERB makes sexual harassment illegal. An employer is liable if he/she fails to take ‘the reasonable steps’ necessary to prevent sexual harassment of his/her employees.

**Comment:** S76(1) states: ‘A worker is liable under this section….’ It does not specify the penalty or the offence. The offence ought to be clearly created.
The ERB also requires an employer to develop and maintain a policy to prevent sexual harassment in his/her workplace, consistent with any national policy guidelines developed for preventing sexual harassment in workplaces (by regulation).

9.3 Discrimination in Employment Matters

S77 of the ERB provides that if an applicant for employment or a worker is qualified for work of any description, an employer or his agent must not:

(a) refuse/omit to employ him/her on work of that description which is available;
(b) pay the worker or offer the applicant, less favourable terms of employment, conditions of work, or other fringe benefits, and opportunities for training, promotion, and transfer that are made available to applicants or workers of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;
(c) terminate the employment of the worker, or subject the worker to any detriment, in circumstances in which the employment of other workers employed on work of that description would not be terminated, or in which other workers employed on work of that description would not be subjected to such detriment; or
(d) retire the worker, or to require or cause the worker to retire or resign, subject to any written law or employment contract imposing a retirement age, by reason of any of the prohibited grounds of discrimination or by reason of the workers involvement in the activities of a union.

A worker is deemed to be involved in union activities if, at any time within 12 months before the action complained of, that worker was involved in any activity of the union as an officer, management committee member, or negotiator, of was involved in the formation or proposed formation of a union, or had submitted an employment grievance to the employer, or had participated in a strike.

The burden of proof that union activity was not the reason for non-hiring, etc, is on the employer.

Comment: ‘participation in a strike’ could include participation in an illegal strike, or a strike declared illegal. Whether continuing participation in a strike that has been declared illegal can be deemed to be ‘union activity’, or ‘participation in a strike’, needs to be considered.

S78 of the ERB prohibits unlawful discrimination in rates of remuneration. It requires that an employer must not refuse/omit to offer or pay a person the same rates of remuneration as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description for any reason including the gender of that person. This provision is in line with ILO Convention 100 (Equal Remuneration, 1951), which is a Fundamental ILO Convention.

Comment: the prohibition of discrimination in rates of remuneration applies only to gender and not other social markers like ethnicity, religion, etc. The legislation should provide for a prohibition of discrimination in rates of remuneration on all prohibited grounds of discrimination in employment. S77(1) provides for prohibition of ‘less favourable terms of employment’, which may be constructed as including rates of remuneration. However, where a specific section is provided on gender wage discrimination, and not other forms of wage discrimination, courts could construe the legislation to not to prohibit wage discrimination on the basis of other social identifiers.
In determining whether an element of differentiation exists, based on the gender of the workers, in the rates of remuneration, the following criteria must apply:

a) the extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility;

b) the extent to which the conditions under which the work is to be performed are the same or substantially similar; or

c) the rate of remuneration that would be paid to the workers with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort (s79).

Any instrument made after the proposed law comes in force must not contain classifications of work or rates of remuneration that differentiate on the basis of the gender of the workers; if such an instrument were made, it would be void and of no effect. For instruments already in existence that provide for gender differentiation, the instrument must be reviewed within 12 months of the coming into force of the new law. If this is not done, a party to an instrument (or the party’s representative, a labour officer or a labour inspector) may apply to the Employment Tribunal to make the necessary amendment(s) to the document. A worker could also recover any difference in the remuneration between what was paid and what should have been paid on the basis of the new law (s80).

9.4 Exceptions (s81-89)

The ERB lists numerous grounds in which discrimination in job classification are permitted. These are listed below.

9.4.1 Authenticity and privacy

Discrimination is permitted where

a) being of a particular gender or age is a genuine occupational qualification for the position or employment, or

b) gender where the position needs to be held by one gender to preserve reasonable standards of privacy, or the nature or location of the employment makes it impracticable for the worker to live elsewhere than in premises provided by the employer (and the only premises available are not equipped with separate sleeping accommodation for each gender, and it is not reasonable to expect the employer to equip those premises with separate accommodation, or to provide separate premises, for each gender).

9.4.2 Counselor

Discrimination on gender, race, ethnic or national origins, or sexual orientation is permitted where the position is that of a counselor on highly personal matters such as sexual matters or the prevention of violence.

9.4.3 Religion

Where the position is for the purposes of an organised religion and is limited to one gender so as to comply with the doctrines or rules or established customs of the religion, gender based job classification is permitted.
9.4.4 Religious of ethical belief

Discrimination in job classification on this basis is permitted if the sole or principal duties of the position are the same/substantially same as, those of a clergyman, priest, pastor, official, or teacher among adherents of that belief or involves the propagation of that belief; or consist of acting as a social worker on behalf of an organisation whose members comprise solely or principally adherents of that belief. However, if a religious/ethical belief requires adherents to follow a particular practice, an employer must accommodate the practice so long as adjustments of the employers activities required to accommodate the practice does not unreasonably disrupt the employers activities.

9.4.5 Disability

Different treatment based on physical disability is not prevented if special services or facilities are required for a worker to perform the duties satisfactorily and if it is not reasonable to expect the employer to provide those services or facilities; or the environment in which the duties of the position are to be performed or matters related to these duties, are such that the person could perform those duties only with a risk of infecting others with an illness, and it is not reasonable to take that risk. (Exceptions to this: if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level; or where the terms of employment or conditions of work are set or varied after taking into account any special limitations that the disability of a person imposes on that person’s capacity to carry out the work; and special services or facilities are provided to enable or facilitate the carrying out of the work).

An employer who employs 50 or more workers may employ physically disabled persons on a ratio of at least 2% of the total number of workers employed by the employer (s84(4)).

Comment: The term ‘may’, as against ‘must’ or ‘shall’ provides a weak basis for enforcing this section. But a stronger terminology, indicating a mandatory requirement, may create significant complication for some employers who may not find qualified disabled persons, or where there is no room for employing disabled persons (for example, on a construction site). A more appropriate provision would be to require all employers employing more than 50 workers to produce a policy on targeting to employ 2% of all workers who are persons with disabilities, and aim to implement such a policy.

9.4.6 Age

If a position or employment where being of a particular age or in a particular age group, is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason, age classification is allowed. Lower payment is also permitted where the lower rate is paid on the basis that the person has not attained a particular age, not exceeding 18 years of age.

Comment: this ground is purely on the basis of age rather than on the basis of productivity. Thus, a worker between 15 and 18 years could be equally productive as a worker above 18 years, but could receive a lower wage than the latter. A qualifier of productivity ought to be added to allow for differential wage payment.
9.4.7 Employment of a political nature

Different treatment based on political opinion is permitted where the position is one of political adviser or secretary to a member of Parliament; political adviser to a member of a local authority; a political adviser to a candidate seeking election to the House of Representatives or a local authority or seeking nomination to the Senate; or member of staff of a political party.

9.4.8 Family Status

Employers can place restrictions on employment of a person who is married to, or living in a relationship in the nature of marriage with, or who is a relative of, another worker if there would be a reporting relationship between them; or there is a risk of collusion between them to the detriment of the employer. They can also place restrictions on the employment of a person who is married to, or living in a relationship in the nature of marriage with, or is a relative of, a worker of another employer if there is a risk of collusion between them to the detriment of that persons employer.

9.4.9 Underground work for females

Employers can prohibit employment of females on underground work in mines of all kinds except in management positions not requiring manual work; in health and welfare services; in education or training; or for occasional non-manual work. The Employment Act (s72) provides for similar restrictions.

Comment: The basis for allowing prohibition of females from underground work in mines needs to be examined. While existing labour laws contain such provisions, its rationale ought to be discussed with stakeholders if such a provision is to be maintained in a progressive legislation.

9.4.10 Qualification on exceptions

Employers are not entitled, by virtue of any of the exceptions, to accord to a person a different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within those exceptions if, with some reasonable adjustment of the activities of the employer, some other worker could carry out the particular duties which fall within those exceptions.

Comments: The requirement on employers to accommodate the religious or ethical practices - so long as adjustments of the employers activities required to accommodate the practices do not unreasonably disrupt the employers activities – has significant potential to create disharmony at the workplace as in a multi-religious, multi-faith country, an employer could be burdened significantly with the adjustment requirements. Employers may also be selective in adjusting to one requirement and not another. This may have a reverse impact on discrimination than what the intent of the ERB provisions maybe. For good governance, religious and ethical beliefs must not be brought into play in employment or the labour market.

Second, the sections in equal employment opportunities (s74-89) do not create any offence for the breach of these provisions. Without creating an offence, these provisions remain outside the scope of enforcement. Consideration ought to be given to creating an offence for breach of the requirements on equal opportunities. In addition, appropriate penalties need to be specified for the parties that are convicted for such breach.
10

Employment of Children

The ERB makes provisions on employment of children. Currently, the Employment Act and the Trade Unions Act provide certain prohibitions on employment of children. The ERB, however, has stronger prohibitions on the employment of children.

10.1 Prohibition of Child Labour

**ERB** (s90-93): The ERB prohibits work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. It also establishes the circumstances and ages at which children may work, and confers certain rights on children. It also protects children in view of their vulnerability to exploitation. Consistent with the ILO Convention No. 182 (Worst Forms of Child Labour Convention), the ERB defines a ‘child’ as a person who is under the age of 18 years. However, the ERB establishes 15 years as the minimum age for work or employment for children for work.

The ERB creates an offence for anyone who employs a child under the age of 15 years. The only exception provided for is for the employment of a child of 13 to 15 years of age engaged in employment or light work or in a workplace in which members of the same family or of communal or religious group are employed provided that the employment is not likely to be harmful to the health or development of the child, and that the employment is not such as to prejudice the child’s attendance at school, participation in vocational orientation or approved training programmes to benefit the child.

The following forms of ‘child labour’ are, as the ILO Convention No. 182 also requires, prohibited (s91):

- all forms of labour slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and any form of forced or compulsory labour, including forced or compulsory recruitment of children in armed conflict;
- the use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs as defined in relevant international treaties; or
- the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.

Anyone engaging a child in such prohibited form of child labour commits an offence.

**Existing Law**: Definition of Child Labour: The Employment Act defines a *child* as a person who has not attained the age of fifteen years. Those between the ages of 15 and 18 are defined as *young persons*.

S59 disallows children under 12 years from being employed in any capacity whatsoever, except for a child employed in light work suitable to his capacity in an agricultural undertaking which is owned and operated by the family of which he is a member.

The overriding law is that no child or young person is to be employed in any employment which in the opinion of proper authority is injurious to health, dangerous, or is otherwise unsuitable (s61(1)).
Comments: ERB is stronger on protection of child labour. It prohibits employment of children under 15 while the Employment Act prohibits employment of children under 12. However, the ERB would create, legally, child labour since a child is defined as someone under 18, while the minimum age for employment is 15.

ERB has new provisions prohibiting employment of child labour (s91). However, all those prohibitions for ‘child labour’ are also prohibitions for any type of labour. The following work:

1. slavery
2. sale & trafficking of people;
3. debt bondage,
4. any form of forced or compulsory labour,
5. recruitment of people in armed conflict
6. the use, procuring or offering of a person for illicit activities (e.g. production and trafficking of drugs)
7. the use, procuring or offering of a person for prostitution, for the production of pornography or for pornographic performances

are already illegal whether it is done by a child or an adult.

10.2 Trade union rights

ERB (s94): A child who is 15 years or over has the right to join a trade union and to vote in trade union elections where the child is a member

Existing Law: S29-30 of Trade Unions Act: A person under 16 may be a member of a trade union, but shall not be a voting member or a member of the executive committee of a registered trade union.

A person under the age of twenty-one but above the age of sixteen years, may be a member of a registered trade union, and may enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules, but shall not be a member of the executive committee of a registered trade union.

Comments: ERB is silent on a person less than 21 years from being a trade union executive committee member. The presumption, then, would be that if the person can vote, s/he can be a voted into an executive committee position.

10.3 Certain restriction on employment of children

ERB (s95): A child must not be employed underground in a mine. In addition, the Labour Minister may declare employment of a child in any employment or workplace to be prohibited or restricted on the ground that it is injurious to health or is hazardous, dangerous or unsuitable, including attendance on machinery, working with hazardous substances, driving motor vehicles, heavy physical labour, the care of children, or work within security services. The ERB creates an offence for breach of this provision.

Existing Law: Under s63 of Employment Act, no child (12-15 years) shall be employed in any industrial undertaking, or in any undertaking in attendance on machinery. S67 of the Employment Act provides: No young person (15-18yrs) shall be employed underground in any mine unless a certificate that he is fit for such work has been given, signed by a medical officer.
Comments: On these restrictions, the ERB provision may be viewed as ‘weaker’ than the Employment Act provisions. The Employment Act (s63) completely disallows employment of a child in an industrial undertaking or attending to machinery, while the ERB gives the power to the Labour Minister to declare employment of child labour in any workplace of employment as illegal. The reason for the weaker provision is that the ERB has raised the age which defines a child from 15 to 18 years, yet it only disallows work for children under 15.

10.4 Children not to be employed against the wishes of parent or guardian

ERB (s96): An employer must not continue to employ a child after receiving notice, either orally or in writing, from the parent, guardian or Ministry, that the child is employed against the wishes of the parent or guardian. Breach of this provision is an offence.

Existing Law: Same provisions in the Employment Act, but does not include ‘Ministry; in the category.

Comments: ERB provision is stronger, and empowers the Ministry of Labour to enforce the law.

10.5 Hours of work for children

ERB (s97): A child must not be employed or permitted to be employed for more than 8 hours in a day; and must be given at least 30 minutes paid rest for every continuous 4 hours worked. A child must not be employed or permitted to be employed during a period when the child is required to attend school or for a period which prejudices the child’s educational participation. A child employed under a contract of legal apprenticeship is excluded.

Existing Law: Under the Employment Act (s64), a child (12-15 yrs) is not allowed to be employed for more than 6 hours in a day nor for more than two hours without a period of leisure of not less than 30 minutes.

If the child is attending school the total time spent in employment and at school shall not exceed seven hours in a day. A ‘child’ (15-18 years of age) is not permitted to be employed for more than 5 hours without a period of leisure of not less than 30 minutes. S/he is also not permitted to work for more than 8 hours in a day, and if attending school the total time spent by him in employment and at school is not to exceed 9 hours a day.

Apprentice exclusion is similar.

A child is required to return each night to the place of residence of his parent or guardian.

Comments: ERB prohibits employment of anyone under 15 years of age. For 15 to 18 year olds: ERB requires 30 minutes break for every 4 hours of work (EA: 30 minutes break every 5 hours of work). Maximum work hours are the same, but ERB has dropped the proviso on hours of work for those attending school.

In addition, while the provisions on apprentices being exempted from the requirements on daily hours of work and rest are present in current legislation, the basis for the exemption is not consistent. The overriding reason from the work day and rest hours for children is health. The same reason ought to apply for apprentices as well.

Finally, no offence is created in the ERB for breach of this section.
10.6 Conditions on night employment

ERB (s98): The Minister may prescribe conditions for the employment of children between 6 o’clock in the afternoon of any day and 6 o’clock in the forenoon of the following day in a workplace.

Existing Law: 1996 amendment to Employment Act has the same provision, but no condition has been prescribed so far.

Comments: Unless conditions are prescribed by the Minister, there will be no law on employment of children at night. The discretion provided to the Minister could also be abused.

10.7 Employers of children to keep register

ERB (s99): Employers of children are required to keep a separate register of all children employed together with their ages, the date of commencement and termination of employment, the conditions and nature of their employment and any other prescribed particulars. The register must be produced for inspection when required by a labour officer/inspector. A breach of this provision is an offence.

Existing Law: Similar provisions are found in the Employment Act (s71).

10.8 Other Comments

10.8.1 Employment Act (s58) empowers the Labour Minister to exempt industrial undertakings or employers from the provisions of child labour. The ERB does not give the minister this specific power, but a general power to exempt, on the recommendation of the ERAB.

10.8.2 The Employment Act has provisions on employment of children in ships. The ERB is silent on this.

10.8.3 S73 of the Employment Act provides that any parent or guardian of a person under 18 who allows him/her to be employed in contravention of the provisions on employment of people under 18, commits an offence against the Employment Act; upon conviction, the parent/guardian is liable to a fine not exceeding $200, and in the case of a second or subsequent offence against the same provision to a fine not exceeding $400 or to imprisonment for a term not exceeding 6 months or to both such fine and imprisonment. The ERB creates no offence against the parent or guardian of a child for allowing the child to work in breach of the ERB.
11
Maternity Leave


The Employment Act provides for maternity leave for workers now. The ERB proposes changes to maternity leave conditions. The stated aim of the proposed changes is to ‘protect women and to ensure that they are not disadvantaged when taking maternity leave’ (s100). This objective is wider than what is provided for in the Employment Act (which provides for the right to abstain from work before and after confinement and be entitled to allowances during this period). The wider objective is a useful feature of the ERB that may become useful in judicial interpretation.

The Employment Act, succeeding the Employment Ordinance, makes very specific provisions on maternity leave. It allows for female employee’s rights to abstain from work before and after confinements as well as payment of allowances during these periods. Key features of the Act are:

a) provision of a right to abstain from work before and after confinement;

b) provision for payment of a maternity allowance

c) conditions for the entitlement of a maternity allowance

d) restriction on dismissal of female workers during the maternity period, and

e) employer obligation to keep a register of maternity allowance payments.

The right to a maternity leave is provided by clause 74(1) of the Employment Act, which states:

Where a female employed in any undertaking expects to be confined, she shall, subject to furnishing her employer with a certificate from a registered medical practitioner or registered nurse specifying the possible date of confinement, be entitled to abstain from work for a period of forty-two consecutive days … before, and for a further period of forty-two consecutive days … immediately after her confinement and shall, subject to the, provisions of this, Act, be entitled to an allowance … in respect of such abstention from work:

The leave and allowance payment provisions, however, are only applicable for workers who worked for four months before the birth of a child, or for not less than one hundred and fifty days during the nine months preceding an applicant’s confinement. S74(2) states that every female at any time during the four months immediately preceding her confinement was employed by an employer by whom she had been employed for a period of, or periods amounting in the aggregate to, not less than one hundred and fifty days during the nine months preceding her confinement shall be entitled, in respect of the pre-confinement allowance period and the post- confinement allowance period, to receive from such employer a maternity allowance of one dollar fifty cents per day payable at such intervals as relates to the intervals at which the wages of the female were normally paid by the employer.

This provision was amended in 1991 and the allowance quantum raised to $5 per day (Employment Act (Amendment) Decree 1991). Since November 1991, therefore, workers on maternity leave have been entitled to an allowance of $210 before delivery and $210 after delivery for all child births while employed. The burden of payment of the allowance is on the employer(s).
The legislation prevents employees from claiming maternity allowance from more than one employer. It also provides for an employer to claim a contribution from another (previous) employer of the person the proportion to the allowance as the number of days on which she worked for such other employer during the period of nine months immediately preceding her confinement. In all cases, the allowances are only claimable for days during the period the employee is not at work; there is no entitlement for days on which the employee works during the pre-confinement or post-confinement period except for 7 days immediately preceding her confinement, irrespective of whether she worked or not. For post-confinement period, if the employee works on any one day, her entitlement to a post-confinement allowance for all remaining days after the day she worked ceases.

The legislation also makes provision for the payment dates of the allowances. For the pre-confinement period, the allowance shall be paid by the employer within seven days from the date upon which the employer knows or has notice of the confinement. The post-confinement allowance shall be paid within seven days from the expiration of the post-confinement allowance period.

The legislation also makes provision for the payment of the allowances to nominees or personal representatives of the employee in cases of death of the employee from any cause before her confinement. The maximum payment for pre-confinement period in case of death is for a period of forty-two days. If the death occurs after confinement, the allowance shall be paid to the day preceding the day of her death.

Employees, however, are required to inform the employer of the pregnancy. An employee who abstains from work because she expects to be confined within forty-two days, shall within seven days from the date upon which she abstains from work notify her employer of her expected confinement. On failure to do this she loses up to 7 days of her pre-confinement allowance. An employee who has been confined ought to inform her employer of her confinement within fourteen days of her confinement. A failure to do this terminates any right to maternity allowance in respect of the post-confinement allowance period. Notices could be given in writing or verbally. A labour officer or a labour inspector may also give notice on behalf of any female.

An employee who intends to resign from her job within four months of the confinement period ought to inform the employer about her pregnancy. A failure to do so terminates the entitlement of the employee.

Employers are restricted from terminating workers who remain absent from work after the maternity leave as a result of illness certified by a registered medical practitioner as arising from her pregnancy and which renders her unfit for work until such absence exceeds 3 months including the maternity leave.

The right of the female to maternity leave is preserved even in cases where she is dismissed with wages in lieu of notice at any time during the four months immediately preceding her confinement.

Employers are also required to keep a register showing all maternity leave payments made to females.
11.2 Comparison of Employment Act and ERB

11.2.1 Period of Maternity Leave

While the basic period of leave remains 84 consecutive days, the ERB does not specify the way the 84 days is to be divided between pre-confinement and post-confinement. Under current legislation, 42 days needs to be taken before confinement and 42 days after confinement. Under the ERB provisions, the woman may proceed on maternity leave at any time before or after confinement provided that if she continues to work during the pre-confinement period she must produce a medical certificate certifying that she is fit to work during that period (s101). Normally, it is believed that employees prefer a longer period after confinement to recover as well as to take care of their babies.

Under current legislation, the maternity allowance in respect of the post-confinement allowance period shall be paid by the employer within seven days from the expiration of the post-confinement allowance period (c 75(2)). While provision is made in the current legislation for the employee to nominate someone else to receive an employee’s maternity leave allowances, unless the employee so nominates someone, she shall herself pick her allowance. This means that she would have to return to her job on the 43rd day after delivery. Where females do not do so, they forfeit their post-confinement allowances. Actual practice in the garment industry reveals that in numerous cases, females pick up pre-confinement allowances but not the post-confinement allowances.

The ERB condition, therefore, better reflect the needs of the employees in terms of child delivery and post-delivery maternal and child health conditions.

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The ERB condition, therefore, better reflect the needs of the employees in terms of child delivery and post-delivery maternal and child health conditions.

The ERB provision, however, requires that the 84-days of leave entitlement be consecutive days. Under the current legislation, the pre and post confinement periods must be of 42 consecutive days each. Thus, while the 84-consecutive day provision, without any strict 42-day pre confinement specification may appear to be more flexible, in practice it may not be so.

**Comment:** Maternity related absences of single days - for example a medical checkup – is not covered as a paid leave, unless the employee takes this day off as an annual leave entitlement. Other than this, single day maternity related pre-delivery absences, when the employee could still be medically fit to work for days closer to child delivery, would result in pay forfeiture. Employees can not accumulate maternity leave days.

11.2.2 Maternity Allowances

The second major difference in the ERB provisions is in the rate of allowances. The ERB proposes the allowance at full rate of pay which the employee would be receiving had she been at work (s101(2)). The existing rate of allowance is a minimum of $5 per day; employees and/or trade unions could, however, negotiate a better allowance rate than $5/day.

**Comment:** The ERB is not clear on whether the payment for maternity leave is an allowance or a wage. For wage payments, superannuation deductions are required. However, for allowances, superannuation deductions and contributions are not necessary. Section 101(2) of the ERB states: ‘All maternity leave shall be paid at the rate of pay the woman would have received if she had been at work’. There is a need for clarity on whether statutory contributions (FNPF and TPAF) are to be deducted and contributed to by the employer.
11.2.3 Number of Leaves

In both, the Employment Act and the ERB, there is no restriction on the number of maternity leaves a female worker could take. Over the years, however, many influential trade unions have negotiated better rates of allowances than that provided for by the Employment Act, with the allowance sometimes being the full wage/salary for specified number of children.

With full wage/salary as the allowance for all maternity leave, the impact of this on the employers needs to be examined, particularly for small businesses.

11.2.4 Maternity Leave Payments

The third difference is that the procedure for division of maternity leave payments in cases of more than one employer for an employee, is streamlined. Under the current provisions, where there is more than one employer from whom the female would be entitled to claim maternity allowance, the employer who pays the maternity allowance is entitled to recover from such other employer or employers, as a civil debt, ‘a contribution which shall bear the same proportion to the amount of the maternity allowance paid to the female, as the number of days on which she worked for such other employer during the period of nine months immediately preceding her confinement bears to the total number of days on which she worked during the said period’ (c.74(3)). The ERB provision places the burden of determining the payment of wages by different employers on the Chief Executive Officer of the Labour Ministry (s101(5)). This may prevent lengthy litigation by one employer of another.

11.2.5 Protection against Disadvantage

The fourth difference is that the ERB clearly protects the employment rank, seniority and pay of the employee on maternity leave. S101(7) states that a woman who returns to her employment after maternity leave ‘must be appointed to the same or equivalent position held prior to proceedings on maternity leave, without any loss of salary, wages, benefits and seniority’, or ‘may be appointed to a higher position’. The current provision does not so protect the employee, leaving to the employer the possibility of demoting the employee returning from maternity leave, which may or may not be related to productivity.

11.2.6 Protection against Termination

Fifth, the ERB aims to streamline the restrictions on termination of employees due to pregnancy or maternity. In particular, s104 states that no woman could be terminated from employment on the ground of pregnancy, and further, that if a termination of a female employee does occur, the burden of disproving that the termination was related to that condition rests with the employer.

The present provision disallows any termination of employment, on any ground, of an employee already on maternity leave if the notice of the termination expires during the leave period (s79). The ERB does not contain any such provision, thereby enabling employers to terminate employees on maternity leave as long as the termination is not related to her pregnancy.

A confusing clause in the ERB is s104(3), which states: ‘If a woman remains absent from her work up to 3 months after her maternity leave expires, as a result of illness (certified by a registered medical practitioner) arising out of her pregnancy or the birth of her child that renders her unfit for work, her employer may give her notice of termination.’
Maternity Leave

Comment: Does this clause empower an employer to give a termination notice to an employee who is absent from work due to medically certified illness arising from pregnancy or child birth for even 1 day after the maternity leave period is over? The intention of this clause is not clear and could result in confusion for both, the employer and the employee.

The present provision is clear in that no termination notice could be given to an employee who is absent from work due to medically certified illness arising from pregnancy or childbirth for a period of 3 months; such notices could only be given when the employee is absent for more than 3 months including the 84 days of maternity leave. In effect then, the existing provision is that if an employee was absent from her work for 7 days after her post-confinement leave, even if such an absence was medically certified to be arising from her pregnancy or childbirth, the employer could give a notice of termination to the employee.

11.2.7 Leave Computation period

Under current provision, if an employee was terminated from employment with wages in lieu of any termination notice 120 days before her confinement (i.e. 78 days before the scheduled pre-confinement leave), her period of employment is deemed to include the period when a termination notice would have expired had one been given.

The ERB contains no such provision. But it does contain a provision on the computation period in case an employee is terminated for absences after the maternity leave. Noting the confusion which the provision on termination for absences after maternity leave gives rise to, if any termination was effected, then the computation of her employment period would be to the end of her maternity leave.

11.2.8 Register of Allowances

The ERB makes no provision for the maintenance of a register of allowances paid to workers on maternity leave. Whether this is on account of the fact that full pay would be paid for maternity leave, thereby the wages register is to incorporate this, is not clear. The assumption, however, may be faulty as evidences show that there are significant cases of maternity leave allowance payments which are less than the statutory minimum.

It must, however, be noted that one reason for the payments to be lower than the statutory minimum of $420 per leave has been the need for employees to comply with onerous conditions of information and reporting to be entitled to the full allowances. The ERB eliminates such onerous reporting requirements, and provides for full payments on the submission by the employee to the employer of a certificate from a registered medical practitioner or registered nurse specifying the possible date of birth.

There, nonetheless, have been cases of clear breaches of the law, rather than simply strict adherence of procedures. Workers’ employments have been terminated on account of pregnancies, and employers have outrightly refused to pay maternity allowances. In many cases employees have not taken these matters up with the authorities on account of their lack of awareness of their rights to maternity leaves.

Comment: The provision on the maintenance of a maternity leave register, as a separate registers, needs to be reintroduced in the ERB.
11.2.9 Contracting Out

Both, the existing provision (s80) and the ERB (s105) prohibit any contracting out of the provisions of maternity leave by any private arrangement.

11.2.10 Deficiencies

There are two other deficiencies in both, the current provisions on maternity leave and the ERB provisions.

First, there is no clarity on cases of stillborn child. Whether maternity leave provisions would continue to apply, or whether sick leave provisions would apply to this is not clear. The ERB needs to cover for still born children.

Second: There is no clarity on cases of miscarriages during early stages of pregnancies, or for other pregnancy related medical complications.
Provisions on redundancy for economic, technological or structural reasons are new proposals for inclusion in labour legislation in Fiji. The object of this is to provide workers facing redundancy with some degree of certainty about the problems faced by the employer and the assurance of compensation (S106).

S107 makes provision of information to employees and the state. It requires that if an employer contemplates termination of the employment by redundancy for reasons of an economic, technological, structural or similar nature, the employer must:

(a) provide the workers, their representatives and the CEO Labour not less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and

(b) give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining.

S108 makes provisions on redundancy pay. It requires that if an employer terminates a worker’s employment for reasons of an economic, technological, structural or similar nature, the employer must pay to the worker not less than one week’s wages as redundancy pay for each complete year of service in addition to the worker’s other entitlements. This payment is applicable only if the worker has completed one year of service with the employer.

While redundancy agreements tend to be collectively bargained, the ERB provides redundancy pay for all workers, including those without unions or without collective agreements. This is a significant advance in employment relations from the situation prevailing now.
13 Employment Grievances

This is a new proposal for labour legislation in Fiji. The objective is to reduce the number of trade disputes which arise out of worker grievances. At the moment, there is no legislated mechanism for individual workers to adopt to get their grievances resolved. Where workers are not unionized, or where there exist unions but workers opt not to be members of the union for some reason, a lack of a procedure for resolving individual employment grievances acts against the interests of the workers. Individual employment grievances also lead to unnecessarily prolonged union intervention, which in certain circumstance could also be against the interest of the employee as well as the enterprise.

The ERB provides for grievance procedures for individual workers to pursue employment grievances. They could do this either personally or through the assistance of a representative (s109).

Comment: This section seems to aim to provide an individual worker a procedure for handling grievances. If so, then would the ‘representative’ include a trade union representative? If the objective is to keep trade unions out of grievance procedures, then this matter needs to be clarified.

S110-113 provide for employment grievance procedures in employment contracts. An employment contract must contain procedures for settling employment grievances, including confidentiality and natural justice; and where possible, in the case of sexual harassment complaints, the need for women to be represented on the grievance panel.

The procedures must be agreed by the parties. If there are no agreed procedures, the procedures set out in the schedule (Schedule 4) of the ERB are to be adopted.

The procedures provided in the schedule require the aggrieved worker to submit the grievance to the employer or representative of the employer within 6 months of the date of grievance. Such grievances are to be kept confidential between the parties. The employer is required to accord the worker a fair hearing by allowing the worker an opportunity to be heard. If the grievance is not settled in discussions between the worker and the employer, the worker must promptly give to the employer a written statement outlining the grievance and the remedy sought. If the employer is not prepared to grant the remedy sought, and the parties have not otherwise settled the grievance, the employer must as soon as possible, but in any event not later than 7 days of receiving the written statement, give to the worker a written response setting the employers view of the facts and the reasons for the employer to not grant the remedy sought. If the worker is dismissed; or the worker is not satisfied with the employers written response; or the employer fails to provide a response within 7 days, or the employer and worker have agreed to waive the requirement for an exchange of written statements and the worker is not satisfied with the employers response to the grievance, the worker may refer the employment grievance to Mediation Services in the prescribed manner.

Where an employment contract includes an internal appeal system the internal appeal system must first be exhausted before any grievance is referred for Mediation Services (s110(4)).
*Comment:* The ERB states: ‘Where an employment contract includes an internal appeal system it must not provide for appeal to the Tribunal or Employment Court, and the internal appeal system must first be exhausted before any grievance is referred for Mediation Services’ (s110(4)). This provision is not too clear on whether an employee can at all take the matter to the Tribunal or the Employment Court under this section, or can do so only after the mediation services deals with the matter and is unsuccessful. The first part of the section needs to be better drafted to reflect the intention of the proposed law.

A worker who believes that he has an employment grievance may pursue the grievance procedure in person, and may be assisted by a representative (s111(1)). The Labour Ministry’s ERB promotional material provides a chart showing the grievance procedures. This chart, reproduced as Chart 13.1, shows that after exhausting the internal grievance procedures, if the grievance remains unsettled, it could be taken to mediation services. If still the grievance is not settled, it could be referred to the Tribunal. If the Tribunal fails to resolve it, it can be submitted to the Employment Court, whose decision could be appealed against in the Court of Appeal.

Under these grievance procedures, where a grievance concerns discrimination or sexual harassment, a worker must elect, whether he or she proceeds under the ERB provisions or the Fiji Human Rights Commission Act, but not both.

S114 of the ERB requires that if a worker is dismissed, the employer must, when dismissing the worker provide to the worker a statement in writing of the reasons for the worker’s dismissal. However, the section does not make any reference to a procedure to be followed before an employee can be dismissed.
Comment: The ERB ought to provide against unfair dismissal, and for natural justice when possible cases of dismissal arise.

Second, grievance procedures are innovative means of resolving grievances. But in situations of unequal power relations between the employer and the aggrieved employee, requiring the grievance procedures to be abided by before resorting to mediation services would disadvantage the employee.

However, what empowers the worker is that under the proposed legislation, workers could take matters up through the proposed dispute settlement machinery on an individual basis. At the moment, there is no provision which would allow for individuals to take up their grievances, other than through trade unions.

While making a provision for individuals to take up their grievances is a powerful tool in the proposed legislation, whether this would signal the decline of trade unionism is a matter that needs assessment. Trade unions derive their significance from, inter alia, taking up worker grievances. If workers would take up their grievances on their own, one important incentive for a worker to become a union member would be eliminated. The matter, therefore, is one which reduces to whether trade unions are viewed by the society as useful social agents in the nation, which need to be allowed to flourish, or whether their functions could effectively be taken over by individual employees and the market.
14

Trade Unions: Registration

The ERB aims to replace the *Trade Unions Act* (TUA). The TUA currently provides for all aspects of the functioning of trade unions. The objective of both, Part 14 of the ERB, and the TUA is to provide for the registration of trade unions, and to stipulate minimum requirements to be observed by trade unions in their operations.

**14.1 Registrar and other officers**

*ERB* (s116): The Labour Minister is empowered to appoint a Registrar of Trade Unions and one or more Assistant Registrars of Trade Unions, who will be responsible for the performance of the duties and functions assigned under this law. The RTU and ARTUs are required to act independently and not be subject to any direction or control by any person or body.

*Existing Law*: Trade Unions Act (s3) gives the RTU the same powers, but with the additional power to appoint a Committee of 4 persons to advise the RTU in relation to the performance of his duties and functions (Trade Union Advisory Committee). The Committee is to consist of a person each who the Minister thinks represents employers and employees; and two persons who in the opinion of the Minister are independent persons one of whom is to be chairman.

The RTU is required to consult the Committee when performing any duties or functions concerning registration of TU, changing names of unions, refusal to register, suspension or cancellation of registration, and union rules.

*Comments*: ERB strengthens the power of the RTU by requiring that s/he act independently, and eliminating the need to consult any Committee. In a good governance environment, this provision is positive, but if the RTU is an incompetent or biased person, then the provision can frustrate unions/employers significantly.

**14.2 Protection of officers**

*ERB* (s117): The RTU and ARTU’s are not liable for anything done or omitted to be done, by them in good faith and without negligence in the exercise of any power or in the performance of any duty required under the law.

*Existing Law*: Similar immunities are provided in existing laws.

**14.3 Register of trade unions**

*ERB* (s118): The RTU is required to keep a register of trade unions containing the particulars relating to every registered trade union, any alteration or change in the name, constitution, officers, location or postal address of a registered trade union, and any other matter required to be contained in the register by the ERB or regulations under it.

*Existing Law*: S6 of the TUA has the same requirement.
14.3.1 Application for registration

*ERB* (s119): All trade unions are required to be registered. TU’s are required to apply for registration in the prescribed form, to be signed by more than 6 members of the TU applying for registration.

No member is to belong to more than one trade union.

The details on documentation to be submitted with the application are listed.

*Existing Law*: TUA (s7-8; s36) has similar provisions

14.3.2 Timeline for Registration

*ERB* (s120): The RTU is required to decide on the application to register a TU within 21 days of receipt of the application.

*Existing Law*: No provision on timeline for registration by RTU exists now. But TUA (s7) requires every TU to apply for registration within one month of the date of its formation, which is the first date on which 7 employees agree in writing to become or to form a trade union. An offence is created for failing to abide by this provision; the TU is also deemed to be dissolved.

**Comments**: By establishing a timeline for registration, and lifting the timelines on TU for application, uncertainty on the status of union is reduced.

14.3.3 Power of Registrar to call for further particulars

*ERB* (s121): The RTU may call for further information for the purpose of confirming that the application complies with the law or that the trade union or proposed trade union is entitled to registration under the law.

*Existing Law*: S11 of TUA has the same provision.

14.3.4 Alteration or change of name of trade unions

*ERB* (s122): If the name under which a trade union is proposed to be registered is identical with the name of an existing registered trade union or any other registered body, or if it so nearly resembles the name of another trade union as likely to deceive or mislead the public or the members of other trade unions or registered body; or is, in the opinion of the RTU, undesirable, the RTU must request the applicant to alter the name of the trade union. He must then not register the trade union until the alteration has been made.

The RTU may, upon application by a registered trade union, change the name of the registered trade union if the change is supported, in a secret ballot, by more than 50% of all members entitled to vote.

*Existing Law*: S12 and s33-35 of the TUA have similar provisions, but require 2/3rd majority vote for a change of name.
14.3.5 Amalgamation of trade unions

**ERB (s123):** If 2 or more registered trade unions wish to amalgamate, the unions must apply to the RTU for amalgamation. However, the amalgamation must be supported, in a secret ballot, by more than 50% of all members of each of the applicant trade union. The RTU could refuse an application for amalgamation if the proposed rules of the amalgamated trade union do not make adequate provision for all matters that are to be contained in the rules of the trade union, or any of the purposes of the trade union would be unlawful. Actions consequent to amalgamation are also provided for (like dissolution of original unions, treatment of their properties, debts, etc)

**Existing Law:** S44 of TUA has similar provisions, but the votes required for a motion of amalgamation to pass should be 50% plus, and of such votes cast, those in favour of the proposal exceed by 1/5th or more the votes against the proposal.

S45: TUA provides for appeal against the RTU’s refusal to consent to amalgamation within fourteen days after the RTU has given such notice. Such appeal is to be to the ‘Supreme Court’ (whose equivalent now is the Fiji Court of Appeal). This is a provision which may not be allowed by the rules of the High Court as all appeals against administrative decisions go to the High Court in the first instance.

In addition: s47(2): provides for an amalgamation to take place with or without any dissolution or division of the funds of the trade unions.

S49 provides for other requirements to dissolve a TU.

**Comments:** The ERB proposal for requirement to amalgamate is in line with democratic traditions in unions. However, this provision could be abused in unions where membership changes take place rapidly. The ERB is silent on how the funds of the amalgamated unions should be utilised. This may cause problems since members opposed to an amalgamation may desire to leave the union. This complicates the issue of distribution of funds.

14.4.6 Affiliation to federation of trade union

**ERB (s124):** Any affiliation with any other trade union or trade union federation, is only allowed if a motion to this effect is supported, in a secret ballot, by more than 50% of all members of the trade union.

**Existing Law:** There is no provision on affiliation

**Comments:** In a situation where there are more than one national trade union centre, a provision on affiliation is relevant.

14.3.7 Refusal of registration of a Trade Union

**ERB (s125):** The grounds on which the RTU may refuse to register a TU are listed as:
- the principal objects of the persons seeking registration are not in accordance with those set out in the definition of trade union;
- the trade union is used for unlawful purposes;
- the trade union has not complied with requirements for the registration of trade unions;
- any of the objects in the constitution or rules of the trade union are unlawful or conflict with this Act;
e. the proposed rules of the trade union do not make adequate provision for the matters to be specified in the constitution,
f. the trade union is under the domination of the employer, whether by financial or other means, with the purpose of placing the trade union under the control of the employer.

If the RTU refuses to register a trade union, the Registrar must notify the applicants in writing of the grounds of the refusal within 7 days from the date of the decision, upon which the TU is dissolved.

Provision of appeal against the refusal is provided for.

Immunity: The ERB provides immunity to a person to act on behalf of a dissolved trade union for the purpose of any proceedings brought by or against the union; or dissolving the union and disposing of its funds and property in accordance with its constitution and rules.

*Existing Law*: S13 of the TUA contains a similar provisions, but the TUA lists the following additional grounds for refusal to register a TU:

a. any other trade union already registered is adequately representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration,
b. the trade union seeking registration is an organization consisting of persons engaged in or working at more than one trade or calling and that its constitution does not contain suitable provision for the protection and promotion of their respective sectional interests;
c. proper and satisfactory arrangements for the custody, distribution, investment of and payment from the funds of such trade union are not contained in the constitution.

If registration is refused, the RTU is required to inform the TU in writing of the decision and the grounds within 2 months of the receipt of the application for registration.

*Comments*: The ERB disallows the formation of employer sponsored and controlled trade unions. The ERB does not prevent the formation of multiple trade unions at a workplace. One major issue creating industrial relations tension in Fiji on occasions since 1959, has been the creation of trade unions on racial or religious basis. Trade unions are bodies that aim to protect and advance the interests of workers irrespective of other social identifiers. Racial or religious TU’s drive a wedge in TU solidarity. The ERB, therefore, should provide for disallowing TU’s which are founded on racial or religious basis. Freedom of association provided for in the Constitution would not be violated if the prohibition is for a greater good.

### 14.3.8 Certificate of registration

**ERB** (s126): The RTU is required to issue to registered TU a certificate of registration

*Existing Law*: S10 of the TUA has the same provision.

### 14.4 Officers of a trade union

**ERB** (s127): Only those have been engaged or occupied for a period of not less than 6 months in an industry, trade or occupation with which the union is directly concerned qualify to become an officer of a TU. The offices of secretary and treasurer, however, may be filled by a person who has not been engaged or employed in an industry, trade or occupation with which the union is directly concerned. An officer of a TU cannot be an officer of any other TU or engaged in any
other capacity whatsoever with any other trade union

Others not permitted to become officers of a TU are:
  a.  an undischarged bankrupt, &
  b.  a non-Fiji citizen.

Another restrictions is that a person convicted of an offence relating to dishonesty, moral turpitude or violence for which the penalty is 6 months imprisonment or more can not be an officer of a TU for 3 years after the date of the conviction.

An offence is created for breaching this provision.

**Existing Law:** S31 of the TUA has similar provisions, but:
  a.  the period of occupation for an officer is at least 1 year
  b.  there is no restriction for an officer to be engaged in other capacities than officers, with other TUs.
  c.  to fill the treasurer’s post from outside the TU, the RTU’s permission is necessary.
  d.  a literacy qualification is placed on holding the post of secretary or treasurer
  e.  the period during which a person convicted of any crime involving fraud, dishonesty or extortion can not be an officer of a TU is 5 years.

**Comments:** The ERB lifts some restrictions and imposes others on those who qualify to hold office in TUs.

Foreign citizens who work in Fiji and are members of TUs, can not be officers of a TU. This would significantly prejudice the interests of members and/or unions which cater for foreign workers (like at University of the South Pacific).

Second: TU officials are prohibited from being engaged in any capacity with other TUs. These other capacities would include acting as consultants or advisors. This may prejudice the interests of smaller TUs which often rely on officers of larger TUs for advice or to represent them in proceedings. This provision also disallows a staff of a union from being an official of a TU in another industry, or even within any possible trade union of union employees.

**14.5 Inspection of Accounts**

**ERB (s128):** The account books, receipt books and receipts for expenditure of a registered trade union and a list of its members must be open to inspection by an officer or member of the trade union.

The minutes relating to financial matters, the list of members and the account books and other documents relating to the accounts of a registered trade union must be open to inspection by the RTU or a person authorized by the RTU.

The RTU can ask for any detail on the account of a TU from the Treasurer.

An offence is created for any obstruction of the RTU from carrying out an inspection.

**Existing Law:** S55-66 of the TUA has similar provisions. However, the penalty for the offence created is $1000 in ERB instead of $50, while the jail term in ERB is 3 months instead of 6 months.
Trade Unions: Registration

Comments: Trade Unions are legitimate civil society organisations. As such their operations are of interest to the wider society. Members of the public should, therefore, be allowed opportunity to inspect the books of the TUs. The TUA (s40) provides for access of the public to the TU constitution and rules, and list of officers. The provision, together with provision for public access to union membership roll, should be provided for.

14.6 Annual Returns

ERB (s129): The secretary of a TU is required to provide the RTU by 30th September in each year a general audited statement of all receipts and expenditure during the 12 months ending on 31 December of the previous year, and an audited statement of the assets and liabilities of the trade union as at 31 December of the previous year. The statements are to be accompanied by a copy of the auditors report. The secretary is required also, by 30 April in each year, to submit to the RTU a list of officers of the trade union, and a copy of any amendment to the constitution and rules and of any new rule made by the trade union during the previous year.

The ERB creates an offence for the breach of this provision.

Existing Law: S54 of the TUA has requirements on annual returns, but:

a. audited financial reports are to be submitted by 30th April in every year, and
b. every member of a union is entitled to receive, free of charge, a copy of the general audited financial statement, with the TU required to supply a copy of such statement to every member at or before the annual general meeting.

Comments: The ERB extends the period for submission of the audited financial statement by 5 months to September. This is inconsistent with the requirements of union constitutions on audited financial statements. Delayed submission deadlines would also tend to create complicity in TUs.

The ERB is silent on the provision of audited financial statements to members.

14.7 Constitution and rules

ERB (s130): The rules of a TU must provide for all matters concerned with the operation of the TU. These matters are listed in a schedule to the ERB (Schedule 5). The rules and any alteration to these, are to be submitted to the RTU within the specified times. Provisions must be made in the union rules and constitutions for:

1. The name of the union and the location and postal address of its registered office.
2. The persons eligible for membership of the trade union.
3. The objects for which the trade union is established.
4. A list of officers of the trade union and the functions of each office.
5. A list of officers empowered to operate bank accounts.
6. The establishment of the executive committee and secretary, treasurer, and other officers of the trade union.
7. The manner of making, altering and rescinding rules.
8. The keeping of a register of members of the trade union.
9. The registration of collective agreements by the Registrar and all amendments thereto.
10. Convening and conducting annual general meetings and extraordinary general meetings or annual delegates conferences whichever are more convenient, and the matters to be
presented to the members of the trade union at such meetings, such as the presentation of audited accounts.

11. The annual or periodical audit of the accounts.

12. Provisions for keeping in a separate fund all moneys received or paid by the trade union in respect of any contributory provident fund or pension fund scheme.

13. The manner of the dissolution of the trade union and the disposal of the funds at the same time of such dissolution.

14. The taking of decisions by secret ballot by voting members of the trade union on the following:
   (a) the election of officers of the trade union;
   (b) the alteration of the rules of the trade union;
   (c) all matters relating to strikes and lock-outs;
   (d) dissolution of the trade union;
   (e) the amalgamation of the trade union with any other trade union;
   (f) the federation of the trade union with any other union or with a trade union federation;
   (g) the imposition of levies.

15. The right of any member, who is not disqualified from voting, to a reasonable opportunity to vote.

16. The amount of subscriptions and fees payable by members.

17. A requirement that at any meeting of the trade union or branch a quorum consists of not less than 20% of the voting members of the union or branch.

*Existing Law:* S37 of the TUA has similar provisions, but the following provisions, contained in the TUA, are not in the ERB:

   a) the purposes for which union funds shall be applicable;
   b) the conditions under which any member may become entitled to any benefit assured, and the fines and forfeitures to be imposed on any member.
   c) the maintenance of discipline within the trade union, including provision for appeal to the voting members at a general meeting of the trade union against any decision of the executive committee cancelling the membership of any member or dismissing any officer.
   d) the appointment or election and removal of an executive committee and secretaries, treasurers, and other officers of the TU.
   e) the custody and investment of the funds of the trade union.
   f) the inspection of the books and names of members of the trade union by any person having an interest in the funds of the trade union.
   g) dissolution of the trade union and the disposal of the funds available at the time of such dissolution.
   h) disqualifications of a member from voting on any matter concerning the TU and from receiving benefits if his subscription is more than thirteen weeks in arrears.
   i) if honorary members are to be permitted, the conditions under which a person may become an honorary member.
   j) provisions on members ceasing to be members of the union if their subscriptions are more than 12 months in arrears.
   k) requirements to become a voting member.
   l) quorum requirements for any executive committee meeting.
Comments: The ERB is weaker than the TUA on requirements placed on union constitutions.

As is, the ERB only provides for the establishment of the executive committee and secretary, treasurer and other officers’. The mode of the establishment is not provided for. Since trade unions are regarded as legitimate civil society organizations, and since they are given significant immunities, the law ought to provide for all executive positions to be filled by elections in which all members participate.

The ERB has an additional provision, which is on registration of collective agreements by the RTU and all amendments thereto.

ERB (and the TUA) has requirements for ‘annual or periodical audit’ of union accounts. This is less specific than what is provided in s129 of the ERB, which requires the TU to provide the RTU annual ‘general audited statement of all receipts and expenditure during the 12 months ending on 31 December of the previous year’.

14.7.1 Right of member to access constitution and rules

ERB (s131): A member of a trade union has the right to access or obtain a copy of the constitution and other rules of the registered trade union of which he is a member.

Existing Law: S38 of TUA has a similar provision, but the TUA in addition requires that a copy of the constitution and rules of the TU be prominently displayed in the registered office of the TU and every branch of it.

14.8 Registered office and postal address

ERB (s132): A registered trade union must have an office and a postal address. The notice of the location of the office and of the postal address of the trade union must be given to the RTU upon registration of the union and upon any change of the office or postal address of the union.

The ERB creates an offence for the breach of this section.

Existing Law: S36 of TUA has similar provisions.

14.9 Cancellation or suspension of registration

ERB (s133): The RTU has the power to cancel or suspend the registration of a TU. The grounds for the cancellation and the processes are provided for. The RTU ‘must cancel’ the registration of a registered trade union if:

(a) the registration was obtained by fraud or misrepresentation;
(b) any of the objects of the trade union, have become unlawful and the union fails to rectify any such unlawfulness within the period specified by the Registrar;
(c) the trade union has willfully (after prior notice of contravention from the Registrar) contravened this Act, or allowed a rule to continue in force which is inconsistent with this Act, or has rescinded a rule providing for a matter for which provision must be made under section 130; or
(d) the trade union has ceased to exist.

The RTU ‘may suspend or cancel’ the registration of a registered trade union if:
(a) the accounts of the trade union are not being kept in accordance with this Act;
(b) registration was obtained by mistake;
(c) the trade union has been or is being used for an unlawful purpose or for a purpose inconsistent with its constitution or rules; or
(d) officers of the trade union have persistently and willfully failed to comply with the provisions of this Act.

An additional provision is for the RTU to hold an inquiry on the proposed cancellation/suspension if cause is shown by the TU for the RTU to not to proceed with his actions.

**Existing Law:** S14 of the TUA has similar provisions, except for two additional grounds for cancellation of registration:

- a. if the funds of the TU have been or are being expended in an unlawful manner or on an unlawful object or on an object not authorised by the TUA;
- b. the TU, being one which caters for persons engaged in or working at more than one trade or calling has failed to carry out the provisions of its constitution in relation to protection and promotion of the respective sectional industrial interests of its members.

The existing protection of trade union funds are useful protections for union members. Fiji has a long history of abuse of member funds by unions and/or officials. There is no significant body of evidence to show that unions and/or officials have voluntarily introduced transparency and other measures of good governance in union financial affairs. For this reason, there is a need for a strong protective mechanism, provided by law, to ensure union funds are not abused.

One variation in the process of cancellation/suspension is that in the ERB not less than 2 month's written notice of grounds for suspension is required, while in the TUA, this period is 1 month.

### 14.9.1 Consequence of suspension of registration

**ERB (s134):** This section takes away the rights, immunities or privileges of a registered trade union, its officers and members during the period of suspension.

However, if the TU has lodged an appeal against the suspension decision to the court, the decision to suspend the TU is stayed until the determination of the appeal by the Court.

**Existing Law:** S15 of the TUA has similar provisions, but there is no provision on the decision being stayed during the period of any appeal. This presumes that only the court can grant a stay.

### 14.9.2 Cancellation of registration

**ERB (s135):** This section provides for the effects of a cancellation of a TU’s registration.

**Existing Law:** S18 has similar provisions. (See also s21 of the TUA).

### 14.10 Winding up

**ERB (s136-7):** The powers of a liquidator in relation to winding up are provided for. These are standard powers of a liquidator.

**Existing Law:** S19 of TUA has similar provisions.
14.11 Notification in Gazette

**ERB** (s138): The RTU must give notice in the Gazette of any of the following matters within 28 days of its occurrence:

(a) an application for registration by a trade union;
(b) the registration or refusal of registration by a trade union;
(c) the cancellation or suspension of registration of a trade union;
(d) the registration of a change of name of a registered trade union;
(e) the amalgamation of 2 or more registered trade unions; or
(f) the dissolution of any registered trade union.

**Existing Law**: S67 of the TUA has similar provisions. However, the TUA also requires the RTU to give a notice in the Gazette within 28 days of it’s occurrence that a trade union has applied to amend its constitution so as to expand the class of employees authorised to be members thereof.

**Comments**: The lack of any provision in the ERB for informing the public that a TU intends to provide for a wider category of membership, is likely to intensify union ‘turf wars’.

14.12 Appeal against decisions of Registrar

**ERB** (s139): A person aggrieved by a decision of the Registrar may, within 30 days of the date of the decision, appeal against the decision to the Tribunal.

**Existing Law**: Under s16 of the TUA, there is specific provision for appeal against the RTU’s decision to refuse registration of a TU. The appeal is to the RTU or the Supreme Court.

**Comments**: The ERB creates an Employment Tribunal, and appeals to it. This would improve the quality and efficiency of remedies which TU’s seek against the decisions of the RTU.

14.13 Certain Acts do not apply

**ERB** (s140): The ERB provides that the Co-operatives Act, the Companies Act, and the Industrial Associations Act do not apply to any registered trade union.

**Existing Law**: S68 of the TUA has the same provision.

14.14 Other Comments

14.14.1 Trade Union Funds

The Trade Unions Act has strong provisions on the use of union funds. S50 provides that TU funds was not to be ‘applied either directly or indirectly for any political purpose or be paid or transferred to any person or body of persons in furtherance of any political purpose whether within or outside Fiji’. It also provides for the use of union funds only for the following objects:

1. the payment of salaries, allowances and expenses to officers of the trade union;
2. the payment of expenses for the administration of the trade union, including audit of the accounts of the funds of the trade union;
3. the prosecution or defence of any legal proceedings to which the trade union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the trade union as such or any rights arising out of the relations of any member with his employer or with a person whom the member employs;
4. the conduct of trade disputes on behalf of the trade union or any member thereof;
5. the compensation of any member for loss arising out of trade disputes;
6. allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment of such members;
7. allowances to members in distress through circumstances beyond their control;
8. social insurance, medical aid, and the supply of medicaments and drugs to members or their dependants, and any incidental expenses thereof;
9. expenses incurred on trade union business by officers and members of the trade union;
10. the erection of any building or the purchase or lease of any building or land required for the purposes of the trade union, and for the rent, upkeep and furnishing thereof;
11. affiliation fees or contributions payable to a trade union federation to which such union is affiliated;
12. contributions to a charitable, educational or cultural institution or society approved by the Registrar;
13. contributions or loans, with the approval of the Registrar, to any registered trade union for the purpose of assisting such trade union in financial difficulties; *(Amended by 42 of 1965, s. 8.)*
14. the educational, cultural and vocational training of members as approved by the Registrar, and any incidental expenses thereof;
15. the organization of any theatrical performance, concert, reception, dance, sports meeting or excursion;
16. the purchase of books, newspapers and other literature and the upkeep of a reading room for the use of members;
17. the editing, printing, publication and circulation of any book, newspaper or other periodical, bulletin, pamphlet or other printed literature for the advancement of the lawful objects of the trade union or the promotion of the interests of its members as such;
18. the payment of interest on loans and the payment of income and other legally imposed taxes;
19. the provision of social facilities for members;
20. any other object which, by notification in the Gazette, the Minister may, on the application of any trade union, declare to be an object for which such funds may be expended by such trade union or by any trade union, such expenditure to be subject to such conditions as the Minister may, by the same or any such notification, direct.

The TUA creates an offence if the treasurer or any officer of a trade union fails to comply with these requirements, with, on conviction, a liability of a fine or to imprisonment for a term not exceeding one year or to both a fine and an imprisonment, together with the liability to refund to the trade union any funds which have been unlawfully applied or expended.

These are strong protective mechanisms for unions and union members. The ERB has no such provisions.

Trade unions are institutions which are given legislative protection as well as considerable immunities. In Fiji, there is no clear good governance provisions which would separate the activities of trade unions and political organisations like political parties. At this juncture in Fiji’s union movement, where trade union leadership is bitterly divided along political lines and there is active direct participation of trade unionists in political processes, there needs to be clear protection of union members by making provisions protecting abuse of union funds – and their use for political purposes. S50-53 of the TUA ought to be incorporated in the ERB.
There are two specific matters which arise in relation to the proposed law; these concern the office of the Registrar of Trade Unions, and the interface of trade unions with national party politics.

14.14.2 Office of the RTU

Under the ERB, as well as under existing laws, the Office of the Registrar of Trade Unions is empowered to regulate trade unions in the country. Trade unions are important civil society organisations in modern societies. Given their importance, and wide recognition of their useful roles, it is important that the legislation create an environment that encourages transparency and professionalism in trade unionism. In this respect, the responsibilities on the office of the RTU, and the conduct of the RTU are critical.

Under existing legislation, the Minister for Labour appoints an RTU. The ERB has similar provisions on the appointment of the RTU:

Without prejudice to the powers of the Public Service Commission, the Minister may appoint a public officer as Registrar of Trade Unions who will be responsible for the performance of the duties and functions assigned to the Registrar by or under this Act. One or more Assistant Registrars of Trade Unions and such other officers may be appointed pursuant to section 15 for the purposes of this Act (s116(1)).

The ERB further proposes, as in existing laws, that the actions of the RTU should be independent:

The Registrar of Trade Unions and any Assistant Registrar of Trade Unions must each act independently and are not to be subject to any direction or control by any person or body in exercising the duties and powers under this Act (s116(2)).

The appointment of a ‘public officer’ as the RTU potentially compromises the position of the RTU. Public officers operate under the General Orders of the Public Service, which bind them to the preclusion of independence.

Moreover, the existing practice has been to appoint the CEO of Labour (previously the Permanent Secretary of Labour) as the RTU. This practice again potentially compromises the office of the RTU. Under the ERB, the CEO is required to perform important functions in relation to numerous matters. Appointing the CEO as the RTU, therefore, does not provide for an environment where the RTU would be able to carry out his duties independently of the CEO position and responsibilities. The current practice, as well as the likely outcomes under the ERB, are likely to not only undermine the independence of the RTU, but also breach the requirement of independence of the RTU under the law.

It is, therefore, proposed that consideration be given to creating an independent office of the RTU. This needs to be done outside the provisions or ambit of the Public Service Commission. A better approach would be to create a statutory office of the RTU. This would prevent conflicts of interest and breach of provisions on independence, and enhance good governance.

The statutory office of the RTU may also be charged with the responsibility of establishing, developing and sustaining the requirement of the establishment of labour-management cooperation and consultation committees in establishments employing more than 20 workers (s9(3)).
14.14.3 Trade Unionism vs National Politics

During the past 2 decades, Fiji has witnessed a rapid transition of trade unions from focusing purely on industrial relations matters to focus also on national politics. This has been a logical progression of trade unions in Fiji. Similar developments have also been witnessed in other, more advanced countries. While such an evolution of trade unionism has been normal, it is now important that direct involvement of trade unions in party politics be discussed.

Trade Unions are important civil society organizations. Trade unions and their officials and members have also been given significant protection by law, and immunities which do not apply to other organisations. These are done in recognition of the fact that trade unions protect and advance worker interests in the country.

The direct involvement of trade union officials in party politics, however, has a significant potential to compromise the interests of trade union members. It could also result in, as Fiji has witnessed on numerous occasions during the past 2 decades, party political agitation disguised as industrial action. This can be costly to the nation.

Developed countries, which went through similar transitions of trade unionism, have put in place strong codes of conduct/practice on the separation of trade unionism and party politics.

Whether it is time now for Fiji to consider, as a part of the new employment relations legislation, the development of legislative measures to separate trade unionism and party politics, is a matter for consideration. If it were, then serious discussion needs to take place on the merits and demerits of providing for strict rules on the separation of trade unionism from party politics. An extreme approach would be, for example, that the law could allow for no official of a trade union to hold an office of a political party or become a member of either of the houses of the Parliament, and if they were to hold any such office, then their union position would lapse. There are, obviously, alternatives to such extreme positions. One is that there could be put in place stronger provisions on monitoring the functioning of trade unions, especially the conduct of union elections, union decision making, and reporting requirements to the members, the RTU and the public. Other countries - like the UK, Australia, New Zealand, Germany, France and Scandanavian nations – have a mixed bag of softer approaches from which Fiji could draw lessons. 4

Fiji’s own socio-political environment, political maturity, and experiences would also need to be considered if one were to arrive at a sensible conclusion on this. What is probably the main issue is whether Fiji should continue to allow a situation where employment relations matters could be used as a shield to wage political battles in which political parties are involved, or whether it wants the ERB to be the mechanism to address this issue.

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4 In New Zealand, for example, the NZCTU is often linked to the Labour Party. Many unions are formally affiliated to the Labour Party. The Secretary of the NZCTU also speaks at the annual conference of the Labour Party. But there is no formal link between the two. In the UK, trade unions may affiliate with political parties and establish a separate fund called ‘political fund’ under a resolution supported by a majority of the members in a secret ballot on this. The British Labour Party derives over 40% of its funds through such union affiliation (see http://www/eurofound.edu.int/201/11feature/uk0111106f.html ; “Unions Review Links with “New Labour””). Under this transparent arrangement, affiliated unions have a legitimate constitutional voice in the party.
15
Trade Unions: Rights and Liabilities

Part 15 of the ERB provides for rights and liabilities of trade unions. Existing provisions on rights and liabilities of trade unions are contained in the Trade Unions Act (TUA). The ERB aims to enable trade unions to function fully as social partners and as legal entities capable of incurring legal obligations (s141). Part IV of the Trade Unions Act also makes similar provisions.

15.1 Trade Unions Not Unlawful

ERB (s142): The purposes of a registered trade union are not, merely because they are in restraint of trade, unlawful so as to render a member or an officer of the trade union liable to criminal prosecution for conspiracy or otherwise; or to render an agreement or trust void or voidable.

Existing Provision: TUA (s23-24) has the same provisions.

15.2 Immunity from Civil Suit

ERB (s143): No suit or other legal proceedings may be instituted and maintained in a court of law against a registered trade union or an officer or member of the trade union in respect of an act done in contemplation or in furtherance of a dispute.

Existing Provision: TUA (s20) provides the same immunities.

Comments: Whether making TUs immune from civil suits – for e.g. defamation, nuisance, etc. – is just for those parties/individuals who may be aggrieved because of a negligent TU or TU official conduct during a dispute. Providing civil immunity to a body with significant influence is not desirable.

15.3 Registered Trade Union as Corporate Body

ERB (s144): The registration of a TU renders it a body corporate.

Existing Provision: S17 of TUA has the same provisions.

15.4 Access to Workplaces

ERB (s145): A representative of a registered trade union, authorised in writing by the TU (and with the consent of the employer which shall not be withhold unreasonably), has the right to enter a workplace without disrupting the work arrangement of the employer to discuss union business with union members, to recruit workers as union members, or to provide information on the union and union membership to any worker on the premises.

Existing Provision: No such provision.

Comments: This provision gives additional powers to the TU to organize and serve members’ interests.
However, there is no provision for encouraging union democracy by allowing contenders for union positions in union elections an equal platform or a level playing field.

15.5 Liability in Contract

*ERB* (s146): A TU is liable for contracts it enters into. However legal proceedings cannot be instituted to enforce or recover damages for the breach of any agreement:

- a) between members of a TU concerning the conditions on which members of the TU are or are not permitted to sell their goods, transact business, employ or be employed;
- b) for the payment by a person of any subscription or penalty to a TU;
- c) for the application of the funds of a TU to provide benefits to members and to provide contributions to an employer or worker who is not a member of the TU;
- d) between one TU and another; or
- e) to secure the performance of an agreement.

*Existing Provision:* TUA (s27) has the same provisions.

15.6 Proceedings by and against Trade Unions

*ERB* (s147): Money ordered in civil proceedings, or a fine, to be paid by a TU may be recovered by the sale of property belonging to the trade union.

However, no distress may be levied on a benevolent or provident fund kept by the union unless the Court so orders.

A notice or other document required to be served on a registered TU is duly served if it is sent by registered mail or courier to the registered office of the TU, or served personally on the president, treasurer or secretary of the trade union.

*Existing Provision:* The TUA (s28) has the same provisions. However the TUA is silent on notice to be served on a TU.
16

Collective Bargaining

The ERB proposes a new concept of ‘good faith bargaining’ in industrial relations. It aims to:

a. provide the core requirements of the duty of good faith in relation to collective bargaining;

b. provide a code of good faith to assist the parties to understand what good faith means in collective bargaining;

c. recognise the view of parties to collective bargaining as to what constitutes good faith;

and

d. promote orderly collective bargaining (s148).


Bargaining for collective agreements is currently covered in the Trade Unions (Recognition) Act 1998 (TURA). S3 of the TURA states that where there is a registered trade union of which more than 50% of the persons eligible for membership and employed by an employer are voting members, and no other registered trade union claims to represent those persons, that trade union is for the purpose of collective bargaining entitled to recognition by the employer in accordance with a voluntary recognition agreement executed between the employer and the trade union. The TURA provides for the processes which must be followed by trade unions to seek recognition from the employers, and the responsibilities of the employers on application of recognition. It also provides for the recognition of minority trade unions.

Once given recognition, a trade union could bargain with the employer for collective agreements. Unions which are not given recognition by the employer do not have the legal standing to bargaining with the employers. But even for those which are given recognition, there is no established procedures on collective bargaining. The consequence is that many trade unions do not succeed to bargain for collective agreements.

The ERB, on the other hand, provides for both, a process/procedure for collective bargaining, as well as a legal standing for any registered trade union to bargain with the employer.

16.2 Every Registered Union can Engage in Collective Bargaining

Under the ERB, every registered TU, whether majority union or not, can bargain collectively. In fact, a cornerstone of the ERB is collective bargaining between unions and employers. This is, in essence, an enforcement of the right to collective bargaining enshrined in the Constitution: ‘Workers and employers have the right to organise and bargain collectively’ (s33(2)). The enacting clause of the ERB states that the proposed legislation promotes the welfare and prosperity of all of Fiji’s people by 6 separate measures, of which the fifth one is to comply with the Constitutional provisions. The third measure is to provide ‘for a structure of rights and responsibilities for parties engaged in employment relations to regulate the relationship and encourage bargaining in good faith and close observance of agreements..’ In concrete measures, the ERB states that one objective of the ERB is ‘to enable trade unions to function fully as social partners…” (s141).

Collective bargaining, therefore, is at the heart of the ERB. Given this, the need for prior
recognition of trade unions by employers is not necessary for collective bargaining. As long as a trade union is registered, it can bargain collectively with the employer. As such, the provisions of the Trade Unions (Recognition) Act, 1998 become redundant.

The cornerstone of collective bargaining is good faith bargaining.

16.3 Good faith in bargaining for collective agreement

The duty of good faith requires a union and an employer bargaining for a collective agreement (CA) to do, at least, the following things:

(a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner;
(b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining;
(c) the union and the employer must consider and respond to proposals made by each other;
(d) the union and the employer:
   (i) must recognise the role and authority of any person chosen by each to be its representative or advocate;
   (ii) must not, directly or indirectly, bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union or the employer agree otherwise; and
   (iii) must not undermine or do anything that is likely to undermine the bargaining or authority of the other in the bargaining; and
(e) the union and the employer must provide to each other, on request, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

The matters about which a union and an employer may continue to meet each other in good faith include:

(a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer
(b) the provisions of any agreement about good faith entered into by the union and the employer;
(c) the proportion of the employers workers who are the members of the union and to whom the bargaining relates; and
(d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer, including resources available to the union and the employer (s149).

Of significance is that under the ERB the duty of good faith does not require a union and an employer bargaining for a collective agreement to agree on any matter for inclusion in collective agreement, or to enter into a collective agreement (s150). However, a union or an employer must provide any specific information requested in writing, by a union or an employer to the other. Such a request must specify in sufficient detail the nature of the information requested to enable the information to be identified. The request should also specify the claim or the response to a claim in respect of which information to support or substantiate the claim or the response is requested. It should also specify a reasonable time within which the information is to be provided. The information could be provided to an independent reviewer, appointed by consent, if the union or the employer providing the information reasonably considers that it should be treated as confidential information. In this case, the independent reviewer must advise the parties of his or
her opinions within a reasonable time. If the independent reviewer determines the information is confidential, it must only be used for the bargaining concerned and not disclosed to a third party unless the parties decide otherwise (s151).

16.4 Code of good faith

Under the ERB, the Minister may direct the ERAB to develop a code of good faith, the object of which is to provide guidance about the application of the duty of good faith in relation to collective bargaining. The Code would be an important document for the Employment Tribunal or the Court to consider in determining whether or not the parties to a collective bargaining have dealt with each other in good faith in bargaining for a collective agreement (s152).

16.5 Collective Agreement Bargaining

Bargaining for a new collective agreement or variation of an existing collective agreement may be initiated by one or more unions with one or more employers. Bargaining for a new collective agreement may also be initiated by one or more employers with one or more unions if the coverage clause of the union constitution will cover work that is or was covered by another collective agreement to which the employer is or was a party (s153). If there is no applicable collective agreement in force between a union and an employer the union or the employer may initiate bargaining for a collective agreement at any time (s154).

If, however, there is an existing collective agreement in force between a union and an employer, the union or the employer may initiate bargaining for variation of the collective agreement. If there is only one applicable collective agreement in force, a union or employer must not initiate bargaining unless the party gives 30 days written notice to the other party. If there is more than one applicable collective agreement in force that binds more than one union or more than one employer or both the party needs to give 60 days written notice to all the parties to bargain for variations (s155).

If there is only one applicable collective agreement in force a union or employer must not initiate bargaining for a new collective agreement earlier than 60 days before the date on which the collective agreement expires. If, however, there is more than one applicable collective agreement in force that binds more than one union or more than one employer or both, the union or employer must not initiate bargaining 120 days before the date on which the last applicable collective agreement expires, or 60 days before the date on which the first applicable collective agreement expires (s156).

**Comment:** 60 days is too short a period for many smaller unions without full-time paid officials to initiate new negotiations and complete them. This period should be increased.

16.6 Procedures

The ERB provides the procedure for collective agreement bargaining. A union or employer initiates bargaining for a collective agreement by giving, in writing, to the intended party or parties to the agreement a notice that identifies the intended parties to the CA and the intended coverage of the collective agreement (s157). Where there are a multiplicity of parties (employers and trade unions) seeking a single collective agreement, the members must support the proposal by a simple majority in a separate secret ballot conducted by each of the respective trade unions if there was previously no collective agreement (s158).
Collective Bargaining could also be consolidated. If an employer receives 2 or more notices for CA from different unions, and the notices relate, in whole or in part, to the same type of work, the employer may, within 30 days after receiving the first notice, request each union concerned to consolidate the bargaining initiated for a single collective agreement. Each union receiving the request must, within 30 days, agree to the request. A union that does not agree to the consolidation, retains the right to initiate bargaining (s159).

A collective agreement comes into force on the date specified in the agreement. A collective agreement may provide that one or more of its provisions come into effect on different dates. Where a collective agreement provides for an expiry date it expires on the date specified in the agreement. A collective agreement that would otherwise expire, continues in force for a period not exceeding 12 months if the union initiated, for the purpose of replacing the collective agreement, collective bargaining before the collective agreement expired (s160-61).

A collective agreement has no effect unless it is in writing, is signed by each union and employer that is a party to the agreement, and is registered by the RTU. A collective agreement must contain:

(a) coverage clause;
(b) clause relating to disciplinary procedures;
(c) procedures relating to settlement of disputes and employment grievances at appropriate levels within the undertaking;
(d) a clause dealing with the rights and obligations of the workers and employer if the work of any of the workers were to be contracted out or the business or part of the business of the employer concerned were to be transferred or sold for the purpose of protecting workers bound by the agreement from being disadvantaged;
(e) the services available for the resolution of grievances or disputes;
(f) a clause providing how the agreement can be varied; and
(g) a clause providing the expiry of the agreement, if applicable (s162).

A collective agreement that is in force binds and is enforceable by:

(a) the parties to the agreement; and
(b) a worker who is employed by an employer that is a party to the agreement, or who is or becomes a member of a union that is a party to the agreement.

If the registration of a union that is a party to a collective agreement is cancelled or suspended, the collective agreement continues to bind the employer or employers who are parties to the agreement, and the workers who are members of the union bound by the collective agreement.

If two or more unions amalgamate, the collective agreement binds the amalgamated union.

16.6.1 Deduction of union fees

If the CA has no provision on deduction of union dues, it must be treated as if it contains a provision that requires an employer to deduct, with the consent of a union member, the member’s union fee from the members salary or wages on a regular basis during the year and be paid to the union concerned in a manner agreed to by the union.
16.6.2 Multiplicity of Unions and Collective Bargaining

Under the provisions of the ERB, provision is made for multiplicity of trade unions. S159(4) provides the right to each of these unions to engage in collective bargaining on its own. These provisions have the potential to create significant problems for workers as well as employers/management. It also opens the way for management to control union membership by giving a favoured union a better treatment than another in terms of collective bargaining and agreement on terms and conditions. Such an eventuality could be disastrous for trade unionism.

16.7 Other Matters

A member of a union who is bound by a collective agreement and who resigns as a member of the union but does not resign from his or her employment, may not be subject to any other bargaining for a collective agreement or bound by any other collective agreement until the 60th day before the expiry date of the collective agreement binding on the member before the member resigned as a member of the union (s165).

Comment: This requirement is contrary to the freedom of a member of a union to resign from one union and join another within the same industry, or to establish another union with at least 6 other workers. If the latter union were given the recognition by the employer to have collective agreement, then disallowing the person resigning from the former union from becoming part of the collective agreement, would not only breach his right of union membership, but also jeopardize his chances at work, which may be a civil wrong.

Second, if the collective agreement is one which in effect is a continuing one, the 60-day rule could deprive a worker a right to be a part of collective agreement totally.

Third, s165 is designed to prevent resignation of members from trade unions. This would be contrary to their rights of association/disassociation.

It is suggested that this provision be deleted entirely from the ERB

The parties to a collective agreement must, within 28 days after it is made, lodge a signed copy of the agreement with the RTU for registration. On receipt of the collective agreement the RTU must notify the parties of any matter which the RTU is satisfied is contrary to any law, or may issue a certificate of registration of the agreement. The provisions of a collective agreement are an implied condition of contract between a worker and an employer to whom the collective agreement applies. The ERB creates an offence for breach of this section (s166). Similar provisions on registration of collective agreements are available in the Trade Disputes Act (s34).
17 Employment Disputes

The ERB amends and consolidates the trade dispute provisions of the Trade Disputes Act (TDA). It aims to set out procedures for the resolution of trade disputes. The ERB refers to ‘trade disputes’ as ‘employment disputes’.

17.1 Procedure for Settling Disputes

The ERB requires an employment contract to contain a procedure for settling disputes. The procedure may confer jurisdiction on the CEO who may refer the employment dispute to Mediation Services or to the Tribunal. If there is no agreed procedure, the procedure is specified in a schedule to the ERB. This is as follows:

a) The party invoking the procedure must advise the other party or parties to the contract of the existence of the dispute, the basis of the dispute, and the solution sought in respect of the dispute.
b) The parties must then meet to discuss the dispute.
c) If the parties fail to resolve the dispute, the party that invoked the procedure must, within 7 days, give to the other party a written statement setting out the nature of the dispute, the relevant facts in relation to the dispute, and the solution sought in respect of the dispute.
d) If the other party is not prepared or able to provide the solution sought, and the dispute has not otherwise been settled, the other party must no later than the 7th day after the day of receiving the written statement of the dispute provide a written response setting out that party’s view of the facts; and the reason why that party is not prepared or able to provide the solution sought.
e) If the parties agree in writing that the exchange of written statements under the preceding provisions is inappropriate or unnecessary, they may dispense with those parts of the procedure.
f) If the party invoking the procedure is not satisfied with the other party’s written response, or the other party fails to provide, within the 7 day period required, a written response; or the parties have agreed to waive the requirement for an exchange of written statements and the party invoking the procedure is not satisfied that the dispute has been resolved, the party invoking the procedure may refer the dispute to the CEO Labour.

In the Trades Disputes Act, provision was made for a dispute to be reported ‘by or on behalf of any of the parties to the dispute’. Amendments to the Trade Disputes Act in 1992 and 1998 narrowed the reporting possibilities only to:

a) an employer who is a party to the dispute or a trade union of employers representing him in the dispute; or
b) a trade union of employees recognized under the Trade Unions (Recognition) Act, which is a party to the dispute;
c) a trade union of employees that has applied for recognition under the Trade Unions (Recognition) Act and which is a party to the dispute; or
d) an employee who is a member of a trade union that has applied for recognition under the Trade Unions (Recognition) Act and which is a party to the dispute.

The report is to sufficiently specify the employers and employees who are parties to the dispute, the place where the dispute exists, the party on whose behalf the report is made, each and every
matter over which the dispute has arisen; and the steps taken by the parties to obtain a settlement under any arrangement for the settlement of disputes which may exist by virtue of any registered agreement between the parties.

The ERB restricts further the parties which could report a dispute to only:
   a)  an employer who is a party to the dispute, or
   b)  a registered trade union that is a party to the dispute (s169).

Once the dispute is referred to the CEO, the CEO is required to either accept the dispute or reject the dispute. Chart 17.1, produced by the Ministry of Labour’s ERB promotional team, summarises the procedures.

**Chart 17.1: Resolution of Employment Dispute**

17.2 Institutions for Settling Disputes

The ERB creates three institutions to resolve employment disputes: Mediation services, Employment Tribunal, and Employment Court (see chapter 20 for details on these).

The current provisions have mediation services, conciliation, and an Arbitration Tribunal, to which disputes unresolved by mediation and conciliation are submitted (s6, TDA). Appeals against the Tribunal’s decisions can only be done by way of a judicial review in the High Court of Fiji. The ERB creates a special Employment Court to consider both appeals from the Tribunal, as well as determine cases referred to it by the Tribunal. By preventing the matters from going to the country’s court system, the ERB provides for a more efficient mechanism for the resolution of employment disputes.
Employment Disputes

The Trade Disputes Act also provided for the setting up of a board of inquiry to inquire into the causes and circumstances of a trade dispute, either reported to the CEO or not, and whether the matter is an actual dispute or a possible dispute (s7; 18-19). The ERB has no provision for such a board or inquiry.

17.3 Decisions by the Chief Executive Officer

**ERB** (s170, 173): The CEO can accept or reject a dispute reported to him, and so inform the parties in writing. If he rejects the dispute, he is required to explain the reasons for the rejection. The party aggrieved by the decision may appeal to the Tribunal. However, the CEO must not accept a report of a dispute after 6 months from the date on which the dispute arose except where the delay to report was caused by mistake or other good cause. If the dispute is accepted, it becomes an employment dispute, which must either:

a. be referred to the Tribunal if it relates to interpretation, application or operation of an employment contract; or
b. be referred to Mediation Services in all other cases.

If it is referred to Mediation Services, the mediation process must first be exhausted before the dispute can be referred to the Tribunal by the Mediator.

**Existing Provision:** S2 of the Trade Disputes (Amendment) Decree provides that the CEO is not to accept any dispute that arose more than 12 months from the date it is reported, except in cases where the delay or failure to report the trade dispute within the specified period was occasioned by mistake or other good cause.

If it were a dispute of interest, it would be referred to a mediator. Disputes of Rights are referred to the Disputes Committee, which consists of an independent chairperson appointed by the CEO, and a member each appointed on the recommendation of the parties affected by the dispute.

**Comments:** No timeline is provided for the CEO to accept or reject the dispute. Because of the significance of employment dispute to the workers involved, as well as the employer, the CEO should be required to make and convey a decision within 48 hours of the report of the dispute.

The Mediation Services in the ERB emerged from the provision of mediator in the current law. Similarly, the Employment Tribunal is an advance over the Disputes Committee of the current law. The ERB processes are much clearer and appear more efficient than the current provisions.

17.4 Decision by the Employment Relations Tribunal

**ERB** (s171-2): The Tribunal must make its decision on a matter referred to it within 60 days from the date of the completion of the hearing. The decision may have retrospective effect. Any party that is aggrieved by a decision of the Tribunal may appeal to the Employment Court.

**Existing Provision:** Under the Trade Unions Act, the Disputes Committee is required to hear the parties to the disputes and make its decision within 14 days from the date the trade dispute was referred to it, unless the circumstances of the case required an extension of time by the CEO. Consensus decision is binding on the parties. If one or both parties, or the Disputes Committee fail to comply with requirements, the CEO is required to refer the dispute to the Minister who shall authorise the CEO to refer such dispute to a Tribunal for settlement. The Tribunal’s decision is final and binding. The CEO may also refer the dispute to the Tribunal if both parties consent,
and agree in writing to accept the award of the Tribunal. But irrespective of whether the parties consent, the Minister may authorise the CEO to refer a dispute to a Tribunal if a strike or lock out arising out of a trade dispute, whether reported or not, has been declared by order of the Minister to be unlawful; or a trade dispute, whether reported or not, involves an essential service; or the Minister is satisfied that a trade dispute, whether reported or not, has jeopardised or may jeopardise the essentials of life or livelihood of the nation as a whole or of a significant section of the nation or may endanger the public safety or the life of the community.

If a dispute is referred to a Disputes Committee or the Tribunal, no employee employed by an employer who is a party to the dispute shall discontinue or impede normal work either totally or partially. Similarly, no such employer shall take any action in respect of the dispute. If the dispute involves an intention to dismiss an employee, the employer is required to suspend the employee, pending the settlement of the dispute. The suspension period is without remuneration unless decided otherwise.

Comments: The mechanisms for resolving trade/employment disputes in the ERB are much clearer and amenable to greater efficiency in resolving trade disputes.

17.5 Appeals

ERB (s173): If the CEO rejects a report of a dispute, the aggrieved party has the right to appeal to the Tribunal. A party aggrieved from the decision of the Tribunal can appeal to the Employment Court.

Existing Provision: There is no provision in the TDA for appeal. The only remedy is to seek a judicial review of the CEO’s decision.
18

Strikes and Lockouts

Under current legislation, provisions on strikes and lockouts are covered in the Trade Disputes Act and the Trade Unions (Recognition) Act. The ERB consolidates these provisions and provides for some new provisions on strikes and lockouts. One of the most important measures contained in the ERB is that there is no need for a recognition of a trade union by an employer for collective bargaining. As such, the significance of trade union recognition by employers is done away with. And with this, industrial action on the matter of recognition are also no longer made necessary. Consequently, the provisions in the Trade Unions (Recognition) Act 1998 relating to strikes and lockouts (s14-16), and the associated penalties, need no longer be retained in labour legislation.

18.1 Objective of the Legislation

The ERB recognises that the requirement that a union and employer must deal with each other in good faith does not preclude certain strikes and lockouts. However it aims to ensure that where a strike or lockout is threatened in an essential service, there is an opportunity for a mediated solution to the problem.

18.2 Secret Ballot a Prerequisite to Strike

ERB (s175): No strike is to take place without providing a notice of secret ballot to the RTU. The notice must be served 21 days prior to the nominated date to hold the strike ballot, stating the date, time and place to hold the ballot and the issues for the strike. Secret ballot procedures are specified; these are:

- the ballot paper must state all the issues on which a strike mandate is sought;
- each issue must be supported by more than 50% of all the members entitled to vote provided that such members are directly affected by the issue;
- the secret ballot must be supervised by the RTU; and
- the union must, as soon as possible, notify the RTU of the result of the ballot.

A secret ballot for a strike mandate is valid for 6 months from the date of the declaration of the results.

Existing Provision: While the provisions are somewhat different, the TDA has similar effect. S10 makes sympathy strikes illegal; in ERB, strikes are only permissible for issues that directly affect the workers. Secret ballot provisions are made in the Trade Union Regulations taken out under the Trade Unions Act

Comments: The impact of the first two requirements of s175 of the ERB listed above could be mixed. In an environment of multiplicity of trade unions in one enterprise, an issue on which one union goes on a strike may directly affect another union in the same organization. In such a situation, a ‘sympathy strike’ is permissible as long as this is agreeable to a majority of the members in a secret ballot. However, whether one can impute that the affairs of one enterprise/organisation would ‘directly affect’ workers in another enterprise/organisation is open to debate. In many situations, the interests of the workers of one organization (for example, sugar mill workers) may be directly affected by the activities of another (for example, sugar cane farmers). In other situations, this may not be so.
The outcome, therefore, is that the ERB provisions on strikes, while by no means absolutely clear, may turn out to be weaker than the provisions in the *Trade Disputes Act*.

It should, however, be noted that the ILO’s Committee on Freedom of Association has concluded that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions. The Committee has stated that ‘workers and their organizations should be able to express their dissatisfaction regarding economic and social matters affecting workers’ interests in circumstances that extend beyond the industrial disputes that are likely to be resolved through the signing of a collective agreement’. While the ILO recognizes that worker action should consist merely in the expression of a protest and not be intended as a breach of the peace, the Committee on Freedom of Association has stated that ‘a declaration of the illegality of a national strike protesting against the social and labour consequences of the government’s economic policy and the banning of the strike constitute a serious violation of freedom of association’ (see Gernigon, etal, 1998: 14).

Under the ILO standards, therefore, sympathy strikes are not illegal. In fact the only matters which the ILO accepts as forming the bases of making a strike illegal is in the case of public servants exercising authority in the name of the State or of workers ‘in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population’ (Gernigon, et al 1998: 14-5).

The ILO’s Committee of Experts has stated categorically that it ‘considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful’ (Gernigon, 1998: 16).

In these respects, therefore, both the existing provisions and those advanced by the ERB are contrary to the standards established by the ILO.

### 18.3 Notice Prerequisite for Lockout

*ERB* (s176): Employers can not lockout unless they give a 28-day written notice to the CEO and the respective trade unions. Such a notice is valid for 6 months

*Existing Provision*: None

### 18.4 Unlawful Strikes or Lockouts

*ERB* (s177): Certain strikes or lockouts are declared unlawful. These are if the strike or lockout:

- a. occurs while a collective agreement binding the workers participating in the strike or affected by the lockout is in force, unless it was an aspect of a collective agreement that a right to strike or lockout was provided or it relates to a matter which is not covered by the existing collective agreement or variation to the collective agreement;

- b. occurs during bargaining for a collective agreement or variation of a collective agreement that will bind the workers participating in the strike or affected by the lockout, unless at least 21 days have passed since the bargaining was initiated, or on the date bargaining was initiated, the workers were bound by the same collective agreement and that collective agreement has expired; or on that date the workers were bound by different
collective agreements and at least one of those collective agreements has expired;
c. relates to a dispute that is reported and is being processed;
d. takes place without a secret ballot;
e. takes place in contravention of section 186, 187 or 191(2), (which deal with strikes in essential services);
f. takes place in contravention of a settlement by a Mediator or a decision of a Tribunal or the Court;
g. where a strike or lockout continues after it is declared unlawful; or
h. where a strike or lockout continues after a health and safety issue is resolved in accordance with the Health and Safety at Work Act.

Existing Provision: The TDA (s8-9) provides for conditions under which strikes could be declared unlawful. But the TDA is not as clear on the circumstances as the ERB is.

Comments: The first condition in the ERB – italicized in (a) above) – is not clear and needs to be redrafted.

Secondly, there is no provision in the ERB requiring the dispute reported to be referred to for settlement (by mediation or the Tribunal) within a specified time. If a dispute has been reported the CEO could continue to drag the matter for long periods of time, without referring them for settlement promptly, thereby frustrating an early remedy to the aggrieved party. In this eventuality, parties could not carry out a strike or a lockout. The ERB should provide for a time period within which the CEO should refer the matter for settlement, failing which a party could resort to a strike or a lockout.

One matter, however, that is present in the TDA but not in the ERB is that the TDA does not declare a strike or lock out illegal if 42 days elapse since the date on which the report of the dispute causing such strike or lock out was accepted by the CEO and the dispute was not within that time settled or directed by the Minister to be referred to a Tribunal for settlement.

18.5 Lawful Strikes or Lockouts on Grounds of Safety or Health

ERB (s): Participation in a strike or lockout on grounds of health and safety is lawful only if the workers who strike have, or the employer who locks out has, exhausted the health and safety dispute resolution procedures set out under the Health and Safety at Work Act.

Existing Provision: There is no provision other than as in the HASAW Act.

Comments: The HASAW Act Provides for cessation of work in certain conditions relating to health and safety issues. But under the definition of ‘strike’ in the ERB, such cessation of work would be regarded as a strike. The recommendation on amending the definition of strike would take care of this problem.

18.6 Effect of Lawful Strikes or Lockouts

ERB (s179): Lawful participation in a strike or lockout does not give rise to an action founded on tort, or any action or proceedings for the breach of an employment contract.

Existing Provision: None.
Comments: The drafting ‘lawful participation in a strike or lockout does not give rise .. to an action founded on tort’, provides too wide a scope of immunity. The intention seems to be to provide immunity to the parties directly involved in the strike against tortuous acts of each other by each other. Extending the immunity to those unaffected by the strike – (for example, where participants in a lawful strike make defamatory statements against one, more or selected members of the public) would breach the fundamental rights of citizens to legal redress if wronged. It is suggested that the section be redrafted so as to apply only to tortuous claims and counter claims by each of the parties to the strike only.

18.7 Power of the Minister to Declare Strike or Lockout Unlawful

ERB (s180): If a strike or lockout is unlawful the Minister may, by order, declare the strike or lockout unlawful. Such declaration is effective on the date the order is served on the union or the employer.

18.8 Court May Order Discontinuance of Strike or Lockout

ERB (s181): Where there is a strike or lockout, parties may apply to the Court for an injunction to discontinue the strike or lockout. Parties are:

a. a union, in the case of the lockout;

b. an employer, in the case of the strike; or

c. the Minister, in the case of strike or lockout, in the public interest or in an essential service.

18.9 Wages During Lockouts

ERB (s182): Workers are not entitled to any remuneration in respect of the period of any lawful lockout, except where the lockout is unlawful. On the resumption of work by the workers, their services must be treated as continuous, despite the period of the lockout, for the purpose of rights and benefits that are conditional on continuous service.

Existing Provision: None

Comments: An equivalent provision on wages during a strike is required.

18.10 Record of Strikes and Lockouts

ERB (s183): If a strike or lockout occurs, the employer of the workers participating in the strike or affected by the lockout must keep a record of the strike or lockout, and give a copy of the record to the CEO Labour, within one month after the end of the strike or lockout.

Existing Provision: None

18.11 Prohibition or Expulsion of Members

ERB (s184): A person refusing to take part or to continue to take part in an unlawful strike or lockout, must not be expelled from the Union, or be liable to a fine or penalty, or deprived of a right or benefit to which he or she was or is or her representatives was entitled; or directly or indirectly be disadvantaged.

Existing Provision: S13 of the Trade Disputes Act has a similar provision.
19

Essential Service Industries

Under the ILO standards, essential services are ‘services whose interruption could endanger the life, personal safety or health of the whole or part of the population’ (Gernigon, 1998: 14-5). Currently, the Trade Disputes Act prescribes the procedures on strikes and lockouts in industries that are regarded as essential services. The ERB adds to the list of essential services, and proposes procedures for handling industrial relations in these industries.

19.1 Objective

ERB (s185, 188): The ERB prescribes the circumstances in which workers or employers engaged in essential services may undertake a strike or lockout. The list of essential services is:

(a) Air Transport;
(b) Air/Sea Rescue Services;
(c) Air Traffic Control Services;
(d) Banking Services;
(e) Civil Aviation Telecommunication Services;
(f) Customs Services;
(g) Electricity Services;
(h) Emergency Services in times of national disaster;
(i) Fire Services;
(j) Health Services;
(k) Hospital Services;
(l) Hotel Services;
(m) Immigration Services;
(n) Mediation and Judicial Services;
(o) Light House Services;
(p) Manufacture, conveyance, loading and marketing of sugar or ethanol;
(q) Metrological Services;
(r) Mine Pumping Ventilation and Winding;
(s) Port and Docks Services including stevedoring and lightering, loading and unloading of cargo from or on to any ship and despatch of any cargo to destination;
(t) Quarantine Services and Animal Services of the Government
(u) Sanitary Services;
(v) Supply and distribution of fuel, petrol, oil, power and light essential to the maintenance of the above services;
(w) Telecommunications and Telegraphs;
(x) Transport Services necessary for the operation of any Services under paragraph (r);
(y) Vault Security Services of the Reserve Bank of Fiji;
(z) Water Services.

The list of essential services is to be displayed by the employer in all premises in some conspicuous place where the list may conveniently be read by persons employed in that essential service.

The ERB creates an offence for not displaying such a list, and for removing, damaging, defacing, obliterating or destroying such a notice.
**Existing Provision:** Under the Trade Disputes Act, the list of essential services includes the list under the ERB except:

a) Banking Services;
b) Mediation and Judicial Services; and
c) Manufacture, conveyance, loading and marketing of sugar or ethanol.

However, the TDA included all transport services necessary for the operation of essential services. The ERB includes transport services necessary only for mine pumping, ventilation and winding.

S15 of the TDA has a similar provision on notice. However, the TDA gives immunity to government, as an employer, from prosecution if it fails to place such a notice.

**Comments:** The list of services included as ‘essential’ services needs to be examined. In ordinary situations, essential services are those that are essential to life and property. If this notion is utilised, then only those services which are essential to the maintenance of life and property would be regarded as essential services. Consequently all services other than emergency, hospital, water, health, fire, and rescue are not essential services.

The ILO has proposed a separation of what are ‘essential’ services from what are services of ‘fundamental importance’. Its Committee of Experts uses the expression ‘essential services’ to refer only to essential services in the strict sense of the term (i.e. those the interruption of which would endanger the life, personal safety or health of the whole or part of the population), in which restrictions or even a prohibition may be justified. However, in the services of fundamental importance a ‘minimum service’ would prevent the need for outright ban of strikes. In the latter a substantial restriction or total prohibition of strike action would not appear to be justified; as long as the public’s basic needs are met and that facilities operate safely or without interruption, these would not comprise essential services. This approach is desirable.

If such a separation were adopted, it would regard only the hospital sector as an essential service. Electricity services, water supply services, the telephone service and air traffic control would be regarded a services of fundamental importance. In general the following would not constitute essential services in the strict sense of the term; some may even not be regarded as services of fundamental importance:

a) radio and television;
b) the petroleum sector;
c) ports (loading and unloading);
d) banking;
e) computer services for the collection of excise duties and taxes;
f) department stores;
g) pleasure parks;
h) the mining sector;
i) transport generally;
j) refrigeration enterprises;
k) hotel services;
l) construction;
m) automobile manufacturing;
n) aircraft repairs;
o) agricultural activities;
p) the supply and distribution of foodstuffs;
q) the metal sector;
  r) the Mint;
  s) the government printing service;
  t) the state alcohol, salt and tobacco monopolies;
  u) the education sector;
  v) metropolitan transport;
  w) postal services.

The ILO has maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition (Gernigon, 1998: 21). However, the ILO’s Committee of Experts on Freedom of Association state that account must be taken of the special circumstances existing in the various member States, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety and health of the population… Furthermore, a non-essential service in the strict sense of the term may become essential if the strike affecting it exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered (for example, in household refuse collection services). In order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility …rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term (Gernigon, 1998: 22).

The ERB, on the other hand, has taken a different notion of essential services; this is services that are essential for the continuation of the economy. It is for this reason that banking, tourism, etc are included as essential services.

Inclusion of Banking services, Mediation and Judicial services and Manufacturer, conveyance, loading and marketing of sugar or ethanol are not regarded as essential services under the ILO approach to essential services.

A useful approach would be to adopt the ILO recommendation of distinguishing essential services from minimum operational services, and make provisions for both these.

19.2 Strikes in Essential Services

ERB (s186): If a strike is contemplated by a trade union in respect of workers in or in control of, an essential service in pursuance of a dispute between the workers and their employer, the trade union must:

(a) conduct a secret ballot (under s175); and
(b) in writing, give at least 28 days notice of strike to the employer with a copy to the CEO. The notice of strike must, inter alia, state the date and time on which the strike is contemplated and the place or places where the contemplated strike will occur; the category of workers who will strike; and the estimated duration of the strike.

If the notice of strike does not comply with this section, or the strike does not take place as notified, the notice is deemed not to have been made and any strike undertaken under the notice
would be unlawful.

*Existing Provision:* S16 of the TDA has similar provisions, but the TDA requires that before a strike, a report of the trade dispute is to be made to the CEO. It also requires direct information, rather than a cc, to the CEO.

### 19.3 Lockouts in Essential Services

*ERB (s187):* No employer engaged in an essential service may lock out workers in that essential service unless the lockout is lawful under this Act, and the employer gives 28 days notice to the RTU and the trade union of the lockout. The lockout notice is also to be posted in all premises used for the purposes of that service in some conspicuous place where the notice may conveniently be read by persons employed in that essential service.

The notice must specify the nature of the proposed lockout, including whether or not it will be continuous; the place or places where the proposed lockout will occur; the date and time on which the lockout will begin; and the names of the workers who will be locked out.

*Existing Provision:* TDA does not have any specific provision on lock-outs. S16 states: ‘Where any strike or lock out is contemplated by persons employed in or in control of an essential service in pursuance of a trade dispute with their employer…’ The reference to a lockout is unclear as it refers to a lockout by persons in pursuance of a trade dispute with their employer.

### 19.4 Offences for Breaches of Service Affecting Essential Services

*ERB (s189):* It is an offence for a person to break his or her employment contract in respect of essential services if this was done with the knowledge, or probable knowledge that the probable consequences of so doing, will be to:

a) deprive any section or whole of the public, wholly or to a great extent of an essential service, or substantially to diminish the enjoyment of that service, or

b) endanger human life or cause serious bodily injury or to expose valuable property whether real or personal, to destruction, deterioration or serious damage.

It is also an offence to cause or procure or counsel or influence a worker to break the employment contract, or an employer to cause a lockout in any of the circumstances referred to.

Employers are required to display a copy of this section (s189) in all premises in some conspicuous place where the notice may conveniently be read by persons employed in that essential service. An offence is created for failing to do this, or for anyone destroying or damaging the notice.

*Existing Provision:* S14-15 of TDA has similar provisions.

### 19.5 Requirements for Mediation Services

*ERB (s190):* Where a notice of intention for a strike or lockout in an essential service is given, the CEO must ensure that mediation services are provided as soon as possible to the parties to the proposed strike or lockout for the purpose of assisting the parties to avoid the need for the strike or lockout.

*Existing Provision:* There is no specific provision for mediation for a notice of strike in an
essential service. However, under the Trade Dispute (Amendment) Act 1992 the Minister may authorise the CEO, to refer a dispute to a Tribunal if there is a trade dispute, whether reported or not, involving an essential service, or if the Minister is satisfied that a trade dispute, whether reported or not, has jeopardised or may jeopardise the essentials of life or livelihood of the nation as a whole or of a significant section of the nation or may endanger the public safety or the life of the community.

Comments: The procedures proposed in the ERB would more rapidly address the matters of dispute affecting the workers and the employer.

19.6 Minister to Refer Strike or Lockout in Essential Services to the Court

ERB (s191): Where there is a lawful strike or lockout in an essential service and neither party is willing to settle the dispute, or neither party reports the dispute, and the Minister is satisfied that the continuance of the strike or lockout is not in the public interest or will jeopardise or likely to jeopardise the life or livelihood of the nation, economy or public safety, the Minister may refer the employment dispute or grievance to the Court. If this is done the Minister must order the discontinuance of the strike or lockout.

Existing Provision: Under the Trade Dispute (Amendment) Act 1992 the Minister may authorise the CEO to refer a dispute to a Tribunal if there is a trade dispute, whether reported or not, involving an essential service, or if the Minister is satisfied that a trade dispute, whether reported or not, has jeopardised or may jeopardise the essentials of life or livelihood of the nation as a whole or of a significant section of the nation or may endanger the public safety or the life of the community.
20

Institutions

The proposed good faith bargaining and dispute resolution mechanisms are two new approaches to industrial relations in Fiji. To facilitate this, the ERB proposes the creation of three institutions that facilitate good faith industrial relations practices. Institutions created are:

a) Mediation Services,
b) Employment Relations Tribunal, and
c) Employment Relations Court.

These institutions aim to:

(a) support the obligations of good faith;
(b) recognise that employment relationships are more likely to be successful if differences in those relationships are resolved promptly by the parties themselves;
(c) recognise that if differences in employment relationships are to be resolved promptly, information and assistance need to be available at short notice to the parties to those relationships;
(d) recognise that the procedures for problem solving need to be flexible;
(e) recognise that there will always be some cases that require judicial intervention;
(f) recognise that judicial intervention needs to be that of a decision making body that is not inhibited by strict procedural requirements; and
(g) where the parties are unable to resolve differences, provide for mediation and adjudication to be invoked to resolve such matters in a timely manner (s192).

20.1 Mediation Services

The ERB requires the Labour Ministry to create a Mediation Unit to provide mediation services. The Unit is to comprise a Chief Mediator responsible for the daily management of the Mediation Services, and other mediators. The other mediators may include qualified people outside the public service. The mediation services may include the provision of general information about employment rights and obligations and services that assist the smooth conduct of employment relationships and that can resolve disputes or employment grievances promptly and effectively. It may also provide services to resolve any problem relating to employment contracts associated with the fixing of new terms and conditions of employment (s193).

20.1.1 Reference to mediation services

Matters in relation to employment grievance may be referred to mediation services by a worker, whether the worker is a union member or not. Matters relating to an employment dispute reported to the CEO under s170, may be referred to mediation services by the CEO (s200). If an employment grievance has been referred to mediation services or a dispute reported to the CEO, the employment grievance cannot be subsequently reported as a dispute. Similarly, if the CEO refers an employment dispute to mediation services the dispute cannot subsequently be referred to mediation services as if it were an employment grievance (s200).
20.1.2 Procedures for Mediation Services, and Settlements

The ERB (s194) empowers the mediator to choose the services that are appropriate to the particular case. But in providing mediation services, the mediator needs to pay regard to the objective of the ERB, and prompt and effective resolution of disputes/grievances. This may include receiving any information, statement, admission, document, or other material, in any way that he or she thinks fit, whether or not it would be admissible in judicial proceedings.

A party to proceedings before a Mediator may appear personally or be represented by a person whom the Mediator is satisfied has the authority to act in proceedings. But no legal practitioner is allowed to represent a party during mediation. If a Mediator fails to resolve an employment grievance or an employment dispute, the Mediator is required to refer the grievance or dispute to the Employment Tribunal.

Where a matter is referred to mediation services, a notice is to be issued to all parties to appear before the Mediator at a place and time specified in the notice. A party that fails to appear before the Mediator as required, without reasonable excuse, commits an offence and is liable to a fine (s210).

20.1.3 Confidentiality

The ERB provides for confidentiality of the mediation process (s195). Except with the consent of the parties or the relevant party, each party to and participant in the mediation must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation. This includes giving evidence in any court proceedings. Courts also cannot admit any evidence of any statement, admission, document, or information that are to be kept confidential in a mediation. The only exception to this is if the mediation were for the purpose of assisting persons to resolve any problem in determining or agreeing on new terms and conditions of employment. The ERB, however, does not prevent the discovery or affects the admissibility of any evidence merely because the evidence was presented in the course of the provision of mediation.

Where an employment dispute or employment grievance is resolved through mediation, and the terms of the settlement are signed and endorsed, the settlement is deemed to be a final and binding decision. Except for enforcement purposes, no party may then take the terms of settlement before the Tribunal or any court, whether by action, appeal, application for review, or otherwise (s196).

Mediation can not be challenged or called in question in any proceeding on the grounds that the nature and content of the mediation was inappropriate, or that the manner in which the mediation was provided, was inappropriate (197).

The ERB requires the CEO to ensure that mediators are able to act independently, in deciding how to handle or deal with any particular dispute or employment grievance or aspect of it; and are independent of any of the parties to whom mediation services are being provided in a particular case. The CEO may also give instructions about the manner in which mediation services are to be provided in relation to particular types of matters or particular types of situations or both. Provisions are also made where a Labour Ministry employee or its CEO are parties to a grievance or dispute (s198).
20.1.4 Code of Ethics

The ERB requires the CEO to develop, in consultation with the stakeholders, a code of ethics on standards to guide Mediators in performing their duties and functions (s199).

20.2 Employment Relations Tribunal

The ERB establishes an Employment Relations Tribunal (ERT). The Trade Disputes Act provides for the appointment of a ‘Tribunal’ as well as a Permanent Arbitrator (s19-22); the former is a lower office than the latter, with powers like that of a Commissioner, while the latter has the status of a court. The ERB merges the two offices and creates a Tribunal, which has a status of a court. The office of the Chief Tribunal is similar and comparable to that of the Permanent Arbitrator of the TDA.

The Tribunal is deemed, for all intents and purposes, as a subordinate court to the Employment Relations Court. It has the jurisdiction, powers and functions conferred on it by the ERB or any other written law (s202).

20.2.1 Membership (s203-8)

The ERT consists of a legal practitioner with not less than 7 years practice, preferably in employment relations, as the Chief Tribunal; and other members who may or may not be legally qualified. S203(2) states: ‘For the purposes of exercising its jurisdiction, the Tribunal consists of one member only, subject to subsection (3)’. Subsection 3 states: ‘The Chief Tribunal may, in writing, nominate up to 3 members, including the Chief Tribunal, to hear and determine the matter.’

Comment: There needs to be clarity on the number of members of the Tribunal and the number who can at any time exercise the jurisdiction of the Tribunal.

The Chief Tribunal is appointed by the Judicial Service Commission while the Minister, taking into account diversity of gender and ethnic representation, appoints the other members of the Tribunal. Persons to be appointed as members of the Tribunal must have relevant qualifications or significant experience in employment relations and any other criteria that may be specified by the Minister. The Chief Tribunal and other members of the Tribunal are appointed for a term not exceeding 3 years, but they are eligible for reappointment. Part-time appointments are also provided for. The ERB also makes provisions for the vacation and resignation of the tribunal members.

In performance of his/her duties, a member of the Tribunal has the same protection as is given to judicial officers (under s65 of the Magistrates Courts Act). Proceedings of the Tribunal are deemed judicial proceedings (s209).

20.2.2 Functions and Jurisdiction of the Tribunal

The function of the Tribunal is to assist employers and employees (or their respective representatives) to achieve and maintain effective employment relations by adjudicating and determining any grievance or dispute between parties to employment contracts. The Tribunal may assist parties to amicably settle the matter without requiring the Tribunal to provide mediation assistance in a matter as a prerequisite to adjudication (s210).
The Tribunal has jurisdiction to hear and adjudicate on every matter concerned with employment, for example:

a) grievances,
b) disputes,
c) interpretation of contracts,
d) contractual breaches,
e) recovery of wages,
f) entitlements,
g) interpretation of any provision of labour laws (ERB) or any other written laws relating to employment,
h) any matter under the Workmen’s Compensation Act,
i) any matter on Part VIII of Health and Safety at Work Act 1996 (on notices by health and safety inspectors),
j) equal employment opportunities,
k) trade unions and their members, and
l) any appeal referred to it under this Act.

It also has the power to adjudicate on matters referred to it by the CEO or the Mediation Services or any party to the mediation. In addition, it has the power to adjudicate on employment related claims up to $40,000 (or $10,000 if the Tribunal member is not legally qualified), and if members are legally qualified, then to hear and determine offences against the provisions of the ERB, as are prescribed by regulations. It also has powers to impose fines not exceeding $2,000 or a term of imprisonment not exceeding 2 years, otherwise, it may refer the matter to the Court for sentencing (s211).

The Tribunal has the power to order a party to a proceeding to do or cease to do a specified thing or activity in order to comply with the ERB, an employment contract, or a decision of the Tribunal. The ERB creates an offence for a failure to comply with a compliance order (s212).

Without limiting any other power of the Tribunal the Tribunal may determine the classification of work and rate of remuneration that would represent equal pay; questions relating to the implementation of equal pay that may be referred to it; questions in relation to an instrument that is referred to it by a party to an instrument or the representative of a party, or a labour officer or labour inspector; and other questions, and give rulings as may be necessary for the exercise of its jurisdiction (s213).

Workers (or labour officers/inspectors) may commence action in the Tribunal to recover wages or other money payable by an employer to a worker under an employment contract, if there has been default in payment to a worker of wages or other money, or if payment of wages or other money has been made at a lower rate than that legally payable under law or an employment contract. The time limit for commencing action in the Tribunal is 6 years after the day on which the money became due and payable. The claimant may produce evidence to show that the defendant employer failed to keep or produce a wages and time record and that the failure prejudiced the workers ability to bring an accurate claim (s214-5).

20.2.3 Procedures

The Tribunal is required to act fairly. An officer of the Tribunal must keep and maintain a record of all sittings of the Tribunal. The applicant may not withdraw a matter before the Tribunal without the written consent of the parties or prior leave of the Tribunal (s216).
The Tribunal may refer a question of law to the Court for its opinion. If the Court makes a
determination on the question of law, the Court may refer the matter to the Tribunal for a decision
in accordance with the determination (s217).

A party to the proceedings may apply to the Tribunal to have the proceedings transferred to the
Court for the hearing and determination of the matter. The Tribunal may order the transfer of the
proceedings to the Court if it is of the opinion that an important question of law is likely to arise,
or the case is of such a nature and of such urgency that it is in the public interest that it be
removed immediately to the Court (s218).

If the Tribunal declines to transfer the proceedings, the party concerned may seek special leave of
the Court for an order that the proceedings be transferred to the Court. The Court must consider if
a matter of law is likely to arise, or whether the case is of such urgency that transferring it would
be in the public interest (219-220).

20.3 Employment Relations Court

The ERB establishes the Employment Relations Court (hereinafter referred to as the Court), as a
Division of the High Court. It consists of not more than 3 judges appointed under s131 of the
Constitution to exercise the jurisdiction of the Court. The Court has jurisdiction to hear and
determine on all issues relating to work and industrial relations under this Act, as well as under
any written law or the employment contract. It also has jurisdiction to hear and determine
proceedings founded on tort relating to this Act. In all matters before it, the Court has full and
exclusive jurisdiction to determine them in a manner and to make decisions or orders, not
inconsistent with this Act or any other written law or with the employment contract. However, in
relation to an order cancelling or varying an employment contract or a term of an employment
contract, the Court must make an order only if an order should be made and any other remedy
would be inappropriate or inadequate.

If a person has not observed or complied with a provision of this Act, or an order, determination,
direction, or requirement made or given under this Act by the Court, the Court may, in addition to
any other power it may exercise, by order require that person to do a specified thing, or to cease a
specified activity, for the purpose of preventing further non-observance of or non-compliance
with that provision, order, determination, direction, or requirement, and must specify a time
within which that order is to be obeyed. A failure to comply with a compliance order is an offence
(s221).

Sittings of the Court must be held at times and places as are from time to time fixed by a judge
(s222). In a matter before the Employment Relations Court, a judge may, on the judge’s own
motion or on application by a party, state a case for the Court of Appeal on a question of law
arising in the matter, excluding a question as to the construction of an employment contract
(s224). Proceedings before the Court are not abated by reason of the death of a party to the
proceedings in which case the legal personal representative of the deceased party must be
substituted in the deceased party’s stead (s225).

Comment: The ERC is created as a division of the High Court. The issue is whether the ERC can
have its own procedures separate from the general procedures of the high courts. The ERB
provides elaborate powers and procedures of the ERC. The consistency of these with the
High Court procedures, needs to be examined (see S237-8 of the ERB).
20.3.1 Priority of Wages

Notwithstanding any written law, if an attachment has been issued against the property of an employer, the proceeds realised may not be paid by the Court to any person until any order obtained against the employer in respect of a worker’s wages has been satisfied to the extent of a sum not exceeding 3 years wages of the worker, and the Court has paid to the CEO any sum the worker is entitled to be paid under this Act (s223). Any balance could be recovered through civil action.

S54 of the Employment Act provides for similar priority of wages. However, the maximum permissible for the satisfaction of the employee's wages is a sum not exceeding four month's wages of such employee, leaving the balance, if any, to be recovered through civil action by the worker.

As such, the ERB provisions are much stronger than the Employment Act provisions on priority of wages. However, this may have adverse consequences on other creditors to an employer. It is, nonetheless, presumed that the employees would seek the avenues provided in the ERB to recover wages much earlier than to let wages be unpaid for as long as 3 years.

20.4 Incidental matters

The CEO is required to provide for officers of the Court and the Tribunal to carry out their functions. The Tribunal and the Court must each have a seal, which must be judicially noticed by any court or tribunal for all purposes (s226-7).

Contempt: Assault, threat, intimidation, or willful insult of a member of the Tribunal, a Judge, an officer of the Tribunal, a Registrar of the Court, any other officer of the Court, or a witness, during a person’s sitting or attendance in the Tribunal or Court, or in going or returning from the Court or Tribunal, or willfully interrupting or obstructing the proceedings of the Tribunal or the Court or otherwise misbehaving in the Tribunal or Court; or willfully and without lawful excuse disobeying an order or direction of the Tribunal or the Court comprises contempt of the Court/Tribunal. Contempt is treated in the same way as contempt is treated in other courts of law, but for this the maximum fine is $1,000 or a term of imprisonment not exceeding 3 months or both (s228).

Appearance of parties: A party to a proceeding before the Tribunal or Court may appear personally, be represented by a representative whom the Tribunal or the Court is satisfied has authority to act in proceedings, or be represented by a legal practitioner. The Tribunal or the Court may allow a person who in the opinion of the Tribunal or the Court, is entitled to be heard, to appear or to be represented. The Tribunal or the Court has powers to order any person to appear or to be represented before it (s229).

20.5 Employment Grievance Remedies

If the Tribunal or the Court determines that a worker has an employment grievance, in settling the grievance, it may order one or more of the following remedies:
(a) reinstatement of the worker in the workers former position or a position no less advantageous to the worker;
(b) reimbursement of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;
(c) the payment to the worker of compensation by the worker’s employer, including
compensation for:
(i) humiliation, loss of dignity, and injury to the feelings of the worker;
(ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or
(iii) loss of any personal property (s230)

20.5 Evidence and Proceedings

In proceedings brought before the Tribunal, the Tribunal may accept and admit evidence it thinks fit. However, the Tribunal is not bound by the strict rules of evidence. S232 provides for the provisions that must apply with respect to evidence in proceedings before the Tribunal or the Court. If, without good cause shown, a party to proceedings before the Tribunal or the Court fails to attend in person or by representation, the Tribunal or the Court may act as fully in the matter before it as if that party had duly attended or been represented. If anything which is required or authorised to be done by this Act is not done within the time limit for doing it, or is done informally, the Court or the Tribunal may, if the matter is within its jurisdiction, on the application of a person interested, order the extension of time within which the thing may be done, or validating the thing informally done. To enable the Court or the Tribunal to dispose of a matter effectively, it may, on its own motion or upon application, order other direct parties to be joined or struck out, amend or waive an error or defect in the proceedings, and generally give directions as are deemed necessary or expedient in the circumstances. The Tribunal or the Court may, with or without conditions, order that a part of any evidence given before it or the name of a witness not be published (s231-4; s237).

20.7 Costs

The Tribunal or the Court in proceedings may order a party to pay to any other party costs and expenses (including expenses of witnesses) as it thinks reasonable, and may apportion the costs between the parties or any of them as it thinks fit, and may at any time vary or alter the order in the manner as it thinks reasonable (s236).

20.8 Rules of the Tribunal and Employment Relations Court

The Tribunal or the Court has the power to order suppression of names of witnesses or evidence. The Chief Justice may from time to time make rules for the purpose of regulating the practice and procedure of the Tribunal or the Court. In the absence of such rules, or where no provision is made for a particular circumstance:
(a) the Magistrates Courts Rules apply to the proceedings before the Tribunal; and
(b) the High Court Rules apply to the proceedings before the Employment Relations Court (s237-8).

20.9 Appeals

The ERB makes provisions for appeals from various decision making authorities like the CEO, the RTU, the Minister, the Tribunal and the Employment Court (s239-245).

20.9.1 CEO’s Decision

An appeal against a decision of the CEO must be made by way of a notice of motion filed with the Registry of the Tribunal within 21 days from the date of receipt of the decision by the proposed appellant. Such an appeal is to be heard and determined by the Tribunal.
20.9.2  **RTU’s Decision**

An appeal against a decision of the RTU must be made by way of a notice of motion filed with the Registry of the Tribunal within 21 days from the date of receipt of the decision by the proposed appellant. Such an appeal is to be heard and determined by the Tribunal.

20.9.3  **Minister’s Decision**

An appeal from a decision of the Minister must be made by way of a Notice of Motion filed with the Registry of the Court within 21 days from the date of receipt of the decision by the proposed appellant.

**Comments:** ERB is not clear on whether appeals from Minister’s decision should in the first instance be with the Employment Relations Court or to the Tribunal.

20.9.4  **Tribunal’s Decision**

A party to proceedings before the Tribunal who is aggrieved by a decision of the Tribunal in the proceedings may appeal as of right or by leave to the Employment Relations Court. Such an appeal must be made in the prescribed manner within 28 days from the date of the decision of the Tribunal. The notice of appeal must specify the grounds of appeal, the decision or the part of the decision appealed from, and the precise form of the order which the appellant proposes to seek from the Court. However, no appeal shall lie from an appeal allowing an extension of time; or from any decision of the Tribunal where it is provided by this Act that the decision is final; or without leave of the Tribunal if appeal is from a decision made by consent of the parties or concerns costs, or concerns any interlocutory decision or the decision of the CEO or the Tribunal on extension of time, or any compliance order of the Tribunal. The Court has all the power to make decisions on appeals as other courts have.

20.9.5  **Court’s Decisions**

An appeal from the decision of the Court lies to the Court of Appeal. For this the ‘provisions of the Court of Appeal Act applies, with necessary modifications’. Such an appeal must be filed within 28 days of the delivery of the decision or judgment. A notice of appeal does not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the Employment Relations Court or the Court of Appeal so orders.
21
Offences and Immunities

The ERB creates numerous types of offences (s246-57), and grants numerous immunities (s258-61).

21.1 Offences

Other than for the offences for which specific references are made in the previous sections of the ERB (and in chapters 2-20 of this report), the following specific offences have been created by the ERB:

21.1.1 Offence to delay or obstruct officer: Liable on conviction to a fine not exceeding $10,000 or to a term of imprisonment not exceeding 12 months.

21.1.2 Offence to make a false entry in records: Liable on conviction to a fine not exceeding $10,000 or to a term of imprisonment not exceeding 12 months or both.

21.1.3 Offence on failure to pay wages as required: Liable on conviction, for an individual, to a fine not exceeding $20,000 or to a term of imprisonment not exceeding 5 years or both; or for a corporation to a fine not exceeding $100,000.

21.1.4 Offence by employer not allowing worker to take his property: on conviction, liable to a fine not exceeding $5,000.

21.1.5 Offence by worker relating to money owed to employer (appearing as intended to defraud the employer): on conviction liable to a fine not exceeding $5,000, or to a term of imprisonment not exceeding 2 years or both.

21.1.6 Offences where strikes or lockouts are unlawful: no penalty is specified, thus the penalty rate falls in the provisions of general penalty (see 21.1.12).

21.1.7 Misuse of money or property of a trade union: the Court may order the person to deliver the property to the trade union or to pay to the trade union the money unlawfully expended or withheld. A failure to comply with the order commits an offence and is liable on conviction to a fine not exceeding $20,000 or to a term of imprisonment not exceeding 4 years or both.

21.1.8 Failure to give notice or produce document (Trade Union): on conviction, TU liable to a fine not exceeding $10,000. Every officer of the trade union and every person required by the rules of the trade union to give the notice or send or produce the document is also liable on conviction to a fine of $200.

21.1.9 Offences by company or corporation: If it is proved that the offence was committed with the consent or connivance of, or due to a willful neglect on the part of an officer of the organisation, that officer or person also commits the offence and is liable to the penalty for that offence.
21.1.10 **Intimidation or annoyance:** If, intending to compel any person to do or abstain from doing an act, a person
(a) uses violence to or intimidates the other person or the persons spouse or children or injures or damages the persons property;
(b) persistently follows the other person about from place to place;
(c) hides any tools, clothes, or other property owned or used by the other person, or deprives the person of, or hinders the person in the use of, them;
(d) watches or besets the house or other place where the other person resides, works, carries on business or happens to be, or is at the approach to that house or place; or
(e) follows the other person with 2 or more further persons in a disorderly manner in or through any street or road,
the person commits an offence and is liable on conviction to a fine not exceeding $10,000 or to a term of imprisonment not exceeding 2 years or both.

21.1.11 **Peaceful picketing and prevention of intimidation:** If one or more persons attend at or near a house or place where a person resides, carries on business or happens to be for the purpose of obtaining or communicating information or of persuading or inducing a person to work or abstain from working, and it is in such numbers or in such manner as to be calculated to intimidate any person in that house or place, to obstruct the approach to or the entry to or exit from it, or to lead to a breach of the peace, that person or persons commit an offence and is (are) liable on conviction of a fine not exceeding $5,000 or to or to a term of imprisonment not exceeding 12 months or both.

21.1.12 **General penalty:** A person who commits an offence for which no particular penalty is prescribed is liable on conviction:
(a) for an individual, to a fine not exceeding $10,000 or to a term of imprisonment not exceeding 2 years;
(b) for a company or corporation or trade union, to a fine not exceeding $50,000; and
(c) where applicable, to disqualification from holding a post as an officer of a trade union for 5 years from the date of conviction for the offence.

21.1.13 **Exemption of employer on conviction of actual offender:** If an employer is charged with an offence, he/she is entitled to have any other person whom the employer alleges to be the actual offender charged and brought before the Court, and that other person must be convicted of the offence and the employer must be exempt from the penalty. If a labour officer/inspector is satisfied that the employer has used due diligence to enforce the provisions of this Act and another person has committed the offence, the labour inspector/officer must proceed against that other person other than the employer. These apply to all offences other than for offences and misconduct concerning sexual harassment.

21.2 **Immunities**

There are numerous immunities provided by the ERB (s258-261). These are:

21.2.1 **Removal of liability for interfering with a person’s business:** An act done by a person in contemplation or furtherance of a dispute is not actionable only on the ground that it induces some other person to break an employment contract or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of that person’s capital or labour.

21.2.2 **Prohibition of action of tort:** An action against a registered trade union or any of its
members or officials on behalf of themselves and all other members of the union in respect of a tortuous act alleged to have been committed by or on behalf of the union must not be entertained by any court.

21.2.3 Protection against civil and criminal proceedings: No action or proceeding, civil or criminal, lies against the CEO/labour officer/inspector or body established by or under this Act, for anything done or omitted in good faith in the exercise or purported exercise of a function under this Act by the said officers of bodies.

21.2.4 Conspiracy in disputes: An agreement or combination by 2 or more persons to do or procure to be done an act in contemplation or furtherance of a dispute is not punishable as a conspiracy if the act when committed by one person would not be punishable as a crime. An act done in pursuance of an agreement or in combination by 2 or more persons, if done in contemplation or furtherance of an dispute, is not actionable unless the act if done without the agreement or in combination would be actionable. However, nothing in this section exempts from punishment a person found guilty of a conspiracy for which a punishment is imposed by any other written law. These exemptions, however, do not exempt individuals from offences under the law relating to riot, unlawful assembly, breach of the peace, sedition, or an offence against the Government.

21.3 Time for instituting proceedings for offences

The ERB provides a strict time limit on instituting legal proceedings: Notwithstanding anything in any other written law, proceedings for an offence against this Act may be instituted within the period of 12 months after the act or omission alleged to constitute the offence except that the Court may grant leave to extend such period for a further 6 months (s262).

21.4 Fixed penalties

The offences for which fixed penalty notices, which are of $100, are provided for are offences under sections 44(3), 45(4), 49(2), 55(2), 56(2), 70(3), 96(2), 99(3), 105, 129(4), 132(4), 201(2), 248 and 249. Fixed penalty notices, of $1,000 for individuals and $5,000 for companies, are also provided for, for offences under s247. These notices can be issued by a Labour Officer or other public officer authorised in writing by the CEO. The penalties prescribed in penalty notices shall not exceed one-fifth of the maximum penalty prescribed for that offence. The Minister is empowered to vary the (fixed) penalties by regulations (s263).

21.5 Comments

21.5.1 Penalty Rates

The ERB provides for penalties for offences created that are more reasonable than the penalties existing under current law. However, as witnessed with the penalties under current law, the passage of time renders the penalties insignificant. To address this, constant amendments to the laws would be needed.

The alternative to regular amendments on penalties is to index the penalties to some relevant measure. Numerous relevant measures could be developed, for example indexing the rates to the inflation rate, or providing for periodic increments by certain predetermined percentages, and the like. The actual measures could be developed once the concept of indexing penalties is accepted.
21.5.2 Lack of Offences

A major shortcoming of the ERB is that while it makes numerous provisions on how labour-employer relations are to be regulated, it does not create specific offences for breach of numerous important sections of the proposed law. No offences are created for the following sections:

21.5.2.1: Fundamental Rights and Principles: While these rights are clearly stated, there is no provision for any offence for the breach of these provisions.

21.5.2.2: Contracts of Service (Part 5 of ERB): The only offences created are for failing to get a foreign contract of service attested, recruiting or enlisting workers for employment under foreign contracts of service without written authorisation by the CEO, and requiring medical examination on HIV/AIDS status, sexually transmitted diseases or pregnancy. For other breaches there is no offence created. One major breach could be that a party or parties do not enter into written contracts of service where they are required to do so. Numerous other provisions on contracts of service could be breached. No offence is created for such breaches.

21.5.2.3: Payment of Wages (s47): No offence is created for unlawful deductions from wages.

21.5.2.4: Hours of Work (Part 8): No offence is created for breach of provisions on hours of work.

21.5.2.5: Equal Employment Opportunities (Part 9): No offence is created for breach of provisions on equal employment opportunities.

21.5.2.6: Hours of Work for Children (s97): No offence is created for breach of provisions on hours of work for children.

21.5.2.7: Redundancy (Part 12): No offence is created for breach of provisions on redundancy for economic, technological or structural reasons.

21.5.2.8: Employment Grievances (Part 13): No offence is created for breach of provisions on employment grievances.

21.5.2.9: Registration of Trade Unions (Part 14): The only offences created are for unions/officials who fail to comply with the provisions on office bearers of a union (s127), inspection of books by the RTU (s128), annual returns (s130), and the provisions on operating without a registered office and postal address (s132). No offence is created for the breach of the numerous other provisions on registration of trade unions.

21.5.2.10: Rights and Liabilities of Trade Unions (Part 15): No offence is created for breach of provisions on rights and liabilities of trade unions.

21.5.2.11: Collective Bargaining (Part 16): No offence is created for breach of provisions on collective bargaining except for failing to deliver a collective agreement to the RTU within 28 days of it being made (s166).

21.5.2.12: Employment Disputes (Part 17): No offence is created for breach of provisions on employment disputes.

21.5.2.13: Strikes and Lockouts (Part 18): No offence is created for breach of provisions on strikes and lockouts except for those created under s250 (engaging in unlawful strike of lockout).
A legislation that requires various parties to do certain things, or to refrain from doing certain things, but which does not create any offence for the breach of these provisions, would more likely than not be either ignored or undermined.

It is also important that offences be created for breaches by both, state officers as well as workers and trade unions. The offences which have been created, are largely against employers, employees or trade unions. Breaches of the proposed law by the RTU, labour inspectors, labour officers, or the CEO do not attract any offence or penalty. §117 of the ERB provides immunity to the RTU, the ARTUs, and other public officers responsible for the administration of the labour law, are ‘not liable for anything done or omitted to be done, by the officer in good faith and without negligence in the exercise of any power or in the performance of any duty conferred or imposed by this Act.’

While one may accept that if an activity done, or omitted to be done is a result of good faith and without negligence may absolve the officer, there is no provision for a penalty for work done or omitted to be done in bad faith, or out of negligence. This is another major weakness of the proposed law.

The Ministry of Labour may consider discussing the provisions of (and lack thereof) on offences with experts in prosecution on labour laws and/or the Office of the Director of Public Prosecutions in Fiji.
22
Miscellaneous Provisions

22.1 Regulations

The Minister is empowered to, on the advice of the Employment Relations Advisory Board, make regulations to give effect to the provisions of the law, and in particular to make regulations for any of the following purposes:

(a) providing for the particulars to be contained in written contracts of service, and for the manner of their execution, attestation and registration and for all other matters relating to their making, enforcement, transfer and cancellation;

(b) prescribing the adequacy and cash value of housing and other essential supplies where they form part of the remuneration of workers in employment generally or in relation to a particular kind of work or employment;

(c) prescribing the hours of work of children;

(d) prohibiting or regulating the employment of persons suffering from an infectious disease or any prescribed physical disability;

(e) prescribing the records, registers, books, accounts and other documents to be kept and the information or returns to be rendered by employers and other persons in respect of workers including working children;

(f) providing for the application of sums due to the estates of deceased workers;

(g) prohibiting, restricting, controlling or regulating the employment of children in workplaces or specified occupations;

(h) prescribing for any period the maximum number of hours during which a worker or class of workers, either generally or in relation to a particular kind of work or employment, may be required to work;

(i) regulating the enlisting, recruitment, engagement and the embarkation of workers to be employed under foreign contracts of service;

(j) providing for the establishment and administration of public employment exchanges;

(k) providing for all matters relating to the return of workers from the place of employment to the place of engagement;

(l) providing for the giving of security by employers or other persons and all matters relating thereto;

(m) the manner in which trade unions and the constitutions and rules of trade unions are to be registered and the fees payable for registration;

(n) the manner in which and the qualifications of persons by whom the accounts of registered trade unions are to be audited;

(o) the conditions subject to which inspection of documents kept by the Registrar will be allowed;

(p) the creation, administration, protection, control, disposal and safe custody of the funds of registered trade unions;

(q) the conduct of secret ballots by registered trade unions;

(r) prescribing procedures in the issuance of notices under this Act;

(s) prescribing procedures and rules for resolution of employment related matters for mediation services;

(t) prescribing procedures for authorisation of recruitment agents and private employment agencies for local or overseas employments;

(u) prescribing fees and forms for the purpose of this Act;

(v) regulating the employment conditions of seafarers;
(w) prescribing wages/salaries criteria and guidelines for workplaces;
(x) prescribing all matters which are required to be prescribed by this Act.

Regulations made, however, must not impose a fine exceeding $20,000 and/or a term of imprisonment exceeding 2 years (s264).

The Minister may also, on the advice of the ERAB, issue codes of practice or guides for the purposes of this Act.

22.2 Repeals, Consequential Amendments and Savings (s265)

The ERB aims to replace:
(a) Employment Act (Cap. 92);
(b) Trade Disputes Act (Cap. 97);
(c) Wages Councils Act (Cap 98).
(d) Trade Unions Act (Cap. 96);
(e) Trade Unions (Recognition) Act 1998 (Cap 96A);
(f) Public Holidays Act (Cap. 101).

It also requires amendments to the Workmen’s Compensation Act by empowering the Employment Relations Tribunal to carry out the duties of the resident magistrate, and the Employment Relations Court to do the same for the High Court.

It also aims to amends the Sugar Industry Act to allow for employment disputes and grievances in the sugar industry to use the machinery under the proposed law.

The provisions under the Daylight Savings Act, Shop (Regulation of Hours and Employment) Act (Cap 100) and the Industrial Association Act (Cap 95) are not amended by the proposed law.

At the commencement of the law, the existing members of the Labour Advisory Board, the Wages Councils, appointed under the Employment Act, and the Wages Councils Act, respectively, would continue in office under the same terms and conditions as if they were appointed under the new law.

At the commencement of the new laws, any subsidiary legislation made under the Acts repealed continue as if they were made under this Act to the extent that it is not inconsistent with this Act.

Comment: Subsidiary legislation is recognized in reference to the principal legislation. For the 6 principal laws which would by repealed, there may be subsidiary legislation which may not be inconsistent with the ERB, but which may hang without any reference to provisions in the ERB. All subsidiary legislation under the 6 principal acts need to be examined to establish whether they are relevant to the provisions and objectives of the ERB.

An employment contract that is valid and in force at the commencement of the new law would continue to be in force after the commencement of the law and to the extent that it is not in conflict with the law is deemed to be made under this law and the parties to the contract are subject to and entitled to the benefits of this Act.

A registered trade union in existence at the commencement of this Act would continue to be a registered trade.

The Minister may make regulations for the purposes of other transitional matters, including pending trade disputes and labour complaints.
The positions of trade unions on the ERB are divergent. There are two major trade union confederations in the country, the Fiji Trades Unions Congress (FTUC), and the Fiji Islands Council of Trade Unions (FICTU). Almost all the registered trade unions are affiliated to either of these national centers of trade unions. The individual affiliate positions are often the same as the positions of the respective centers. Where the views of an affiliate diverge from the views of the national center it is affiliated with, the affiliate is quickly brought to tow the line.5 This chapter, therefore, emphasizes the views of the two national trade union centres.6

23.1 Common Union Positions

There are 4 broad issues in the ERB on which trade unions have common positions.

23.1.1 Right to Strike

Under current law, workers have a right to strike for all employment disputes. The ERB restricts the right to strike to only the annual log of claims negotiation. Strikes for other reasons, like restructuring, redundancy, dismissals, demotion, promotion, etc. during the currency of an agreement will be unlawful. These restrictions should be lifted. Sympathy strikes are made unlawful in the ERB; this restriction should also be lifted.

Unions suggest the following:

a. Strike: Import the definition contained in Trade Dispute Act of 1973 prior to 1991 Amendments where strike is defined as cessation of work.

b. S175(3)(b) [on strike ballots to be supported by 50% plus members on each issue which directly affects such members]: Delete requirement that the issue must directly affect workers voting for the strike.

c. S177 [on unlawful strikes/lockouts]: delete this section as these are too detailed and confusing. Retain current laws.

d. S178: This section is in conflict with Health and Safety at Work Act provisions in respect of a worker’s right to stop work in the event of immediate health and safety risk.

On the power of the Minister to declare a strike unlawful, unions feel that this should be exercised judiciously. One union confederation suggests that the following provision be added to S180: ‘Minister shall convene a conference with the union before declaring a strike unlawful’. Also, the effect of the unlawful strike should be from the day following the declaration rather than on the day the declaration is made.

5 One example is the view of the Mine Workers Union of Fiji, which had informed the Parliamentary Sector Committee on Economic Services that it objected to the provisions in the ERB where any 7 employees could form a union. The very next day, the Union wrote to the Committee withdrawing the statement saying that it supported the position of the FTUC, with which it was associated. The union attributed the ‘error’ it made on its views on multiplicity of unions on account of the union being ‘not much aware of the Employment Relations Bill’. The letter was written in January 2006, well after the Ministry of Labour road-shows and FTUC consultation with its affiliated unions. The example highlights the view that the opinions and positions of a few strong unions (unionists) overshadow the views of the smaller and/or less influential unions (unionists).

6 These views are based on the submissions of the respective trade union centers to the Parliamentary Sector Committee on Economic Services examining the Employment Relations Bill, supplemented by discussions with trade unionists.
23.1.2 Essential Services

The list should be in line with the ILO standards. The following services should be deleted from the list:

i. Air Transport  
ii. Banking Services  
iii. Customs Services  
iv. Hotel Services  
v. Public health nursing  
vi. Immigration Services  
vii. Mediation and Judicial Services  
viii. Manufacture, conveyance, loading and marketing of sugar or ethanol  
ix. Port and Docks services

23.1.3 Involvement of Government in TU Matters

Unions feel that the government has no business regulating the conduct of unions, in particular, in examining their financial statements, and supervising their elections. They suggest the following:

a. S127(1): delete ban on union officials assisting other unions. The law can not prohibit assistance of any kind from an official of one union to another union. This runs against trade unions principles.

b. S127(d): remove provision disallowing non-citizens from holding union positions.

c. S128 (inspection of accounts) and 129 (annual returns): Delete these sections as they violate ILO Convention 87.

d. S133(3): delete this sub-section (on TU accounts not kept in according to law; TU used for unlawful purpose; TU officers persistently fail to comply with provision of ERB as grounds for suspending/canceling registration of a TU) as the Registrar should not have such sweeping powers to cancel/suspend registration of a TU.

e. S175(2): 21-day notice for a secret ballot requirement should be deleted as it comprises government interference in union activities.

f. S175: The requirement for a secret ballot as a pre-requisite for strike shows there is too much interference by the RTU. This is in conflict with ILO Convention No. 87.

g. S175(4) – 6 month validity for a strike mandate - should also be deleted.

h. S186(2)(d): Duration of strike under notice of strike is not possible as the duration of the strike period can not be known before the strike. This requirement should be deleted.

i. Delete requirement of a ballot for affiliation (s124). The unions should be free to decide under its own rules and inform the Registrar of their affiliation.

23.1.4 Redundancy

Unions feel that the valid grounds for termination and redundancy should be limited to either where the functions disappear (redundancy), or misconduct, incompetence or operational reasons (termination). Redundancy pay should also be increased. Their specific suggestions are:

a. S29 [on termination of contract: Insert provision]: ‘Notwithstanding 29(1) and 29(2), a contract of employment shall not be terminated by an employer except for misconduct, incompetence or operational reasons’. This would make the section compliant with ILO Convention 158.

b. S41(a) [on termination of contract because the employer can not fulfill the contract]: should be deleted as it is inconsistent with employment grievance provision on dismissal.

c. Insert requirement against unfair dismissal and termination of employment without cause.
d. S107(1)(a) [on redundancy]: allow 90 days before carrying out termination for redundancy instead of 30 days.

e. S108 [redundancy pay]: provide for 3 months pay plus 2 weeks wages for each year of service, instead of 1 week’s wages for each year of service. This will be a deterrent to employers from terminating employees.

f. S114: insert new provision as follows: ‘A worker is entitled not to be unjustifiably or unfairly dismissed’.

23.2 Major Differences between Unions

Trade unions differ on one fundamental matter: the issue of trade union recognition.

The FTUC views the ERB as ‘a milestone in the history of employment relations in Fiji’. This is on account of the fact that the ERB consolidates the existing laws into a single legislation; it aims to protect vulnerable and non-unionised workers; introducing good faith collective bargaining; repealing the ‘controversial’ TU Recognition Act, and introducing ‘Labour Management Consultation Committee’ in establishments with more than 20 employees.

The FICTU, on the other hand, proposes that the TU recognition provision of current laws ought to prevail. The TU recognition law, which was enacted in 1998, has worked well in Fiji. It ensures that majority unions get the right to negotiate with employers. Removing the TU recognition requirement would lead to the rise of numerous unions, each of which would demand to negotiate with the employer. This will be cumbersome and will lead to division amongst workers in the workplace. It would also result in different sets of working conditions with ongoing disputes between employers and several unions, causing chaos in the workplace.

To date this has been the major ‘irreconcilable’ difference between the two groups of trade unions.

23.3 Specific FTUC Suggestions

While the FTUC endorses the ERB, it has made a number of suggestions for amendments. These are as follows:

1. S3(2) [on exclusion of prison officers from the ambit of the Bill]: this exclusion is contrary to ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise Convention, 1948).

2. Part 6 (Protection of Wages): the ERB must provide for national minimum wage rates. The labour market delivers ‘highly disparate outcomes depending on the bargaining strength of individuals or unions’. The government, therefore has ‘general obligation’ to ensure that minimum socially acceptable standards are prescribed and enforced. Fiji has also ratified the ILO Convention No. 26 (Minimum Wage Fixing machinery Convention, 1928) that obliges the government to create minimum wage fixing machinery where no arrangement exists for the effective regulation of wages and where wages are exceptionally low. The FTUC states further that when the first IR draft Bill was introduced, ‘it had a provision on Minimum Wages’.

3. Part 16 (Collective Bargaining): There should be a lead time of 12 to 18 months for the implementation of this part of the bill to allow for the unions and employers to understand and become accustomed to the processes required under this part.

4. Labour laws should be ‘decriminalised’. Labour laws are primarily civil matters and involve contractual relations. As such there should be no criminal sanction in labour laws,
other than for cases involving dishonesty, in which case these should be dealt with under normal criminal law. Imprisonment should not be a penalty for breach of labour laws.

5. Government should not be involved in initiating any legal action; it should leave this to the directly affect party.

6. Bargaining Fees: the ERB should include a provision where non-unionised members of an establishment who benefit from a wage increment bargained for by a trade union, pay a ‘bargaining fee’ to the union.

7. The ERB should include a general provision to the effect that a trade union is entitled to represent its members in relation to any matter involving their collective interests as employees, and that it may represent an employee in relation to the employee’s individual rights as an employee only if the union has an authority from the employee to do so.

8. S37 (Written Contracts): Written contracts should only be required where an individual is not covered by a collective agreement, and where the period of employment is for more than a month. S37(1) should be amended to read: ‘For the purpose of the subsection a collective agreement is deemed to be a written contract’.

9. S67(2): shift workers should get paid or given a day off in lieu of working on a public holiday.

10. S146 [Liability in Contract]: this section should be deleted.

11. S163(2) [Deduction of union fees]: this section should be deleted.

12. S256(c): General Penalty – which disqualifies a person from holding a post as an officer of a trade union for 5 years from the date of conviction for an offence – is too draconian and is against the ILO Convention 87. It should be deleted.

23.4 The FICTU Position on the ERB

The FICTU proposes the following major amendments to the ERB:

1. Title: original title – Industrial Relations Bill – be retained.

2. Part 1 – Interpretation:
   b. Dispute: disputes should be reported by recognized trade unions
   c. Employment Grievances: Insert after ‘dismissed’, ‘or employment terminated’.

2. Some Employers are now adopting termination without cause to avoid justification. This is now a serious problem with several disputes before the Arbitration Tribunal.
   d. Lockout:
      i. b: Insert 'contemplation or' before 'consequence'
      ii. c: Add 'or parts of any agreement'
   e. Part Time Worker: Add at the end 'which does not exceed 40 hrs per week and is not less than 24 hrs per week’. This is to avoid exploitation and guarantee at least 3 days wages per week.
   f. Recognised Trade Union: Insert a new definition for recognized trade union to mean unions which have satisfied the membership requirements for collective bargaining threshold, as in current law.
   g. Week: Add at the end 'beginning Sunday' or should read a calendar week as in current law.

2. Part 2
   a. Employers should also be required to comply with all international labour standards and any other relevant international instruments in all employment and related matters.
3. Part 7  
a. Annual Paid Holiday: Allow for 15 working days annual holiday instead of 10 working days.  
b. Sick Leave: delete 68(4) – on offence for false medical certificate.  
4. Part 8  
a. S73: define managerial and executive positions. This is to avoid abuse of the provision by simply attaching manager titles to ordinary workers. This could be done by limiting the exclusion to say top three layers of Management only.  
5. Part 9  
a. S74(b): allow for equal rates of remuneration for work of equal value ‘for all workers’.  
b. S75 [on prohibited grounds of discrimination]: add union membership or activity.  
c. S77(1)(b): this disallows offering less favourable terms of employment. FICTU proposes that it should also disallow offering ‘more favourable’ terms of employment to some.  
6. Part 14  
a. Retain requirement for appointment of a trade union advisory committee [TUAC] as under current Trade Union Act, and add: ‘The Registrar should be required to act upon advice of the TUAC’.  
7. Part 16  
a. S153-165 [on Bargaining processes]: these sections should be deleted and replaced with the simple provisions and procedures from current laws which provide for collective bargaining to be restricted between an employer and recognized trade union. The detailed procedures and the time restrictions are unnecessary. This should be left to the parties to decide as is currently the practice. Trade Union Recognition Act (1998) should be retained and the Bill amended accordingly.  
8. Part 21 (Penalties)  
a. The penalties and fines are excessive.
Ownership of the ERB

As stated in Chapter 1, the ERB has gone through a long gestation period. Various drafts of the bill have gone through various stakeholders and experts. The Bill was given the green light by the Labour Advisory Board, which is a key tripartite institution in Fiji. In this sense, one would propose that the ERB has broad endorsement by all major stakeholders. Obviously, however, a proposed legislation of the nature of the ERB – which covers a wide range of industrial relations matters, and which also aims to thoroughly review some of the most important the labour laws in Fiji - would have pockets of dissatisfaction. These, however, are not of such an extent that the stakeholders would wish the entire bill to be shelved. In this sense, the ERB has broad ownership amongst the stakeholders.

The Bill itself is one which takes a modern approach to industrial relations in the country. Having seen the transformation of industrial relations climate in countries like New Zealand, which has put in place a similar piece of legislation as the ERB, stakeholders in Fiji at least agree that the status quo is not one which could launch Fiji into a period of better employment relations and improved living standards. From this point of view, the ERB aims to meet the challenges in employment relations created by the contemporary national and global economic environment.

The fact, however, that the ERB will have to be re-tabled in the House of Representatives, with the prospect of a re-examination of the Bill by the Parliament, there is some possibility of re-visiting the major areas of contention which remain.

24.1 Ownership of the ERB

While the trade unions have been expressing dissatisfaction with significant sections of existing labour laws, there is no overall ownership of the ERB amongst them. The reasons for this are twofold. First, there are significant dissatisfactions with most unions on the 4 matters listed above (Chapter 23): right to strike, essential services, government involvement, and redundancy and termination provisions. Second, there are diametrically opposed positions taken by the two major union groups on the law on trade union recognition. A wider ownership of the ERB could be created if there was further consultation on these 5 specific matters between the government, the two national union centers, and experts on these matters. The ILO could be asked to provide assistance in facilitating the consultation through provision of technical expertise.

24.2 Ownership by Employers

The employers as a body do not have an objection to the Bill itself. They, however, are concerned that some provisions may raise the cost of doing business in the country. One such provision concerns maternity leave. The ERB proposes that employees on maternity leave are entitled to full pay during the duration of the maternity leave. There is no limitation on the number of maternity leaves this provision would apply to. The best way of resolving this problem is to examine the cost differences that would arise from the proposed provision vis-à-vis the current provisions.  

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7 In January 2006, the Parliament had commissioned a study of the maternity leave costs in the garment industry. The results show that the additional costs from the new maternity leave provisions amount to $199,290 per annum at current
Other leave provisions are also of concern to employers; these are: annual leave (10 working days), bereavement leave, (3 working days), sick leave (10 working days), and public holidays (12 working days). The total of 35 working day leave would have an impact on the cost of business in the country. This would tend to burden the smaller/newer businesses disproportionately more than the established/large businesses. However, such leaves are now normal components of working conditions in modern societies. As such, the cost of such leave will have to be borne by the society. To counter the likely burden on small enterprises from such requirements, including the maternity leave requirements, the state may consider introducing financial assistance packages for small enterprises.

The third point of contention concerns the ban on medical examination to establish status of HIV/AIDS, sexually transmitted diseases and pregnancy. The employers view this ban as adding to the cost of doing business.

The fourth matter which employers express concern on is the immunity trade unions, and union official and members have been given under the ERB, particularly the immunity provided in s143 (‘No suit or other legal proceedings may be instituted and maintained in a court of law against a registered trade union or an officer or member of the trade union in respect of an act done in contemplation or in furtherance of a dispute.’). While such immunity attracts strong objection from some employers, existing law continues to grant such immunity to unions. Given this, the issue of immunity could be weighed in light of the role of trade unions under the ERB.

24.3 Ownership by Government

This Bill has gone through the life of 4 different governments, all of which supported the need for a new set of labour laws. In terms of labour relations, the government has a dual role. First, the government is an employer in its own right. Currently employing over 20,000 workers, the government is the single largest employer in the country. Second, the government is an ‘arbiter’ in the management of employer-employee relations. In both these roles, the support given to creating a new employment relations environment by various governments, is a strong indicator of consensus on forging ahead with the Bill. Given, however, that the government would have to re-start the process of enacting the laws, it may wish to re-visit some of the matters raised by employers and unions, as well as by this report.

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wage rates; if the new provisions were currently applicable, the maternity leave costs in the industry would be, on average, 0.64% (i.e. 2/3rd of 1%) of the total wages bill, 0.11% of total sales revenue, and 0.44% of total garment industry profits (See FIAS, 2006).
25

Conclusions

The Employment Relations Bill is an innovative legislation proposed for the regulation of employment relations in the country. Its approach is generally progressive. If enacted, the proposed law would create a much better industrial relations climate in the country.

However, there are numerous shortcomings in the proposed law. These have been highlighted in this report. Some of the weaknesses have been responsible for some stakeholders opposing the proposed legislation, at least to the extent of the shortcomings.

There also are some fundamental issues that the ERB raises in terms of the new role of trade unionism in Fiji. The general objective of creating a better environment for labour-employer cooperation and consultation, going even to the extent of profit and benefit sharing, is a remarkably new notion in Fiji. It demands a totally different approach to industrial relations by both unions and employers; an approach which most unions and employers in Fiji are totally uninitiated in. Yet some countries have moved far from a confrontationist union-employer relationship to a more co-operative relationship. The burden on the employers, unions and individual employees placed by the ERB is enormous. For the respective parties to live up to the expectations made of them by the ERB, there is a need for a considerably more efficient and responsive institutional environment, particularly at the state level. Without this, there is a significant likelihood that the ERB may see a gradual withering away of the significance of trade unions in Fiji, with the possible consequence that an environment may be created where there would emerge a relatively unregulated labour market. The latter may be a fertile ground for the germination of considerable trade/employment disputes and industrial disharmony.

The issues raised in this report provide a basis for re-examining the proposed legislation and taking appropriate/corrective action before the legislation is tabled in the Parliament for its consideration. The fact that the ERB will have to be re-tabled in the House of Representatives, with the prospect of a re-examination of the Bill by the Parliament, raises the possibility of addressing some of the issues which would need to be addressed in order to create a better piece of labour legislation.
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26

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**Acknowledgements**

1. Ministry of Labour: The CEO, Mr Taito Waqa, Director of Policy and Planning, Mr. Vimlesh Singh, Director of OHS, Mr. Osea Cawaru, Mr. Harbans Narayan, Industrial Relations Section, Mr. Saha Deo, Industrial Relations Section, Mr. Dalip Kumar, OHS Section, Mr. Sadrugu Ramagimagi, Industrial Relations section. The CEO of Labour, Mr Taito Waqa’s cooperation in terms of facilitating this project is greatly appreciated.

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