

# American Federation of Labor and Congress of Industrial Organizations



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September 18, 2012

William Jackson  
Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences  
and Chair of the GSP Subcommittee of the Trade Policy Staff Committee  
United States Trade Representative  
600 17<sup>th</sup> Street NW  
Washington, DC 20508

Dear Mr. Jackson:

Please accept this request to testify on the behalf of the AFL-CIO at the October 2, 2012 public hearing on Fiji eligibility as a beneficiary developing country pursuant to 19 USC § 2462(d) of the Generalized System of Preferences.

Sincerely,

Celeste Drake  
Policy Specialist for Trade and International  
Economics

BEFORE THE UNITED STATES  
TRADE REPRESENTATIVE

PRE-HEARING BRIEF OF CELESTE DRAKE, TRADE POLICY SPECIALIST,  
ON BEHALF OF THE AFL-CIO

IN SUPPORT OF THE PETITION TO REMOVE

FIJI

FROM THE LIST OF ELIGIBLE BENEFICIARY DEVELOPING COUNTRIES  
PURSUANT TO SECTION 19 U.S.C. § 2462(d) OF THE GENERALIZED SYSTEM OF  
PREFERENCES (GSP)

filed by

THE AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL  
ORGANIZATIONS (AFL-CIO)

SEPTEMBER 18, 2012

## **I. Information Required Pursuant to 15 CFR § 2007**

### **A. Party Submitting Petition:**

AFL-CIO, 815 16th St., N.W., Washington, D.C. 20006  
ph: (202) 637-5344 / fax: (202) 508-6967

### **B. Country Subject to Review:**

Fiji

### **C. Section of Law Warranting Review**

19 U.S.C. § 2462(c)(7)

### **D. Basis for Petition:**

As explained below, at present, the Government of Fiji (the interim Government) is not taking steps to afford internationally recognized worker rights, including the right of association and the right to organize and bargain collectively. The Fijian military regime has amended labor laws in ways that severely restrict and even eliminate internationally recognized worker rights; in practice, it has also taken steps to deny internationally recognized worker rights.

## **II. Introduction and Background**

In 2006, Commodore Frank Bainimarama initiated a military coup to overthrow the democratically elected Government of Fiji. Following the coup, Commodore Bainimarama appointed himself interim Prime Minister. In April 2009, the Fiji Court of Appeal found the coup and interim regime to be illegal. This decision required Commodore Bainimarama to step down as interim prime minister. To avoid this, Bainimarama abrogated the constitution and re-appointed himself as the Prime Minister of Fiji. All judicial appointments were revoked and the Administration of Justice Decree of 2009 (Decree No. 9) was introduced to prevent any court action to question the validity of any decrees promulgated by the self-appointed executive.

Since taking power, the government has ratcheted up its attacks on human and trade union rights in Fiji, both by force and by decree. These attacks have had a severe impact on the ability of trade unions and all Fijian workers to exercise their internationally recognized worker rights. These attacks are detailed herein. We also include as an Appendix the International Trade Union Confederation's (ITUC's) submission to the International Labor Organization (ILO) Committee of Experts in August 2012, which provides additional information with regard to the impact of these laws and practices in specific cases.

Of note, the International Labor Organization (ILO) has condemned these attacks. In November 2011, the ILO Committee on Freedom of Association issued a strong rebuke of Fiji's failure to

respect freedom of association.<sup>1</sup> The AFL-CIO urges the Trade Policy Staff Committee and the United States Trade Representative (USTR) to review and consider the conclusions of the Committee on Freedom of Association as part of this petition.

In mid-August 2011, a High Level Delegation, led by Guy Ryder, then-Executive Director responsible for International Labor Standards and Fundamental Principles and Rights at Work for the ILO, visited Fiji in order to advise the Director General on the situation. The ILO then submitted comments to the 42<sup>nd</sup> Pacific Island Forum, expressing its alarm on the deterioration of labor rights in Fiji.<sup>2</sup> In September 2011, ILO Director General Juan Somavia personally urged the interim Government to change its course immediately.<sup>3</sup> And, at the 15th Asia and the Pacific and Arab Regional meeting of the ILO, held in Kyoto on 4-7 December 2011, a resolution was passed “strongly condemn[ing] the action of the Fiji government” as regards the trade union situation in Fiji.<sup>4</sup>

The interim Government continues to legislate by decrees, many of which restrict human rights and repress dissenting voices.<sup>5</sup> This includes, for example, the Public Emergency Regulations (PER), which was enacted in April 2009. The PER allowed the regime to operate as an authoritarian regime, including the authority to disperse assemblies of more than three persons; to censor all Fijian media; and to search without warrants and to detain persons without charge. The PER was lifted on January 7, 2012. However, amendments to the Public Order Act of 1969 were promulgated on January 5, 2012 (Decree No. 1 of 2012). The decree incorporated and expanded on many of the powers found in the PER.

The interim regime has announced its intention to hold elections in September 2014. A process of voter registration began in mid-2012. However, it is premature to have confidence in elections proceeding in 2014 because the interim regime has previously rescinded announced plans for elections.

While the abrogated Constitution is supposed to secure freedom of association and the Employment Relations Promulgation (ERP) of 2007 should adequately protect workers against anti-union discrimination—these have been abrogated and their coverage restricted by the current regime. The regime has introduced excessive restrictions that curtail freedom of association. Amendments to the ERP (Employment Relations Amendment Decree of 2011 (Decree No. 21)) introduced on May 16, 2011, exclude all public sector workers from its coverage. Overnight, approximately 15,000 workers in Fiji’s public service lost their fundamental rights. The amendments also prohibit public sector workers and their unions from

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<sup>1</sup> ILO Committee on Freedom of Association (CFA), Interim Report - Report No 362, November 2011 Case No 2723 (Fiji) (available at: [http://www.ilo.org/dyn/normlex/en/F?p=1000:50002:0::NO:50002:P50002\\_COMPLAINT\\_TEXT\\_ID:2912033](http://www.ilo.org/dyn/normlex/en/F?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2912033)).

<sup>2</sup> ILO Submission to Pacific Islands Forum Ministerial Contact Group (available at: [http://www.ilo.org/public/english/bureau/dgo/sclecdoc/2011/ilo\\_submission\\_to\\_mcg.pdf](http://www.ilo.org/public/english/bureau/dgo/sclecdoc/2011/ilo_submission_to_mcg.pdf))

<sup>3</sup> Statement of Juan Somavia, September 13, 2011 (available at: [http://www.ilo.org/global/about-the-ilo/media-centre/statements-and-speeches/WCMS\\_162761/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/media-centre/statements-and-speeches/WCMS_162761/lang-en/index.htm)).

<sup>4</sup> The resolution is available online at: [http://www.ilo.org/wcmsp5/groups/public/---cd\\_dialogue/---actrav/documents/meetingdocument/wcms\\_170338.pdf](http://www.ilo.org/wcmsp5/groups/public/---cd_dialogue/---actrav/documents/meetingdocument/wcms_170338.pdf).

<sup>5</sup> See, e.g., Resolution No. 1, Trade Union Rights in Fiji, issued by the ITUC-AP Regional General Council, Singapore Meeting, Nov. 21-22, 2011.

taking any action under the ERP. In addition, the State Services Decree of 2009 abolished the Public Services Appeal Board and terminated all pending appeals, effectively eliminating any right to administrative review for public servants with regard to failure to promote, disciplinary actions, and similar matters.

Even worse is the Essential National Industries (Employment) Decree, introduced in July 2011, which provides broad, discretionary powers to refuse to register unions and cancel union registration; prohibits all strikes; voids current agreements within 60 days and allows employers to impose unilateral contract terms on represented employees. The decree applies to 11 corporations in the aviation, banking, telecommunication, and other essential services sectors.

This petition argues that, unless the Government of Fiji immediately embarks on a time-bound plan to afford internationally recognized worker rights in law and practice, it should be removed from the list eligible beneficiaries under the Generalized System of Preferences (GSP) pursuant to 19 U.S.C. § 2426(d) because it has failed to take steps to afford workers internationally recognized worker rights as required by 19 U.S.C. § 2462(c)(7).

### **III. The interim Government has targeted, arrested, and intimidated trade unions and leaders and should be removed from the list of eligible beneficiary countries for the GSP for failure to take steps to afford workers internationally recognized worker rights.**

#### **A. Assault and Harassment of Trade Unions Leaders**

On repeated occasions, the interim Government has assaulted and harassed the highest-ranking trade union official in Fiji, Mr. Felix Anthony, National Secretary of the Fiji Trade Union Congress (FTUC) and General Secretary of the Fiji Sugar Workers. On February 12, 2011, Anthony was arrested and detained by military officers who threatened him and his family. On February 18, Anthony was told that Commodore Bainimarama wanted to meet him, and he attended the meeting together with two other top union officials. At the meeting, he was accused of being the cause of problems in the sugar mills. The three were later beaten for approximately two hours, and all three required medical attention.<sup>6</sup> On April 1, 2011, the military officer responsible for Anthony's earlier beating approached him while he ate lunch and warned him of further beatings in the presence of friends.

On March 2, 2011, ITUC General Secretary Sharan Burrow reported the matter to ILO Director General Juan Somavia, asking for his immediate intervention in the matter. The Director General wrote to the interim Government of Fiji shortly thereafter, registering his serious concern and asking the Government to investigate the incident and transmit any information in that regard. He further noted the ILO's Committee on Freedom of Association (CFA) had recommended a tripartite mission to Fiji and that the ILO fully supported such a mission.

The interim Government's harassment of trade unionists continued when Anthony sought to participate in the 100<sup>th</sup> International Labor Conference (ILC) in June 2011. The interim

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<sup>6</sup> These incidents have been widely reported internationally, including on Radio New Zealand, in Raw Fiji News (<http://rawfijinews.wordpress.com/>), and by the ITUC.

Government failed to deposit the credentials of Anthony, who had been nominated by the FTUC, the most representative trade union body, to represent Fijian workers at the ILC. The Conference Credentials Committee examined an objection filed by the ITUC on this matter and concluded that, “By the Government’s own admission, it had purposefully ignored the nomination made by the organization that it had itself consulted for the purpose of the nomination of the delegation. As the Committee has stressed in the past, governments *must accept* the most representative organizations’ choice regarding the persons to be nominated as the Employers’ and the Workers’ delegates. Refusal to do so is a clear violation of their obligation under article 3, paragraph 5, of the ILO Constitution” (emphasis added).<sup>7</sup> The Credentials Committee explained further that the Government’s actions “raise[d] doubts as to the Government’s impartiality vis-à-vis the FTUC, considering the allegations that there [are] a deterioration of trade union rights in the country.”<sup>8</sup> The AFL-CIO agrees with the Credential Committee’s conclusion that the decision to deny credentials to Anthony to attend the ILC was most likely in retaliation for his exercise of fundamental trade union rights in Fiji.<sup>9</sup>

Immediately following the 100<sup>th</sup> ILC, military officers assaulted another union leader, the President of the Fiji Sugar and General Workers Union - Ba Branch. On June 22, 2011, two army officers assaulted him and denounced him and Anthony (who was not present at the time) for their union advocacy. During the beating, the military officers demanded that the president submit his resignation from the union, or he would face the same treatment again. He did not resign.

There is no question that physical assaults and threats against trade union leaders constitute a grave violation of the right to freedom of association. However, to the extent that the beating he received was in retaliation for statements made by his colleague Anthony at the ILC,<sup>10</sup> as seems likely, this constitutes yet another violation of freedom of association. Delegates to the ILC have a right to express freely their point of view on questions within the competence of the ILO. If delegates or their associates suffer retaliation for the exercise of this right by their government, their work and the work of the ILO will be seriously undermined.<sup>11</sup>

On August 3, 2011, Mr. Daniel Urai, President of the FTUC and General Secretary of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE) and Mr. Nitin Goundar, an organizer with NUHCTIE, were detained and questioned at the Nadi Police Station. They were charged with “unlawful assembly,” apparently for having met with and advised union members regarding pending collective negotiations with hotel management. They were released on bail on August 4, with a hearing date set for September 2, 2011. The

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<sup>7</sup> See International Labor Conference, Third Report of the Credentials Committee, Provisional Report, June 15, 2011, ¶ 49.

<sup>8</sup> *Id.* at ¶ 51.

<sup>9</sup> The AFL-CIO understands that Anthony *was* allowed to travel to the 2012 ILC.

<sup>10</sup> The ITUC accredited Anthony as part of its delegation so that he was able to attend and participate in the 100<sup>th</sup> ILC.

<sup>11</sup> The Committee on Freedom of Association (CFA) examined a similar case in which a worker delegate was arrested and sentenced following a speech to the Conference, finding that such acts violated the immunities afforded under Article 40 of the ILO Constitution. See Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006 (hereinafter “CFA Digest of Decisions”), ¶ 174.

arrest of trade unionists for conducting trade union activity is a serious breach of the right to freedom of association.<sup>12</sup>

On October 29, 2011, President Urai was arrested again, this time at the airport upon his return from the Commonwealth Heads of Government Meeting in Perth, Australia, where he spoke out against human and trade union rights violations perpetrated by the interim Government. After being held for over a week without charge, Urai was charged with “urging political violence” and was released, but has been ordered to report to police daily and abide by a curfew. To the best of our knowledge, hearings have not been scheduled on the charge.

Each incident related above represents a violation of the fundamental right to freedom of association that demonstrates that the interim Government of Fiji is not taking steps to afford workers internationally recognized worker rights as required by 19 U.S.C. § 2462(c)(7).

### **B. Interference with Union Meetings**

On August 13, 2011, police broke up a regular meeting of the FTUC after revoking its permit to assemble. Many previous applications to hold meetings in 2011 have also been rejected without explanation<sup>13</sup> or on the basis that the trade union does not support interim Government policy—which has been to eliminate trade union rights.

In September 2011, police disrupted a social gathering of some trade union leaders, including Felix Anthony, as it was deemed a meeting of three or more persons without a permit. The police action culminated in hours-long interrogations.

Trade unionists report that the interim Government instituted a *de facto* ban on trade union meetings immediately following the visit of Guy Ryder, then-ILO Executive Director of the Standards and Fundamental Principles and Rights at Work Sector, in August 2011. Under the PER, essentially all requests were either denied or simply never acted upon before the date of the proposed meeting. The ban thus had far reaching implications on industrial relations.

As explained in the introduction, the PER was repealed in January 2012. However, the Public Order Act Amendments maintain many of the same powers and indeed provides the interim Government even more control over trade union and civil society. In 2012, workers report that union meetings are now being held with greater frequency. However, unions must still request permission to meet from the police, who are selective in granting approval. Indeed, the AFL-CIO understands that if Anthony or Urai are scheduled to speak on an agenda, the meetings are much less likely to receive approval. Such government interference with the internal functions of unions is not consistent with the right to freedom of association.

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<sup>12</sup> See CFA Digest of Decisions ¶ 64 (“The detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular.”); ¶ 62 (“The arrest, even if only briefly, of trade union leaders and trade unionists ... for exercising legitimate activities in relation with their right of association constitutes a violation of the principles of freedom of association.”).

<sup>13</sup> See, e.g., Letter from the Ministry of Provincial Development and National Disaster Management to Mr. Felix Anthony, dated Dec. 12, 2011; Press Release (7) – FTUC Meeting Permit Revoked, Fiji Trade Union Congress, Aug. 13, 2011.

These are serious violations of the rights of unions and workers. The Committee on Freedom of Association has stated on several occasions that “[t]he right of occupational organizations to hold meetings in their premises to discuss occupational questions, without prior authorization and interference by the authorities, is an essential element of freedom of association and the public authorities should refrain from any interference which would restrict this right or impede its exercise...”<sup>14</sup> Moreover, the CFA has cautioned against public authorities attending trade union meetings, finding that “where a representative of the public authorities can attend trade union meetings, this may influence the deliberations and the decisions taken (especially if this representative is entitled to participate in the proceedings) and hence may constitute an act of interference incompatible with the principle of freedom to hold trade union meetings.”<sup>15</sup> The strict limitations on media<sup>16</sup> also violate freedom of association, as “the right to express opinions without previous authorization through the press is one of the essential elements of the rights of occupational organizations.”<sup>17</sup> Further, “the application of measures designed to control publication and means of information may involve serious interference by administrative authorities with this activity.”<sup>18</sup>

**IV. Fiji should be removed from the list of eligible beneficiary countries for the GSP because the government has issued several decrees since 2009 that violate the principles of the fundamental right of freedom of association by collectively eliminating most labor rights for workers in the public service and limiting the rights of workers in other key industries.**

Since 2009, the interim Government of Fiji has issued several decrees that curtail fundamental labor rights (and others), largely for public service workers, and simultaneously eliminate access to judicial review and redress for past, present and future violations of those rights. These include:

1. State Services Decree of 2009 (Decree No. 6)
2. Administration of Justice Decree of 2009 (Decree No. 9)
3. Administration of Justice (Amendment) Decree of 2009 (Decree No. 10)
4. Administration of Justice (Amendment) Decree of 2010 (Decree No. 14)
5. Employment Relations Amendment Decree of 2011 (Decree No. 21)
6. Essential National Industries (Employment) Decree of 2011 (Decree No. 35)
7. State Proceedings (Amendment) Decree of 2012 (Decree No. 14)
8. Public Order Act of 1969 (Amendment) Decree of 2012 (Decree No. 1)

These decrees collectively eliminate most labor rights and remedies for workers in the public service (and in some other public entities) and severely limit the rights of workers in several key (and unionized) industries such as air transportation and undermine basic principles of

<sup>14</sup> See CFA Digest of Decisions ¶ 130.

<sup>15</sup> See CFA Digest of Decisions ¶ 132.

<sup>16</sup> Including the Television (Amendment) Decree was promulgated in June 2012, whereby the Minister for Communications has the right to revoke any TV license without the decision being subject to challenge in any court or tribunal.

<sup>17</sup> See CFA Digest of Decisions ¶ 156.

<sup>18</sup> See CFA Digest of Decisions ¶ 166.



democracy, rule of law, and good governance. We understand that all of these changes, which are inimical to the rights and interests of workers, were made without any prior consultation with the relevant trade unions.<sup>19</sup> The most critical aspects of these decrees are described below.

**A. State Services Decree of 2009 (Decree No. 6) (April 14, 2009)**

Article 17 of Decree 6 abolished the Public Services Appeal Board, which was established under the Public Service (Amendment) Act of 1998 to review complaints by public service workers with regard to the failure to promote, disciplinary actions undertaken by the employer, or transfers between districts.<sup>20</sup> Decree 6 even terminated all pending or partly heard appeals. Thus, public servants lost the right to any administrative review with regard to those matters.<sup>21</sup> Article 17 of Decree 6 also immediately lowered the mandatory retirement age from 60 to 55. Over 2,000 public servants were forcibly retired and new recruitment and advancement is taking place on a contract basis. Senior positions are also being filled by non-civilian personnel.

**B. Administration of Justice Decree of 2009 (Decree No. 9) (April 16, 2009),  
Administration of Justice (Amendment) Decree of 2009 (Decree No. 10) (May 12,  
2009) and Administration of Justice (Amendment) Decree of 2010 (Decree No. 14)  
(February 18, 2010)**

The Administration of Justice Decree of 2009 re-established the nation's judicial system. However, under Article 5, courts were divested of their jurisdiction to hear any challenges whatsoever to the Fiji Constitution Amendment Act of 1997, Revocation Decree of 2009, and any decrees made or to be made by the President after April 10, 2009. Article 23(3) of the decree terminated any pending challenges to the legality of any decrees or declarations made between December 5, 2006 and April 9, 2009 and most decisions made by any executive branch official during that time. Decree 9 specifically referenced any decision to terminate any employment on any grounds between December 5, 2006 and January 7, 2007. Decree 9 affected several public sector unions, which were unable to pursue justice arising out of work-related grievances.

Article 3 of Decree 10 extended Decree 9 by terminating the review of any proceedings, claims, disputes, or grievances that challenged any decision made by the Public Service Commission between December 5, 2006 and April 9, 2009 in relation to the terms and conditions of employment of public officers, including any changes to remuneration.

Article 2 of Decree 14 went further still by divesting the courts of jurisdiction to hear any challenge by any person regarding any decision or order by the government to restructure or reform the public service, alter or amend the terms and conditions of employment of any person in any public office or public service, or any changes to terms of services, including

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<sup>19</sup> The Committee on Freedom of Association has on several occasions "emphasized the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights." See CFA Digest of Decisions ¶1074.

<sup>20</sup> See Public Service (Amendment) Act 1998, Article 5.

<sup>21</sup> A Public Services Disciplinary Tribunal was later established, but only to review disciplinary actions.

remuneration. Any pending claim with regard to those issues was immediately terminated.<sup>22</sup> Notably, Decree 14 went beyond the public service workers and included other public entities—and thus more unionized workers.

### **C. Employment Relations Amendment Decree of 2011 (Decree No. 21)**

On May 16, 2011, the interim Government of Fiji promulgated the Employment Relations Amendment Decree (Decree No. 21) which amended Article 3 of the Employment Relations Promulgation (ERP) of 2007 to exclude all public service workers from its coverage. By this decree, roughly 15,000 workers in Fiji's public service lost overnight their fundamental labor rights as well as other rights. To appreciate the extent of the losses, the following is a brief description of the main sections of the ERP of 2007 that no longer apply to public sector workers:

1. Fundamental Rights at Work
2. Employment Relations Labor Advisory Board (and functions of officials)
3. Valid Contracts of Service
4. Protection of Wages
5. Rights to Minimum Conditions of Work (e.g., hours of work, holidays, leave, etc.)
6. Equal Employment Opportunity and Protection from Discrimination
7. Protection from Redundancy or Unfair Treatment
8. Registering of Employment Grievances and Disputes
9. Protection from Sexual Harassment
10. The Establishment, Registration and Operation of Trade Unions
11. Right to Collective Bargaining and Collective Agreements
12. Right to Challenge Employer's Decisions
13. Right to Report Disputes to Mediation, Tribunal or Labor Court
14. Right to Appeals at all levels
15. Subsidiary ERP legislation no longer applicable

Further, Decree 21 prohibits public service workers and their unions from taking any action, proceeding, claim, dispute, or grievance of any kind that arose or could arise under the ERP before any tribunal. The Decree also nullifies any order of any competent tribunal in any action that arose under the ERP. The only protections not eliminated by Decree 21 are those arising under the Workmen's Compensation Act and the Health and Safety at Work Act.

In addition, as of August 4, 2011, the interim Government prohibited automatic dues deduction for all public service workers by a decree amending the Civil Service Act. The effect and probable intent of the decree is to financially weaken public sector unions, requiring them to collect dues from each member by hand.

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<sup>22</sup> Following this series of decrees, the dispute settlement provisions of the Employment Relations Promulgation Act became the only forum for relief for individual cases. That situation would turn out to be short lived.

#### **D. Essential National Industries (Employment) Decree of 2011 and its Regulations**

On July 29, 2011, the interim Government of Fiji promulgated the Essential National Industries (Employment) Decree 2011 (ENID). It came into full effect on September 9, 2011. It designated 11 corporations in the finance, telecommunications, aviation, and public utilities sectors as essential industries and allows the regime to include any other industries as and when it wishes.

Under this Decree, as described below, trade unions in essential industries were forced to re-register under onerous new rules and hold new elections and collective bargaining agreements were abrogated. These measures struck a severe blow to workers' rights in many economic sectors in Fiji.

On September 13, ILO Director General Juan Somavia said the following with regard to the decree:

By going ahead with this Decree the Government has demonstrated the same lack of concern for the views of the international community as it has for the rights and aspirations of its own people. What is really essential for Fiji is that it change course now. That means reversing this and other restrictive labor decrees, a return to dialogue with trade unions and employers, an end to assaults on and harassment of trade unionists, and the immediate restoration of basic civil liberties.<sup>23</sup>

Unfortunately, the regime has ignored the ILO's entreaties and appears wholly committed to the dismantling of the trade union movement by force and by decree. Included below are some of the most objectionable provisions of the ENID.<sup>24</sup>

##### **1. Union Registration and Recognition**

Under Article 6, all union registrations in designated industries were cancelled; in order to operate, unions are required to re-register under new and highly problematic procedures. The CFA has on many prior occasions opined that the cancellation of a union registration by the executive branch constitutes a serious infringement of the principles of freedom of association.<sup>25</sup>

Under Article 7, the leaders of re-registered unions, including office-bearers, officers, representatives, and executives, must be employed by the designated corporations they represent, which conflicts with ILO jurisprudence on workers' ability to elect representatives of

<sup>23</sup> *Supra* note 9.

<sup>24</sup> Thorough examples of the Essential National Industries Decree in action can be found in can be found in the Appendix to this brief.

<sup>25</sup> *See, e.g.*, CFA Digest of Decisions ¶ 689 ("Legislation which accords the minister the complete discretionary power to order the cancellation of the registration of a trade union, without any right of appeal to the courts, is contrary to the principles of freedom of association."). Here, the legislation automatically cancels the registration and requires all existing unions to reregister under a deeply flawed system that grants the government considerable discretion.

their choice.<sup>26</sup> Those that run afoul of this provision face steep civil and penal sanctions—a fine of up to \$50,000 or imprisonment of up to 5 years for individuals and up to \$100,000 for the union.

In many cases in Fiji, there is little institutional structure or expertise at the branch level, with union leadership and technical capacity centralized at the national union. Those with expertise are often employees of the union and not of any of the employers where members are employed. Thus, Article 7 attempts to sever the relationship between the union leadership and the rank and file. Unions report that new bargaining units have been urged to cease association with their national union. As a result, membership has fallen substantially as the workers are either pressured to resign their membership or because they see no reason to be in a union that can provide no services for them.

Under Article 10, “a prospective or existing representative must apply to the Minister in writing to be elected or re-elected as a representative of a Bargaining Unit” and supply specified information. It appears that the Prime Minister has discretion whether to allow an applicant to seek to represent the bargaining unit. The AFL-CIO is deeply concerned that in practice that the decree could amount to a requirement of prior government authorization.<sup>27</sup>

Upon receipt of an application, the Prime Minister has complete discretion under Article 11 to decide the composition and scope of the bargaining unit, and workers and unions have no opportunity to appeal that decision. A “bargaining unit” is defined in Article 2 as a group of at least 75 workers employed by the same employer, apparently precluding workers from having any representation in essential enterprises where there are less than 75 workers.<sup>28</sup> Units belonging to the Transport Workers Union (TWU) including baggage handlers and engineers lost their union because they did not meet the 75-member threshold.

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<sup>26</sup> See e.g., CFA Digest of Decisions ¶¶ 407-408 (“The requirement of membership of an occupation or establishment as a condition of eligibility for union office are not consistent with the right of workers to elect their representatives in full freedom.”); (“If the national legislation provides that all trade union leaders must belong to the occupation in which the organization functions, there is a danger that the guarantees provided for in Convention No. 87 may be jeopardized. In fact, in such cases, the laying off of a worker who is a trade union official can, as well as making him forfeit his position as a trade union official, affect the freedom of action of the organization and its right to elect its representatives in full freedom, and even encourage acts of interference by employers.”).

<sup>27</sup> See, e.g., CFA Digest of Decisions ¶ 272 (“The principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization. Such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or, again, authorization for taking steps prior to the establishment of the organization.”).

<sup>28</sup> See, e.g., CFA Digest of Decisions ¶ 272 (“While a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed.”); ¶ 286 (“The legal requirement laid down in the Labour Code for a minimum of 30 workers to establish a trade union should be reduced in order not to hinder the establishment of trade unions at enterprises, especially taking into account the very significant proportion of small enterprises in the country.”).

Further, only one entity can represent the bargaining unit, which is also clearly prohibited.<sup>29</sup> That representative must also obtain the support of 50% +1 of all workers in the bargaining unit to win the election, rather than 50%+1 of those voting—a standard which makes it more difficult to win an election—especially given the government pressure that we imagine workers will be under to reject the trade union as a representative.

Once (and if) a union is elected, the Registrar has the power to cancel the registration of the union and force a new election at any time if, upon receipt of a complaint from an employer, it finds there is sufficient evidence that the union no longer enjoys the requisite minimum support.<sup>30</sup> In such a case, any collective agreement is voided and the employer may impose the terms and conditions of employment.

Overall, the re-registration process interferes with the ability of worker to choose their own representatives and diminishes the capacity of unions to represent their members, thereby denying workers their internationally recognized rights to freedom of association and organization.

## 2. Collective Bargaining and Dispute Settlement

Under Article 8, all existing collective agreements were void 60 days after the decree entered into force. The parties were to negotiate a new agreement under new procedures before the expiry of the 60 days; however, the decree provides that if no agreement was in place following collective bargaining under the new procedures, the corporation could unilaterally implement new terms and conditions through a new collective agreement or individual contracts. This procedure abrogates the role of the union and is not consistent with ILO guidance that requires both the union and the employer to agree to modify existing contract.<sup>31</sup> Article 8 will likely encourage unscrupulous employers to *appear* to bargain while they wait for the 60 days to pass, at which point they can impose terms on workers in the absence of a mutually accepted collective agreement.

Part 4, which sets forth rules for collective negotiation, also raises several major concerns. First, Article 21(3) provides for a bargaining period of up to three years.<sup>32</sup> If there is no agreement

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<sup>29</sup> See, e.g., CFA Digest of Decisions ¶ 315 (“The right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create, if the workers so choose, more than one workers’ organization per enterprise.”).

<sup>30</sup> Dissolution for insufficient membership must allow for an appeal by a court of law, not the administrative authorities. See e.g., CFA Digest of Decisions ¶ 402 (“A legal provision which requires the dissolution of a trade union if its membership falls below 20 or 40, depending on whether it is a works union or an occupational union, does not in itself constitute an infringement of the exercise of trade union rights, provided that such winding up is attended by all necessary legal guarantees to avoid any possibility of an abusive interpretation of the provision; in other words, the right of appeal to a court of law.”).

<sup>31</sup> See e.g., CFA Digest of Decisions ¶ 942 (“A legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining.”).

<sup>32</sup> This period may be excessive. See e.g., CFA Digest of Decisions ¶ 1046 (“In one case where the legislation contained a provision whereby a time limit of up to 105 days was fixed, within which employers had to reply to proposals by the workers, and a time-limit of six months fixed within which collective agreements had to be concluded (which could be prolonged once for a further six months), the Committee expressed the view that it

after three years, either party may seek the intervention of the Prime Minister under Article 21(4), who may impose a final and binding agreement. That agreement shall be binding on the parties for two years. Under Article 22, collective bargaining agreements do not expire; instead, they are subject to amendment every five years in the absence of an agreement to the contrary, a matter properly negotiated between the parties.<sup>33</sup> There appears to be no mechanism to amend an agreement by mutual consent if not during the amendment period.

Article 26 essentially ensures that there will be no access to industrial justice by abrogating the right of workers and unions to bring claims to a judicial or quasi-judicial (neutral) person or body.

### 3. Right to Strike

Article 27(1) of the decree is categorical in stating that “no job actions, strikes, sick-outs, slowdowns or other financially or operationally harmful activities shall be permitted at any time for any reason,” a prohibition that is not consistent with internationally recognized worker rights.<sup>34</sup> The decree goes further to state that such actions are “expressly prohibited” in connection with efforts to obtain registration, efforts to influence the outcome of bargaining or in the course of collective bargaining, and in disputes over the interpretation or application of a collective bargaining agreement, even though the ILO has recognized the legitimacy of strikes in connection with registration and collective bargaining.<sup>35</sup> Notably, there is no such categorical prohibition on employers’ economic weapons, such as lock-outs.

Despite Article 27(1), 27(2) provides that a union may strike if the parties failed to reach a new collective agreement after *three years* of bargaining, and even then only after a 28-day notice period *and* prior written approval from the interim Government. Moreover, the Minister has to verify the results of the secret-ballot vote to authorize the strike. In the highly unlikely case there is a strike, the employer is permitted to lock-out the workers and unilaterally impose terms and conditions of employment, which effectively abrogates the entire right to strike. The Minister may also declare illegal any strike in an essential industry at any time.<sup>36</sup> A person

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would be desirable to reduce these periods in order to encourage and promote the development of voluntary negotiation, particularly in view of the fact that the workers in the country in question were unable to take strike action.”).

<sup>33</sup> See e.g., CFA Digest of Decisions ¶ 1047 (“The duration of collective agreements is primarily a matter for the parties involved, but if government action is being considered any legislation should reflect tripartite agreement.”).

<sup>34</sup> See, e.g., CFA Digest of Decisions ¶ 521-23, 525 (“The prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87.”).

<sup>35</sup> See e.g., CFA Digest of Decisions ¶ 522 (“The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests”); ¶ 535 (“The fact that a strike is called for recognition of a union is a legitimate interest which may be defended by workers and their organizations.”).

<sup>36</sup> A strike should only be declared illegal by an *independent* authority. See e.g., CFA Digest of Decisions ¶ 628 (“Responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved.”). Further, the draft law’s definition of Vital National Industries is not in conformity with the ILO definition of essential public services. Thus, the government of Fiji has no basis on which to claim that a strike could legally be limited or prohibited in a Vital National Industry. See e.g., CFA Digest of Decisions ¶ 576 (“The right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that

who violates the law may be subject to a fine of \$50,000 and 5 years in jail; the union may face a \$250,000 sanction.<sup>37</sup>

#### 4. Additional Concerns

Article 24(2) & (3) provide that no person in a designated company that operates full-time shall be entitled to overtime pay for work performed on the weekends or on public holidays. In the airline industry, workers are not entitled to overtime pay under any circumstances, unless otherwise agreed by the employer and union.

Article 24(4) prohibits automatic dues deductions unless the employer agrees to do so, which seems unlikely given the overall anti-union legal scheme.

Article 30 provides that the validity of the decree itself, decisions by government officials taken under the decree, and the decisions of any corporation taken under the decree are not reviewable by anyone before any tribunal. The decree goes so far as to extinguish any pending claims under the ERP of 2007. Thus, workers and unions in essential industries have absolutely no redress for any violation of what little is left of their rights at work.

#### E. State Proceedings (Amendment) Decree of 2012 (Decree No. 14)

Decree No. 14 was issued on January 25, 2012. It allows any government minister to make any statement of any nature on any subject, or against any person, without being liable for a legal challenge or prosecution. These utterances, either in official or personal capacity, can be published in any media without fear of reprisal from any quarter. Once again, no one can mount any challenge in any forum on these subjects, and furthermore any such action taken on any instance, will instantly be terminated.

Decree No. 14 purports to amend Chapter 24 of the Laws of Fiji under the same title. However, that chapter would operate when a legally elected Parliament is in office and it generally protects the State, government officials and members of parliament from any unnecessary challenges, thus allowing them to operate more fully and without fear. But those protected would remain accountable to Parliamentary Privilege laws, and other checks and balances, which would bring a semblance of normality and fairness to such acts. As no elected Parliament currently exists, that the original chapter is not applicable. Thus it can be assumed that the provisions of the Decree will operate outside the Laws of Fiji, as shown in the Decree itself: "18A – (1) Notwithstanding anything contained in this Act or any other written law ...." Any reasonable person may wonder why.

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is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.").

<sup>37</sup> See e.g., CFA Digest of Decisions ¶ 672 ("No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike.").

#### **F. Public Order Act of 1969 (Amendments), Decree 1 of 2012**

Until repealed on January 7, 2012, the Public Emergency Regulations (PER) of 2009 gave unchecked powers to the regime to ban most public assembly in Fiji. In 2011, the ITUC reported that the regime selectively denied requests for meetings, using the excuse that the meeting convenors were opposed to interim Government policy. In other cases, the police revoked previously awarded permission and then broke up the meetings. In the most extreme case, FTUC President Daniel Urai and Nitin Goundar were arrested, detained, and charged under the PER for meeting with trade unionists at the hotel where they worked to prepare for collective bargaining.

Decree 1 of 2012 created an expansive definition of “terrorism,” with severe penalties, which could be interpreted to cover just about any organized opposition to the interim Government. As before, requests for public meetings need to be approved by the interim Government, with seven days’ notice required to seek permission to hold a meeting. However, the penalties now include a sentence of up to five years in prison (up from two years in the PER) for holding a meeting without permission. The police have the power to arrest people without warrant and hold with charge for up to 16 days (up from 10 under the PER) at the direction of the Prime Minister. Another provision states that anyone who makes statements or takes action that the interim Government believes may “sabotage” or “undermine” the economy could face up to 10 years in prison. Fiji’s courts were also divested of jurisdiction to hear any claim challenging any decision by the Prime Minister, police commanders, or any public official. As described above, although unions report more meetings being allowed under this decree—this “improvement” still represents a denial of the right to freedom of association—it is not the proper role of the police to have a right of veto over internal union meetings. A fuller articulation of our concerns can be found in the Appendix.

#### **IV. Conclusion**

The interim Government of Fiji has failed and is failing to take steps to afford to Fijians internationally recognized worker rights as is required by 19 U.S.C. § 2462(c)(7). In fact, by using its military to detain, injure, and threaten labor leaders as well as amend prior labor law to deny rights and freedoms, the interim Government is taking active steps to nullify internationally recognized worker rights under law as well in practice. As such, unless the Government of Fiji promptly begins a process to reinstate in law and practice internationally recognized worker rights to all workers, the AFL-CIO urges the President to suspend the application of the duty-free treatment accorded under the GSP. This process should be time bound, with ambitious deadlines for the return of worker rights—Fijian workers cannot afford delay.



## APPENDIX



ITUC INTERNATIONAL TRADE UNION CONFEDERATION CSI CONFÉDÉRATION SYNDICALE INTERNATIONALE  
CSI CONFEDERACIÓN SINDICAL INTERNACIONAL IGB INTERNATIONALEER OEWERKSCHAFTSBUND

MICHAEL SOMMER  
PRESIDENT  
PRÉSIDENT  
PRESIDENTE

SHARAN BURROW  
GENERAL SECRETARY  
SECRÉTAIRE GÉNÉRALE  
GENERALSEKRETÄRIN  
SECRETARIA GENERAL

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Route des Morillons, 4  
CH – 1211 Geneva  
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By fax – 41 22 799 67 71 and by email

HTUR/JSV

31 August 2012

**ILO Committee of Experts on the Application of Conventions and Recommendations**

Dear Director-General,

I have the honour of sending you observations concerning compliance by the government of *Fiji* with the following conventions:

1. **Convention No. 87 on Freedom of Association and Protection of the Right to Organise Convention**
2. **Convention No. 98 on Right to Organise and Collective Bargaining Convention**

Kindly forward this communication to the Committee of Experts for examination during its forthcoming session.

Thank you.

Yours sincerely,

General Secretary

## **Introduction:**

In 2011-12, the military government of Commodore Bainimarama continued its attacks on human and trade union rights in Fiji. With regard to the repressive legislation, much of this is detailed in the allegations and conclusions of ILO Committee on Freedom of Association Case No. 2723 (Fiji) as well as to 2012 observations of the Committee of Experts on the Application of Conventions and Recommendations.<sup>1</sup> These comments provide an update regarding the state of trade unionism in Fiji today (September 2011-August 2012). Section I provides general observations. Section II provides more detailed information on a sector-by-sector basis. Section III provides information on related issues impacting workers and civil society organizations.

## **Section I: General Observations**

### **A. A De Facto Ban On Trade Union Activity**

Until repealed on January 7, 2012, the Public Emergency Regulations (PER) of 2009 gave unchecked powers to the regime to ban much public assembly in Fiji. In 2011, the ITUC reported that the regime selectively denied requests for meetings, using the excuse that the meeting convenors were opposed to government policy. In other cases, the police revoked previously awarded permission and then broke up the meetings. In the most extreme case, FTUC President Daniel Urai and Nitin Goundar were arrested, detained and charged under the PER for meeting with trade unionists at the hotel where they worked to prepare for collective bargaining. The case remains pending, though the government has yet to produce the required disclosures – including the identity of the person or persons accusing the two of violating the PER (which is required in order to proceed with the case).

Trade unionists reported that the government instituted a *de facto* ban on trade union meetings immediately following the visit of Guy Ryder, ILO Executive Director of the Standards and Fundamental Principles and Rights at Work Sector, in August 2011. Essentially all requests are either denied or simply never acted upon before the date of the proposed meeting. Far from being just a nuisance, the ban has had far reaching implications on industrial relations. In mid-2012, union meetings are now being held with greater frequency; however, the authorities (police) are selective in their responses to the permissions sought for meetings. Recently the TWE & AWU were refused permits to hold its AGM because the invited guests included Mr Felix Anthony and Daniel Urai. The police also scrutinize meeting agendas and the content of speeches and presentations before they issue any permits.

On January 5, Decree 1 of 2012 was promulgated, amending the Public Order Act of 1969. The decree incorporates and expands many of the powers found in the PER. It creates an expansive definition of “terrorism”, with severe penalties, which could be interpreted to cover just about any organized opposition to the military junta. As before, requests for public meetings will need to be approved by the junta, with seven days’ notice required to seek permission to hold a meeting. However, the penalties now include a sentence of up to five years in prison (up from two years in the PER) for holding a meeting without

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<sup>1</sup> Available online at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_168206.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_168206.pdf), ¶¶ 809-847.

permission. The police have the power to arrest people without warrant and hold with charge for up to 16 days (up from 10 under the PER) at the direction of the Prime Minister. Another provision states that anyone who makes statements or takes action that the government believes may “sabotage” or “undermine” the economy could face up to 10 years in prison. Fiji’s courts were also divested of jurisdiction to hear any claim challenging any decision by the Prime Minister, police commanders or any public official.<sup>2</sup>

It is worth noting that trade unionists have been harassed and prosecuted under the criminal code in addition to the decrees. Daniel Urai currently faces charges under the criminal code for “Inciting Political Violence by Urging to Overthrow Government.” Some disclosures have finally been provided to the Courts but do not appear relevant to the case. Mr. Urai remains barred from international travel, which inhibits his ability to carry out the representation of his members. This case continues.

## **B. Trade Unions in Essential Industries See Membership Collapse**

As detailed in Section II, two articles of the Essential National Industry Decree (ENID) in particular have devastated trade unions in the covered sectors. First, Article 2 of the ENID provides that the bargaining unit must consist of 75 or more members. In many cases, there are fewer than 75 workers in a job classification, eliminating the right of such workers to form a unit under the ENID. Second, Article 7 requires that bargaining unit representatives be employees of the employer with whom they are bargaining. In most cases in Fiji, there is little leadership, institutional structure or expertise at the branch level, with union leadership and technical capacity centralized at the national union. These people are employees of the union and not of any of the employers where their members are employed. Thus, the relationship between the union leadership and the rank and file is effectively severed. Those union representatives who attempt to support the bargaining efforts of inexperienced new bargaining units can face stiff penalties and prison time under the law. Astonishingly, anyone seeking leadership positions in the new bargaining units must apply for permission from the Prime Minister.

Workers are resigning from unions *en masse*, as they either see no use in belonging to an institution that cannot effectively represent them, are threatened by management to leave the union, or resign out of a general fear that trade unionism is a dangerous undertaking in Fiji today. Some leaders predict that their unions would not be able to hold on financially for too much longer unless the situation changed quickly.

## **II. By Sector:**

### **1. Sugar:**

#### **A: Farmers/Growers**

Farmers in the Fijian sugar industry are today represented by two unions – the National Farmers Union and the Fiji Cane Growers Association – with the first being the larger of the two. Together, the trade unions were active members in the Sugar Cane Growers Council (SCGC). Under the Sugar Industry Act, the SCGC was assigned to “do all such

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<sup>2</sup> See Section III for further details.

things and take all such steps as considered necessary for the protection and development of the industry and of the interests of registered growers and, in particular to:

- encourage and promote cooperation among registered growers and others engaged in the industry
- remove and obtain redress of all legitimate grievances of individual registered growers, of registered growers generally or of registered growers in any particular sector, district or mill area;
- provide registered growers with goods and services relating to the business of cane growing and agricultural diversification
- establish, hold and administer funds for the benefit of registered growers;
- encourage and promote research and education with a view to improving the efficiency and productivity of registered growers and to collect, record and distribute information of value to registered growers; and
- perform such other functions as may be assigned to the Council by this Act or any other written law.”

The Council was comprised of 38 councillors elected by cane growers once every three years. The executive body of the SCGC was the Board of Directors, which was elected from among the councillors. The Board comprised a chairperson, two vice chairpersons and eight members. Throughout its history, the two trade unions together held nearly all of the council positions.

On August 11, 2009, the government ordered the SCGC dissolved, which was effectuated by an amendment to Sugar Industry Act. The SCGC was advised of this decision by letter dated 13 August 2009. Earlier that year, the regime had also dismantled the Sugar Commission of Fiji (SCOF)<sup>3</sup> an independent tri-partite industry institution, and the Fiji Sugar Marketing Ltd (FSM)<sup>4</sup>, the industry’s marketing arm comprising representatives of both the miller and the growers. Each of these decisions was taken without consultation with the cane growers or their unions. The dissolutions, by decree, cannot be challenged in a court of law.<sup>5</sup>

Income from the sugar industry is shared on a 70-30 basis under the Sugar Industry Master Award. This is a legally binding contract negotiated on behalf of all the cane growers by the SCGC with the Fiji Sugar Corporation (FSC), the cane miller. Under the Master Award, cane growers are entitled to receive 70% of the proceeds derived from the sale of sugar with 30% going to the FSC. The Master Award also prescribes the standard provisions governing the mutual rights and obligations of the grower and the miller with respect to:

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<sup>3</sup> The Sugar Commission of Fiji (SCOF) provided for the co-ordination of the activities of all sections of the industry so as to foster cooperation between them and promote efficiency. It had representation from cane growers, millers, landowners and trade unions. It was chaired by an independent chairperson appointed by the Minister after consultation with the stakeholders.

<sup>4</sup> Fiji Sugar Marketing Ltd (FSM) was responsible for the marketing and sale of Fiji sugar and for certifying the apportionment of sugar proceeds to be paid to the growers and the miller. The FSM comprised representatives of cane growers (SCGC), the miller (FSC) and the chair of SCOF. Growers had a say in this important marketing and sale entity, which they have now lost.

<sup>5</sup> In 2010, the government formed the Council of Sugar Cane Growers (CSCG), to replace the SCGC. The NFU rejected the new body as undemocratic, stacked with representatives handpicked by the government.

- the planting, cultivation and harvesting of cane by the grower;
- the sale and delivery by the growers to the corporation of cane harvested by the grower;
- the acceptance and purchase by the Corporation of cane delivered to the Corporation by the grower; and
- the manufacture, storage, marketing, delivery and sale by the Corporation of sugar, molasses and other by-products made from cane and delivered by the growers to the Corporation.

It is anticipated that the government will breach this agreement in 2012 and unilaterally alter the share so that the FSC (which is owned 68% by the State with 32% being held by several minority shareholders) will reap a larger portion of the profits. Indeed, FSC chairman Abdul Khan stated on several occasions in 2011 that the FSC would review the formula with a view to reducing the growers' share of the proceeds. Some reports claim a reduction of around 15%.

With the dismantling of these various institutions, unions allege that the cane growers have been completely side-lined from the industry, which is now a total monopoly of the FSC. Furthermore, FSC has already begun to marginalise the growers from important industry developments. Since it is no longer obliged to cooperate on industry matters, it has begun to withhold vital information that growers are entitled to under the partnership provisions.

Further, the National Farmers Union, as the largest trade union representing cane growers was prevented from holding its general body meeting (GBM) and branch annual general meetings in 2009-2011. These meetings, which are generally held before the onset of the crushing season, are used as a forum to discuss problems farmers face as harvest gets underway. In recent months, they have been unable to hold any meetings at all. In 2010, dues deductions were also halted.

On May 29, 2009 the Labasa Branch Secretary was called for questioning at the Labasa Police Station on the allegation that he was holding a meeting at the union office. Although untrue, he was detained at the station for 24 hours. A week later he was again taken in for questioning but released. In early October 2010, General Secretary of the National Farmers Union, Mahendra Chaudhry, was arrested after allegedly holding a meeting with sugar farmers in Rakiraki in western Fiji. He was charged with unlawful assembly under the PER. Mr Chaudhry claimed that he had been assessing the impact of the drought on the cane farming community, to inform a submission he was preparing to the SCGC for relief assistance for drought-stricken farmers. Earlier in the year, Surendar Lal, an executive of the National Farmer's Union, was also arrested for allegedly defying the cancellation of a permit to meet for the NFUs annual general meeting. Other NFU officials at various centres also report being harassed by the authorities and their movements closely monitored.

In 2010, the Labasa Cane Producers Association (LCPA), which covers cane growers in the Northern Division, was created. The LCPA is constituted by a general assembly of 598 elected harvesting gang representatives with a board of 10 members, a CEO, an accountant and an office assistant. According to trade unions, the LCPA is not a representative institution of cane growers. Harvesting gangs are under the heavy influence of the FSC.

Thus, the ability of such an institution to act completely independent of the FSC remains doubtful. Trade unionists were also firm that they were not consulted about the formation of the LCPA. FTUC also reports that the military intimidated and threatened farmers into joining the LCPA - at the same time the government instructed the FSC to stop dues deduction from NFU members. Farmers were also told that by joining the LCPA, they would get a higher price for the cane supplied to the FSC - which did not in fact materialize. The NFU also states that access to services has been restricted if the farmer is not a member of the LCPA.

The LCPA is established under the Industrial Organizations Act. Article 3.1(iii) of the LCPA constitution provides that officials of any other industrial association or political party cannot be office bearers of the LCPA - meaning that no trade union officer can ever be part of the governance structure of the LCPA. Similar cane producer associations are planned but not yet established for the other cane growing regions. The Western Division is expected to be next.

#### **B: Mill Workers:**

Since 2009, sugar mills have been occupied by the military, which has assumed control over many aspects of the operations - including human resources. The Fiji Sugar and General Workers Union (FSGWU) reports that the military has the power to fire and discipline workers. As previously reported, Mohammed Khalil, President of the FSGWU - Ba Branch was beaten by military officers on February 18, along with Felix Anthony, as well as on June 22. In conjunction with the second attack on Mr Khalil, he was suspended from work for two weeks without pay and was transferred from his job as a locomotive driver to a general employee in the track shop (which implied a drop in wages from \$4.17 to \$3.64 per hour). The military stated that the reason for the transfer was his status as a trade union leader.

On a monthly basis in 2011, the military interrogated Mr Khalil, accusing him of sabotaging the Fijian sugar industry. Khalil reports that the soldiers told him, "If you make one wrong move, we will kill you." The interrogations recently stopped after the new HR officer, Subril Goundar, himself a soldier, intervened. However, Mr Goundar has been no friend to the union. In November 2011, he told Mr Khalil that he would no longer recognize him as the representative of the workers. On several occasions, Mr Goundar simply called in workers to his office to discharge or discipline them; there is no investigation or any consultation with union representatives. The grievance machinery and progressive discipline machinery in the CBA, which remains in force, has been completely ignored. Workers who are caught talking to Mr Khalil have been threatened by management and the military with discipline or discharge.

Since June 2011, monthly consultations with the union have stopped. Mr Khalil links this to a statement by the Commissioner Western Division (a civilian post occupied by a Lieutenant Colonel) who announced at a meeting with mill workers in June 2011 that there is no union now representing mill workers. The union frequently requested meetings with HR, but it never replied. When asked, HR at the Ba mill has stated that it is following the direction of the Commissioner.

Despite annual wages increases provided for in the CBA, Mr Khalil reports that there have been no wage increases for several years. The average wage now stands at roughly \$FJ 120 per week. Further, overtime provisions are routinely violated, with workers either not being paid the overtime premium (1.5-2x) or not being paid at all for overtime work. Indeed, the CBA is respected only in the breach. Cases have been filed over dismissals and other breaches of the CBA. However, these cases are slow to be processed, if ever. The Ministry, which receives the cases and provides mediation, often delays action on the cases for months on end.

The mill is now also using interns (or "practicals") to fill bargaining unit positions. These persons are often friends or relatives of management of the military personnel. They are brought in on an unpaid basis to learn various positions and, when positions open, are placed into them even though bargaining unit members have priority for bargaining unit positions.

## **2. Transportation – Civil Aviation**

### **A. Cabin Crew, Baggage Handlers and Engineers**

The Transport Workers Union (TWU) represents cabin crew, baggage handlers and engineers – essentially everyone but pilots. Roughly 90% of its members are employed by Air Pacific<sup>6</sup> (which is owned 51% by Fiji, 46% by Qantas and 3% divided among Air New Zealand and the governments of Kiribati, Tonga, Samoa, and Nauru). The ENID has severely affected its membership base.

A "bargaining unit" is defined in Article 2 of the ENID as a group of at least 75 workers employed by the same employer. However, only the cabin crew collectively number more than 75 workers. All other groups fail to meet that threshold and are thus ineligible to form a new bargaining unit. These workers now have individual contracts that were drafted and imposed by management. Dues deduction was also eliminated. Many of these workers later withdrew their membership to the TWU. With the elimination of the non-cabin crewmembers, the union lost 50% of its members overnight – roughly 250 workers.

The cabin crew have a bargaining unit, which was voluntarily recognized by management. Under Article 7, the leaders of the bargaining units, including officer-bearers, officers, representatives and executives, must be employed by the designated corporations they represent. Non-employees, i.e. the professional staff of the union, cannot be involved in negotiations with the bargaining unit. Those that run afoul of this provision face steep civil and penal sanctions - a fine of up to \$50,000 or imprisonment of up to 5 years for individuals and up to \$100,000 for the union.

Within the 60 days provided in the ENID, Air Pacific imposed a new CBA which diluted the wages and took back previous gains with regard to overtime pay, meal allowances, clothing allowances, annual leave, sick leave, etc. As per the ENID, the CBA allows for

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<sup>6</sup> Documents have surfaced that show that Air Pacific management retained US-based lawyers to draft the ENID and then lobbied to ensure that the airline would be listed as an essential industry in subsequent implementing regulations. The decree was then used to bust some of the smaller units and to force the remaining ones to negotiate new agreements.



grievances only on terminations – management decides all other matters. Many outstanding grievances over discipline and dismissal were extinguished when the ENID entered into force. Common grievances now are over unpaid overtime, sick leave and discipline and dismissal.

Around mid-December 2011, Air Pacific stopped remitting the cabin crew's union fees to TWU and instead wrote cheques payable to the Air Pacific Flight Attendants' Bargaining Unit. The bargaining unit was pressured by Air Pacific management into disassociating themselves from the TWU. The decision by cabin crew to disassociate themselves from Transport Workers Union has had a significant impact on the union's finances.

### **B. Air Pacific Pilots**

There are 78 pilots for Air Pacific, just over the minimum required to form a new bargaining unit under the ENID. Under the ENID, the parties had 60 days to negotiate a new agreement. The union signed a contract with Air Pacific at 4am on 9th November (the 60 day bargaining window under the ENID expired on the 8<sup>th</sup>) after lengthy and difficult bargaining.<sup>7</sup> The situation forced the union to accept major concessions in the new agreement. These include reductions in annual leave, sick leave and the elimination of long service leave. The contract also contains deep cuts to travel and meal allowances that reduce significantly the amount pilots are compensated. Air Pacific now chooses where pilots stay, which pilots used to be able to choose. Pilots are now paid the UN/WHO amount for meal allowances, and this is further broken into hourly increments. Thus, a pilot may receive a meager allowance to cover meals. Pilots used to get an amount they could spend as they choose based on a flat rate for each city.

Of note, the union bargained with the company on the basis of the old numbers that reflected poor profitability. Just after the agreements were signed between Air Pacific and the various bargaining units, Air Pacific announced greatly improved profits for the company for the previous year. The union believes that the timing of the profit results was intentional and that the union was intentionally misled. If the results had been released earlier, the arguments given for the application of the ENID at Air Pacific wouldn't have held.

### **C. Ground Handlers**

Air Terminal Services (ATS) provides ground handling services at Nadi International Airport, including line maintenance, catering and cabin services, freight sales and handling. Among ATS' major clients is Air Pacific. ATS is owned by the Government of Fiji (51%) and its employees (49%). Its workers are represented by the Federated Airlines Staff Association (FASA), which has a chair on the ATS Board. Rajeshwar Singh, FTUC representative on the ATS Board, was removed from the board on December 31, 2011, just days after being reappointed unanimously. The government claimed that he breached his fiduciary duty to ATS board because of his meeting with Australian trade unionists urging a boycott. Mr Singh does not deny the meeting but rejects the allegation that he called for a

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<sup>7</sup> However, on 18th November, the regime issued an amendment to the decree in which either party could apply a 30 day extension.

boycott. Recently, the government has attempted to dissolve the ATS through the ATS Employees Trust (which holds 49% of ATS).

FASA reported that permits to meet are routinely denied for no reasons, and in some cases in the past permits were granted and then revoked at the last minute once the union had assumed the costs of renting meeting space. They also believe that their telephones are monitored and are thus very circumspect about what they say.

### **3. Pine Industry Workers**

According to the union, there are roughly 3,300 workers in the pine industry – roughly 3,000 of which are lumberjacks and 300 of which are saw millers. The union represents sawmill workers (there is one mill in Fiji, though a second mill is expected to come online in 2012). While the industry has not been classified an “essential industry”, the employer has cited the ENID as the basis for the unilateral actions it has taken. This includes terminating dues check-off. The union has also been unable to hold any meetings in 2011 due to the PER. The union reported that management unilaterally reduced wages for 44 mill workers, arguing that they had been accidentally given a wage increase 10 months prior – which is untrue according to the union. The employer acted unilaterally and made no effort to meet with or bargain with the union over these wages reductions. On average, workers earn \$FJ 100 per week (with the official poverty line at \$FJ 185 per week).

The union had issued its bargaining proposal to the employer on January 2011 (the employer and the union engage in annual negotiations). It has yet to respond to the union’s petition for 2011 or 2012. Indeed, the chairman of the company simple refuses to meet with the union.

### **4. Fisheries**

The union represent workers in the Pacific Fishing Company (PAFCO), which is 98 per cent state-owned. The cannery packs tuna for export, 100 per cent of which is bought by Bumblebee, a well-known US canned tuna brand. Though not listed in the ENID, management is using it as an excuse to crack down on workers. The union has seen a drop in its membership, from roughly 540 to 400 members due to pressure from the government that they would lose their jobs if they stayed with the union.

The union had been unable to meet because of the PER. It has been unable to hold committee meetings and has not had its annual general meeting for two years, as the government has either denied permission or simply failed to respond to requests. The PAFCO Employees Union General Secretary Mr. Tomasi Tokalauvere wrote to the Ministry of Labour several months ago on this issue and has yet to receive a reply. The company has ceased all dues deductions. Worse, on one occasion last year, the employer transferred the dues of the union to another, company-dominated union.

In 2011, Mr. Tokalauvere stated that his home is under frequent police surveillance and that the military had once tampered with his vehicle with the intent to cause the vehicle to lose control. He also claims that he is followed whenever he travels.

In 2011, PAFCO had been not been operating at full capacity and has intermittently shut down and maintained only a bare-bones crew. The plant experienced such a shut down in June, ostensibly to upgrade its equipment and operations in order to comply with US FDA regulations. Around the time of the plant closure, the company demolished the union office, which was on the company premises by virtue of a 7-year old agreement. Many union documents and records were lost permanently. Around the same time, the company announced the abrogation of the CBA.

#### **5. Banking:**

The Fiji Bank and Finance Sector Employees Union (FB-FSE) represents workers in the banking and insurance industry, which was listed as an essential industry under the ENID. Roughly half of its 1,500 members are located in 4 banks – the Bank of Baroda, Bank of the South Pacific, ANZ Bank and West Bank.

As explained, under Article 7, leaders of the bargaining units, including officer-bearers, officers, representatives and executives, must be employed by the designated corporations they represent. This provision has had a devastating impact on the FB-FSE union. The union is structured as a sectoral union with members in various enterprises (banks and insurance companies). The leadership is centralized at the FB-FSE, and the national union is responsible for administration, bargaining and other services for all of its members. As none of the professional staff of the union is employed by an employer, it cannot represent and provide services to its members. Instead, it has tried to help develop new leadership from among the inexperienced rank and file in the new bargaining units in the hope that they can provide leadership and bargain with management. Indeed, the national secretary of the union received a letter in 2011 that he could be jailed if it tried to represent workers.

There is no collective bargaining directly with the union. Since the decree entered into force, only two bank's bargaining units were registered - Bank of Baroda and ANZ. No units were registered by the PM's office in West Pacific Bank and Bank of the South Pacific even though applications were made 8-9 months ago.

At Bank of Baroda, there was some negotiation with bargaining unit representatives but no progress, as the bank does not want to talk about outstanding COLA increases from last year. The bank even threatened to impose changes if representatives did not agree to a number of concessions that it is demanding. A bargaining unit was registered at ANZ in December 2011 but then de-registered by pressure from bank. A new registration was carried out but on ANZ's terms with respect to excluding large number of workers at ANZ operations.

As a result, the union is hemorrhaging members. It has lost roughly 450 members since the ENID went into effect (most from Bank of the South Pacific). The Union has had to reduce Secretariat staff by two, cut costs generally and reschedule loans repayments. Many see no reason to belong to the union, as it can no longer legally represent them. Further, many have left out of fear following threats by management that they not have anything to do with the FB-FSE.

Under Article 26 of the ENID, discipline and discharge disputes, as well as disputes over the interpretation and application of the agreement, must be resolved internally, or by the employer's designated reviewing officer. The Prime Minister may hear and issue a binding determination in disputes involving an issue of over \$5 million. In no case, however, can any worker or union bring a claim to a judicial or quasi-judicial (neutral) person or body. The union had three disputes against West Bank arising out of the last pay agreement that involved roughly \$1 million. They were waiting for a decision from the arbitration board when the decree went into effect. The decree terminated the case. Any new grievances will be resolved by the employer.

Police and military intelligence are present in union general meetings.

## **6. Public Sector**

The ENID and Employment Relations Amendment Decree 2011 (Decree No. 21) have had a severe impact on unions representing workers in the public sector, including civil servants. Trade union membership has fallen steeply, and union finances are shaky given the withdrawal of dues deductions and the loss of membership.

### **a. Teachers**

There are two national teachers unions, the Fijian Teachers Association (FTA) and the Fiji Teachers Union (FTU)(elementary and secondary education). These workers were covered by the Employment Relations Promulgation until Decree 21 of 2011. Now, neither union has dues check off, is able to bargain collectively or strike.

In late 2011, the FTA reported that they have been unable to secure a permit to meet in the last 6 months. The FTA also noted a complete media blackout on anything they say, and that many unions have ceased publishing newsletters for fear of running afoul of the PER. In 2012, however, the FTA was allowed to hold its annual general meeting.

Tevita Koroi, the president of the FTA, was fired from his position as school principal in 2009 after he addressed a gathering of union leaders, civil society leaders, politicians and community leaders, in his capacity as a trade union leader, calling on a quick return to democracy in Fiji. Despite the fact that the ILO CFA called for his immediate reinstatement in November 2010, he has not been reinstated.

### **b. Energy**

Roughly 300 energy sector workers were represented by the Construction, Energy and Timber Workers' Union of Fiji. When the ENID came into force, dues deductions ceased and the CBA was abrogated shortly thereafter. CETWUF knew that the management was about to impose individual contracts on its former members. At no point did management attempt to negotiate a new CBA with the unit. Indeed, individual contracts have now been imposed. CETWUF has seen its membership drop from 980 to 400 members (largely in the timber and construction industry). Notably, the Fiji Electricity Authority (FEA) immediately recognized voluntarily a white-collar bargaining unit and offered to meet to bargain collectively. As of today, the FEA no longer recognizes CETWUF.

**c. Customs and Revenue**

Of the 500 workers at Fiji Customs and Revenue, 380 were union members. Since the ENID entered into force in November, the government has refused to engage with the national union on any level. Dues deductions has been halted. That same month, a new bargaining unit was organized and registered as an in-house union with no relationship to the pre-existing national union.

**d. Water Authority**

The union had 200 members at the water authority in various locations throughout the country. The dues deductions have ceased. A new unit was formed, but it has no relationship with the pre-existing union. There is no new collective agreement between management and the unit.

**e. Telecom**

The Fiji Post & Telecom Employees Association (FPTEA) covers employees in TFL and FINTEL. The Association has tried to register a bargaining unit as prescribed in the Decree but has received no response for the last nine (9) months. The Association lost 15% of its membership due to redundancy in various sections of the Company's operation. The Association request to enter into an agreement for subscription deduction has been flatly refused. There is no collective bargaining today; the CBA was unilaterally modified by the employer and individual contracts are now the norms for appointments and promotions. Union general secretary has not been allowed onto the premises to meet with members.

**f. Public/Civil Service**

On May 16, 2011, the government of Fiji promulgated the Employment Relations Amendment Decree (Decree No. 21) which amended Article 3 of the Employment Relations Promulgation (ERP) of 2007 to exclude all public service workers from its coverage. By this decree, roughly 15,000 workers in Fiji's public service lost overnight their fundamental labour rights. Further, Decree 21 prohibits public service workers and their unions from taking any action, proceeding, claim dispute or grievance of any kind that arose or could arise under the ERP before any tribunal. The Decree also nullifies any order of any competent tribunal in any action brought under which arose under the ERP.

**Section III: Related Issues**

**A. New Decree Could Allow Government to Dissolve NGOs That Criticize Regime**

On November 18, 2011, the Charitable Trusts Amendment Decree (Decree 48) was enacted. Of note, the Decree gives the Prime Minister unreviewable discretion to cancel the incorporation of the board of any charitable organization that receives any government funding if the PM "is satisfied that the charitable trust has failed to achieve its objects, or that the board of trustees have acted contrary to the objects of any such charitable trust." If dissolved, the trustees must furnish within 14 days their certificate of incorporation and a

list of all assets and liabilities or face a \$5,000 fine and/or two years imprisonment. Numerous Fijian NGOs are chartered under the Charitable Trusts Act; they are deeply concerned that Decree 48 will be used to usher in a crackdown on civil society organizations that are perceived to be critical of the government. The Citizens Constitutional Forum, an NGO coalition forum, has denounced the decree.

### **B. Freedom of Expression Limited**

In April 2012, the 'Fiji Times' a daily Newspaper refused to print a paid advertisement from FTUC on Labour Day Message for fear of reprisal from the regime.

### **C. Public Order Amendment Act (Decree 1 of 2012) - Major Concerns**

As explained above, the Public Order (Amendment) Act incorporates and expands many of the powers found in the recently repealed PER. Among our top concerns are:

1. Section 2 of the decree redefines "terrorism" to cover any act, inside or outside Fiji, to compel a government or an international organization to do, or to refrain from doing, any act, where the action is done or the threat is made with the intention of advancing a political, religious or ideological cause, and the act is done or threat is made with the intention of coercing or influencing by intimidation the government of Fiji. Read broadly, someone seeking, for example, a government or international organization to denounce or sanction the government of Fiji, which the government deems to be ideological in nature and intimidating, is guilty of an act of terrorism under the law.

Under Section 7, a person charged as a terrorist may be imprisoned for life. The same section allows for life sentences for those who harbour a "terrorist" or participate in a group involved in the act of "terrorism." This wide net could lead to numerous persons facing severe sentences for seeking international aid to pressure the government to change its policies – clearly its intent.

2. Section 3 maintains the power available under the PER to allow the government to ban the manufacture, use, sale, display or possession of any flag, banner, emblem, picture, etc., if the Prime Minister deems it in the public interest to do so. Under the PER, a violation of this provision carried a penalty of two year imprisonment and/or a \$1,000 fine. Under the new decree, the display of e.g., a prohibited emblem or flag is punishable by three year in prison and/or a fine of up to \$5,000.

3. Section 5 maintains the existing requirement that any person to apply to hold a public meeting with the police seven days in advance. However, the penalties now include a sentence of up to five years in prison (up from two years in the PER) for holding a meeting without permission. The police may deny a permit to any person or organization that has been refused a permit by virtue of any law or any person or organization who failed to comply with conditions imposed with respect to any meeting, procession or assembly or who has organized any meeting or procession or assembly which prejudiced the peace, public safety and good order or sabotaged or attempted to undermine the economy or financial integrity of Fiji. This provision is certain to give the authorities any excuse to prevent a trade union from ever holding a public meeting again.

4. Section 6 provides that the police may prohibit any meeting in any building, public or private, even if a permit has been granted, if the commissioner considers it necessary to secure public safety or public order. The police have the right to order such a meeting to disperse, and may use such force as necessary, including arms, to disperse the meeting after giving due warning. The police are granted total immunity from any civil or criminal action for the loss or harm caused by the use of such force. The police can also prohibit any meeting if the person or organization organizing that meeting was ever refused a permit under the Public Order Act or failed to comply with any conditions imposed with respect to any meeting or assembly or that person or organization had in the past organized a meeting or assembly that prejudiced the peace, public safety and good order. Interpreted broadly, it is not hard to imagine this section to be used to break up a trade union meeting, march or demonstration (even permitted ones) with deadly force if the government could claim it necessary to maintain public order. Failure to obtain a permit, to heed the limitations of a permit, or if the meeting or assembly took place in contravention of a police order, he or she could face five years in prison and/or a \$10,000 fine.

5. Section 6 gives the commissioner of police greater control over the free movement of persons than existed under the PER, including if or when they may leave Fiji and may prohibit or regulate the entry or exit of such person from any division, province, island, city, town, district or other area or place in Fiji. In addition to the reasons available under the PER, these limitations may be exercised if the commissioner of police considers them necessary to ensure that the economy and financial integrity of Fiji is not undermined or sabotaged.

6. Section 8 empowers a police officer who has reasonable suspicion that a person has acted or is about to act in a manner prejudicial to public safety or the preservation of the peace, or if the person fails to satisfy the police as to their identity, place of employment or purpose for being in the place where he or she is, to arrest the person without warrant and detain him or her without charge for up to 16 days by order of the Prime Minister. Under the PER, the maximum detention without charge was 10 days.

7. Section 8 also confers upon the military the power to perform police functions by the consent of the police. Thus, the military will now be even further entrenched in the civilian affairs of the nation, which could no doubt lead to serious abuses of civil and political rights - as they have already.

8. Section 13 provides that any person who makes any statement, orally or in writing, which is likely to undermine or sabotage or attempt to undermine or sabotage the economy or financial integrity of Fiji" faces 10 years imprisonment and/or a \$50,000 fine. The original law, which was targeted largely at hate speech, carried a maximum one-year imprisonment and a \$500 fine. Again, any effort by a person campaigning to sanction the country or any industry for the violation of international labour rights could find themselves in prison until 2022.

9. Finally, and most dangerously, the courts are divested of jurisdiction to hear any claim by any person challenging the validity, legality or propriety of any decision made by the commissioner of police, any divisional police commander, the Prime Minister or any public officer.

