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ESSENTIAL NATIONAL INDUSTRIES (EMPLOYMENT) DECREE 2011 (DECREE NO. 35 OF 2011)

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IN exercise of the powers vested in me as President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

A DECREE TO PROVIDE FOR THE GOVERNING OF RELATIONS BETWEEN EMPLOYEES AND EMPLOYERS IN ESSENTIAL NATIONAL INDUSTRIES IN FIJI

PART 1 — PRELIMINARY

Short title, commencement and application

1. — (1) This Decree may be cited as the Essential National Industries (Employment) Decree 2011.
- (2) This Decree shall commence on a date or dates appointed by the Minister by notice in the Gazette.
- (3) This Decree shall bind the State.

Interpretation

2. In this Decree, unless the context otherwise requires—

“Bargaining Unit” means a group of at least 75 workers employed by the same employer who perform similar types of work for the employer;

“collective agreement” means an agreement between an employer and the representative of the workers in the Bargaining Unit;

“collective bargaining” means acting and negotiating in accordance with this Decree with a view to concluding, reviewing or renewing a collective agreement;

“designated corporation” or “designated company” means corporations or companies which operate in an essential national industry, and are so designated by the Minister under Regulations made pursuant to this Decree;

“essential national industry” means those industries:

- (a) which are vital to the present and continued success of the Fiji national economy or gross domestic product or those in which the Fiji Government has a majority and essential interest; and
- (b) which are declared as essential national industry by the Minister under Regulations made pursuant to this Decree.

“employer” means any designated corporation;

“Minister” means the Prime Minister;

“Registrar” means the Registrar of Trade Unions as established by the Employment Relations Promulgation 2007;

“representative” means the representative of workers in a Bargaining Unit registered and or recognized pursuant to this Decree;

“union” means trade union registered pursuant to the Employment Relations Promulgation 2007;

“worker” means any person who is employed by a designated corporation and is subject to a collective agreement, but does not include:

- (a) persons on individual employment contracts with a designated corporation at the date of commencement of this Decree;

- (b) persons in managerial, supervisory, coordinating or other roles in which those persons are authorized to exercise discretion to bind or act on behalf of their employer up to certain pre-delegated authorities; or
- (c) persons with access to financial information, commercially sensitive information, or critical managerial operational information.

Purpose

3. The purpose of this Decree is to ensure the viability and sustainability of certain industries that are vital or essential to the economy and the gross domestic product of Fiji.

Principles

4. In interpreting and implementing the provisions of this Decree, consideration and due regard must be given as far as practicable and subject to available resources to the following principles—

- (a) the need to promote the development, viability and sustainability of designated corporations for the benefit of Fiji;
- (b) the need to provide workers in designated corporations with a framework and process by which they may bargain as a group and enter in collective agreements with designated corporations, or by which they can decide to deal directly with their employer without union representation; and
- (c) the need to provide a means to resolve any disputes that may arise between workers and designated corporations.

Objectives

5. The objectives of this Decree are—

- (a) to ensure the present and continued viability and sustainability of essential national industries for the benefit of Fiji;
- (b) to avoid any interruption to the continued viability and sustainability of designated corporations;
- (c) to provide for the complete independence of employers and workers in the matter of self organization to carry out the purposes of this Decree;
- (d) to provide certain guarantees to workers in essential national industries relating to joining or not joining unions and engaging in the process of collective bargaining subject to the provisions of this Decree; and
- (e) to provide for the prompt and orderly settlement of all disputes including but not limited to those that may concern rates of pay, work rules, working conditions or disciplinary actions.

PART 2—EFFECT OF DECREE ON EXISTING UNIONS AND COLLECTIVE AGREEMENTS

Re-registration of workers' representatives

6. Upon commencement of this Decree, any union registered under the Employment Relations Promulgation 2007 which represents workers employed by designated corporations must re-register as a representative pursuant to this Decree.

Officers of a union

7.—(1) Any and all officer-bearers, officers, representatives, executives, and members of a union which represent workers employed by designated corporations must, at all times, be employees of the designated corporation which they represent.

(2) In the event any of the persons referred to in sub-clause (1) cease to be an employee of the designated corporation for any reason, their appointment as a union representative shall be nullified with effect from the date that person ceased to be an employee of the designated corporation or from the date pending the final determination by the designated corporation of a grievance, if one is filed, relating to the termination of the former employee (whichever is later).

(3) Any person or body or any union or any representative who fails to comply with this section shall be guilty of an offence, and shall be liable upon conviction in the case of a natural person to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 5 years imprisonment or to both, and in the case of a union or body corporate to a fine not exceeding \$100,000.

Effect of this Decree on existing collective agreements

8.—(1) Upon commencement of this Decree all existing collective agreements will only be valid for a period of sixty (60) days while new or replacement collective agreements are negotiated under Part IV of this Decree.

(2) For the avoidance of doubt, all existing collective agreements shall be null and void and no longer binding between the parties upon expiry of the period of sixty (60) days from the date of commencement of this Decree, and if no new collective agreement is in place, then the designated corporation may implement new terms and conditions of employment through a new collective agreement or individual contracts as called for and applicable in this Decree.

(3) Those workers no longer in a Bargaining Unit and no longer covered by a collective agreement may be provided individual binding contracts with new terms and conditions of employment until such time as a new individual contract is concluded between the parties. However, if no individual contract is provided then the worker(s) shall continue to be employed on the same terms and conditions as they are currently employed.

(4) A worker or representative may appeal to the Minister after implementation of a new collective agreement for a review of the same. However, for the avoidance of doubt, this right of appeal does not restrict the designated corporation's ability to implement new terms and conditions of employment.

PART 3—REGISTRATION OF NEW BARGAINING UNITS AND RE-REGISTRATION AND DETERMINATION OF A BARGAINING UNIT

Registration and re-registration

9.—(1) The Registrar will register a representative of eligible workers in a Bargaining Unit for a term of two (2) years subject to this Decree only after an election conducted pursuant to this Part or after receipt by Registrar of a formal written statement from an employer that it wishes to recognize the representative without an election.

(2) Subject to sections 15 and 16, elections of representatives of eligible workers in a Bargaining Unit shall be held every two (2) years in accordance with the terms of this Decree.

(3) If at the end of the two (2) year period, no representative has been elected or re-elected, then those workers previously represented will be unrepresented until an election occurs and a new representative is registered pursuant to this Part; and if no representative had been elected or re-elected then pursuant to Section 17, any existing or current collective agreement will become null and void and the employer may provide new terms and conditions of employment pursuant to individual contracts or it may continue to employ workers on the same terms and conditions as provided under the collective agreement.

Registration application

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 provide the following information with such application:

- (a) the information required by Section 119(3) of the Employment Relations Promulgation 2007; and
- (b) validated and non-coerced written authorization from at least 35% of the workers in a Bargaining Unit that those workers wish to be represented by the collective bargaining representative.

Composition and scope of Bargaining Unit

11.—(1) Upon receipt of any completed application pursuant to section 10, the Minister, following consultation with the Minister responsible for Industry and Trade, shall determine the composition and scope of a Bargaining Unit for the purposes of conducting worker elections for a representative of that Bargaining Unit.

(2) The Minister may, in determining the composition of a Bargaining Unit, obtain from the employer and the current or prospective representative such information as is necessary to determine the proper composition and scope of a Bargaining Unit and to determine which workers comprise that Bargaining Unit.

(3) The Minister will inform the prospective or existing representative of the workers of his determination under this Part of the proper composition and scope of the Bargaining Unit that the applicant seeks to be elected or re-elected to represent.

Registrar to conduct and supervise elections

12. Determination of the appropriate representative and election of representatives of workers in a Bargaining Unit will be conducted and supervised by the Registrar, subject to such directions and determinations as the Minister

may give so that there is a single representative elected to represent workers and such representative must have obtained votes from a majority of the workers (i.e. 50% + 1) in a Bargaining Unit.

Secret ballot

13. Elections for a representative shall be conducted by secret ballot.

Requisite majority

14.—(1) Registration of a union as a representative will only be granted if a majority (i.e. 50% + 1) of the workers in the Bargaining Unit affirmatively vote in favour of a particular union applying to be a representative of workers in a Bargaining Unit.

(2) If such a majority of a Bargaining Unit selects a union as its representative, the Minister shall provide written notice of such registration to the Registrar, the employer, and to the elected representative of the Bargaining Unit.

(3) If a majority of the workers in a Bargaining Unit do not affirmatively vote in favour of representation, the Minister shall provide written notice to the representative, the employer and to the union that sought representative status and shall not register that union.

(4) Notwithstanding the provisions of subsection (1), the Registrar may refuse to register a union as a representative of workers in a Bargaining Unit on any of the grounds set out in section 125(1) of the Employment Relations Promulgation 2007.

Application for cancellation of registration by employer

15.—(1) Notwithstanding registration of a representative pursuant to this Decree, an employer may, if it has reliable objective information and evidence that at least 35% of workers in a Bargaining Unit no longer support their registered representative, apply to the Registrar for cancellation of representative's registration.

(2) Any employer applying to the Registrar pursuant to subsection (1) must provide simultaneous written notice to the registered representative of such application.

(3) If the registered representative disputes the employer's application under subsection (1), it shall give written notice of such dispute together with the grounds for such dispute to the Registrar within seven (7) days of receipt of notification of such application under subsection (2).

(4) If the Registrar finds there is sufficient information and evidence to support an employer's application, it can cancel the representative's registration and require a new application and election.

Application for cancellation of registration by workers

16. If 35% of the workers in a Bargaining Unit who are represented by a registered representative desire to have that representative's registration cancelled, they may apply for new elections upon application to the Minister in accordance with the provision of this Part.

Effect of non-registration or Cancellation

17. In the event that a representative is not re-elected or representation is cancelled, then the existing or current collective agreement will become null and void and the employer may provide new terms and conditions of employment pursuant to individual contracts or it may continue to employ workers on the same terms and conditions as provided under the collective agreement.

Period before new elections

18. Notwithstanding anything contained in this Part, no worker or group of workers in a Bargaining Unit may apply for new elections for a period of one (1) year from the outcome of any election to register a representative.

PART 4—COLLECTIVE BARGAINING PROCESS

Negotiation of a new collective agreement or amendment

19. Upon receipt of written certification from the Minister that a particular representative has been elected or recognized and registered pursuant to the terms of this Decree, an employer has a duty to recognize and engage with the registered representative for the purposes of bargaining and entering into a collective agreement, continuation of any existing agreement, or amendment of an existing collective agreement.

Good faith

20. The principles of good faith set out in Division I of Part 16 of the Employment Relations Promulgation 2007 shall apply to all negotiations and interactions between the employer and the registered representative under this Decree.

Initiating collective bargaining

21.—(1) Subject to the terms of a collective agreement either agreed upon between the parties or imposed pursuant to the terms of this Decree, and unless negotiations are already being conducted between the parties, the employer and representative shall give at least thirty (30) days' written notice to the other of their intention to initiate collective bargaining in relation to workers in the relevant Bargaining Unit.

(2) Unless negotiations are already being conducted between the parties, the time and place for the beginning of negotiations between the representatives of the parties interested in the collective bargaining process shall be agreed upon no later than ten (10) days after the receipt of said notice, and said time of negotiation shall be within the thirty (30) days provided in the notice.

(3) Upon initiation of collective bargaining, the parties shall have thirty six (36) months in which to reach a new or successor collective agreement; provided however, if new terms and conditions of employment were implemented pursuant to Section 8, then those terms and conditions will be in effect until such time as a new collective agreement is agreed upon by the parties.

(4) In the event the parties cannot agree to the terms of a collective agreement within the period set out in subsection (3), either party may apply to the Minister in writing for a determination of the final terms of the collective agreement.

(5) Any determination of the Minister pursuant to subsection (4) shall be final and binding on all parties for a period of two (2) years.

(6) All collective agreements agreed between the parties and determinations of the Minister pursuant to this section shall be registered with the Registrar.

Amendable date for collective agreements

22.—(1) Collective agreements subject to this Decree shall not have expiry dates but shall instead have dates upon which they become amendable.

(2) The amendable dates of collective agreements shall be as agreed upon by the parties, but if no agreement is reached on an amendable date, it shall be five (5) years following the date of execution of the collective agreement.

Re-negotiation of collective agreements: financial distress

23.—(1) If an employer has suffered operating losses for two (2) consecutive fiscal years, or two (2) years of actual or expected operating losses in a three (3) year period, it shall have the immediate right to re-negotiate all its existing collective agreements notwithstanding any such agreement's moratorium or duration provisions, or any other provisions in this Decree.

(2) The employer shall notify all representatives of its workers, the Minister, and the Registrar of such operating losses and shall meet with all representatives within ten (10) days from the date of such notice in order to confer and agree upon a date to commence good faith negotiations for new or amended collective agreements, which date shall be no later than thirty (30) days after such notice.

(3) If the parties are unable to reach agreement on a new or amended collective agreement within sixty (60) days after their initial date of negotiations pursuant to subsection (2), above, the employer's proposals for a new or amended collective agreement may, at any time thereafter, be submitted to the Minister for review.

(4) Upon receipt of the employer's proposals, the Minister, following consultation with the Minister responsible for Industry and Trade, shall evaluate whether the employer's proposals for a new or amended collective agreement were made in good faith, and whether the proposals will assist the employer in returning to profitability or sustainability in the future.

(5) Upon evaluation of the employer's proposals, and any further information or particulars which the Minister may require from the parties, the Minister, following consultation with the Minister responsible for Industry and

Trade, shall make a decision of the terms and conditions of the new or amended collective agreement, which shall be final and binding on all parties.

(6) The duration of a collective agreement that results from the Minister's decision pursuant to this section shall be for five (5) years unless the parties subsequently agree to an alternative duration or to a different collective agreement.

(7) "Operating losses" in this section means losses before any taxation benefit; exclusive of extraordinary or unusual items or favourable changes in accounting policy.

PART 5—LIMITATIONS AND DISPUTE RESOLUTION

Scope

24.—(1) If in their collective agreement, the agreement provides for terms different than otherwise required or provided by the Employment Relations Promulgation 2007, then the terms of the collective agreement shall prevail.

(2) No person employed in any "designated corporation" that operates on a full-time (7 days per week or 24 hour per day) basis shall, unless otherwise mutually agreed upon by the employer and the representative, be entitled to any overtime pay for work performed on Saturdays, Sundays or public holidays.

(3) Without affecting the generality of subsection (2), given the nature of their employment, flight duty restrictions and duty period scheduling, no pilot, cabin crew, or engineer employed or engaged in any airline industry shall be eligible for overtime pay, unless otherwise agreed by the employer and the representative.

(4) There shall be no requirement for an employer to deduct union fees from a worker's salary or wages unless agreed otherwise by the employer.

(5) The Wages Council shall have no jurisdiction over any "designated corporation" or essential national industry, and any order, determination or regulations of the Wages Council shall not apply to "designated corporation" of essential national industry.

Duty of employers, workers and representatives and to settle disputes

25. It shall be the duty of all employers, their managers, agents, and representatives and workers who are governed by a collective agreement under this Decree to exert every reasonable effort to make and maintain agreements concerning rates of pay, work rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any employer growing out of any dispute between the employer and the representatives and/or workers.

Dispute resolution process

26.—(1) As part of any collective agreement negotiated or imposed under this Decree, there shall be included a process for the resolution of disputes over discipline and discharge, and the interpretation or application of that collective agreement.

(2) The process for resolution of disputes noted in subsection (1) shall provide that all such disputes must be processed and resolved internally or by reference of such disputes to the employer's designated reviewing officer, and no recourse shall be available to any party to any court, tribunal, commission or any other person or body exercising a judicial or quasi-judicial function.

(3) The process for resolution of disputes mentioned in subsection (1) shall provide that any such dispute which remains unresolved internally or by reference to the employer's designated reviewing officer, shall be referred to the Minister for a final and binding determination; provided however, that only disputes involving an issue of over \$5 million in value in one (1) year may be referred to the Minister.

Job actions, strikes, sick outs, slowdowns, and lockouts

27.—(1) No job actions, strikes, sick outs, slowdowns or other financially or operationally harmful activities shall be permitted at any time for any reason; and any such actions are expressly prohibited in connection with—

- (a) a union's efforts to obtain registration as a representative of a Bargaining Unit
- (b) a union's efforts to influence the outcome of collective bargaining, or in the course of any collective agreement negotiations; or
- (c) disputes over the interpretation or application of any collective agreements.

(2) If at the end of the period noted in section 21(3) the parties have not agreed upon a new or successor collective agreement, the Bargaining Unit (through a secret ballot verified by the Minister) may go on strike, or the employer may implement a lockout, provided however, that no strike or a lockout may occur unless—

- (a) a 28 days' prior written notice of the strike or lockout is provided to the Minister and to the employer or the representative of the Bargaining Unit, as the case may be; and
- (b) the prior written approval of the Minister is obtained before any strike or lockout.

(3) If a union or the workers who are members of a union engage in a strike, the employer may, in addition to all other remedies, lock out the striking workers and unilaterally impose terms and conditions of employment different from those set out in the relevant collective agreement.

(4) Any person, body, union, representative or any worker who fails to comply with this section shall be guilty of an offence, and shall be liable upon conviction in the case of a natural person to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 5 years imprisonment or to both, and in the case of a union or a body corporate to a fine not exceeding \$100,000.

(5) The Minister, following consultation with the Minister responsible for Industry and Trade, may, by order, declare any strike or lockout in any essential national industry to be unlawful.

(6) Any person, body, union, representative or any worker who remains on strike, or any employer who continues to impose a lockout, after a declaration by the Minister under subsection (5) that any such strike or lockout is unlawful, shall be guilty of an offence, and shall be liable upon conviction in the case of a natural person to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 10 years imprisonment or to both, and in the case of a union or a body corporate to a fine not exceeding \$250,000.

PART 6—GENERAL

Application of Employment Relations Promulgation 2007, etc

28.—(1) This Decree has effect notwithstanding any provision of the Employment Relations Promulgation 2007 or any other law and, accordingly, to the extent that there is any inconsistency between the Decree and the Employment Relations Promulgation 2007 or any other law, this Decree shall prevail.

(2) Except as otherwise provided in this Decree, the provisions of the Employment Relations Promulgation 2007 shall not apply to any essential national industry, designated corporation or any person employed in any designated corporation or any essential national industry.

Minister can delegate functions

29. The Minister, following consultation with the Minister responsible for Industry and Trade, may, by notice in the Gazette, delegate all or any part of the Minister's functions and powers to the Solicitor-General.

Certain decisions not to be challenged

30.—(1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question—

- (a) the validity, legality or propriety of this Decree;
- (b) any decision of any Minister, the Registrar or any State official or body, made under this Decree; or
- (c) any decision of any designated corporation made under this Decree.

(2) Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, against any designated corporation that had been instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree but had not been determined at that date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree, and all orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal.

(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission or any other adjudicating body, in respect of any of the subject matters in subsection (2), then the presiding judicial officer, without hearing or in any way determining the proceeding or the

application, shall immediately transfer the proceeding or the application to the Chief Registrar or the registrar of the Employment Relations Tribunal for termination of the proceeding or the application and the issuance of a Certificate under subsection (2).

(4) A certificate under subsection (2) is, for the purposes of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function, conclusive of the matters stated in the certificate.

(5) A decision of the Chief Registrar or the registrar of the Employment Relations Tribunal to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.

Regulations

31.—(1) The Minister, following consultation with the Minister responsible for Industry and Trade, may make regulations to give effect to the provisions of this Decree.

(2) Without affecting the generality of subsection (1), regulations made under this section may—

- (a) declare any industry to be an essential national industry for the purposes of this Decree;
- (b) designate any corporation or company or employer to be a designated corporation or designated company for the purposes of this Decree;
- (c) impose conditions, require acts or things to be performed or done to the satisfaction of the Minister or any officer authorized by the Minister; or
- (d) impose fines and penalties for any action or omission by any person under this Decree.

Given under my hand this 25th day of July 2011.

EPELI NAILATIKAU
President of the Republic of Fiji