

MUNRO LEYS

HOT TOPICS 2019

Note: The material set out in this presentation is of a general nature. It is not a substitute for specific legal advice in a given situation and should not be relied on as such. Munro Leys cannot accept responsibility for any such reliance.

...commits an offence and is liable on conviction

- a) in the case of a natural person, to a fine not exceeding \$30,000 or to imprisonment for a term not exceeding 5 10 years, or to both**
- b) in the case of a body corporate, to a fine not exceeding \$100,000 or to imprisonment for each director and manager for a term not exceeding 5 years, or to both.**

Taxpayers strike back

....but FRCS has other plans for you

**Rajnil Krishna
(Senior Associate)**

Covering

Recent tax cases, law changes, and “what’s hot at FRCS”

Taxpayer wins in Court on

- qualifying dividends
- forfeited deposit
- BPRANT (Branch Profit Remittance Additional Normal Tax)

FRCS strikes back with

- new Taxpayer Identification Number rules
- threatening to jail you for failing to declare your assets
- threatening to jail your accountants if they get your tax returns wrong
- the wild and wacky world of “Infringement Notices”
- transfer pricing
- Customs audits (for duty you never knew you had to pay)

RECENT TAX CASES

- Finally (!) – some sense in the Fiji Court of Appeal
- last Fiji Court of Appeal session: Taxpayers 5, FRCS 0
- lower courts delivering mixed results (though even that is an improvement)



Tax cases – 1 [ML tax team]

Qualifying dividends – *Reddys' Enterprises Limited v FRCA*

- Non-resident dividend withholding tax – use of pre-2001 tax credits
- Issue: can tax paid before 2001 create “qualifying credits” for dividends paid after 2001 (when the qualifying dividend regime applied?)
- Tax Tribunal and Tax Court: No
- Fiji Court of Appeal: Yes

Important for taxpayers with pre-2001 undistributed r/e distributed before 2016 (if they still have a dispute with FRCS) [if you didn't object, your loss]

[Also potentially important in guiding FRCS on how to interpret tax laws – they can't just make it up (!)]

Tax cases – 2 [ML tax team]

CGT on forfeited deposit – *Southern Horizon SA v FRCA*

- Deposit forfeited after purchaser defaulted on sale agreement
- FRCS claimed it could take CGT on the forfeited deposit
- Tax Court: Yes
- Fiji Court of Appeal: No

(Mostly historical interest – Income Tax Act has now been changed to tax forfeited deposits as income (the “Southern Horizon amendment”?))

General lesson: FRCS must be more disciplined in interpreting the laws on CGT

Tax cases - 3

BPRANT – *New India Assurance Company Limited v FRCA and Scipio Investments Limited v FRCA*

- About former “Branch Profits Remittance Additional Normal Tax”
- FRCS grabbed the tax before taxpayer remitted it to head office. Was this right?
 - Tax Court – yes
 - Court of Appeal – no



BPRANT no longer exists – but millions at stake, now returned to taxpayers.

Tax cases – the lessons

- Litigating against tax assessments is not hopeless – however you have to be in to win [if you don't object and litigate, you don't get a free ride later when others win]
- If the amounts at stake are substantial, stay the course – there is light at the end of the tunnel
- Court of Appeal decisions create binding precedents on Tax Tribunal and Tax Courts which they must follow – so maybe better tax rulings from lower courts now?
- FRCS is reminded that it is not all-powerful – it must be more disciplined in its approach to assessments.

LAW CHANGES

- last Budget – no substantive changes to tax rates or amounts [election year bonus?]
- but important changes to how tax is collected and how FRCS enforces its laws – just as important
- and sometimes it's important to note what didn't happen



Law changes – 1

Everyone must have a TIN

- *Every Fijian citizen or resident* must, whether liable for tax or not, apply for a Taxpayer Identification Number (TIN) – s.37A, TAA
- A *resident* includes a person who is in Fiji for more than 183 days in any 12 month period.
- Maximum penalty of \$25,000 or imprisonment for 10 years or both

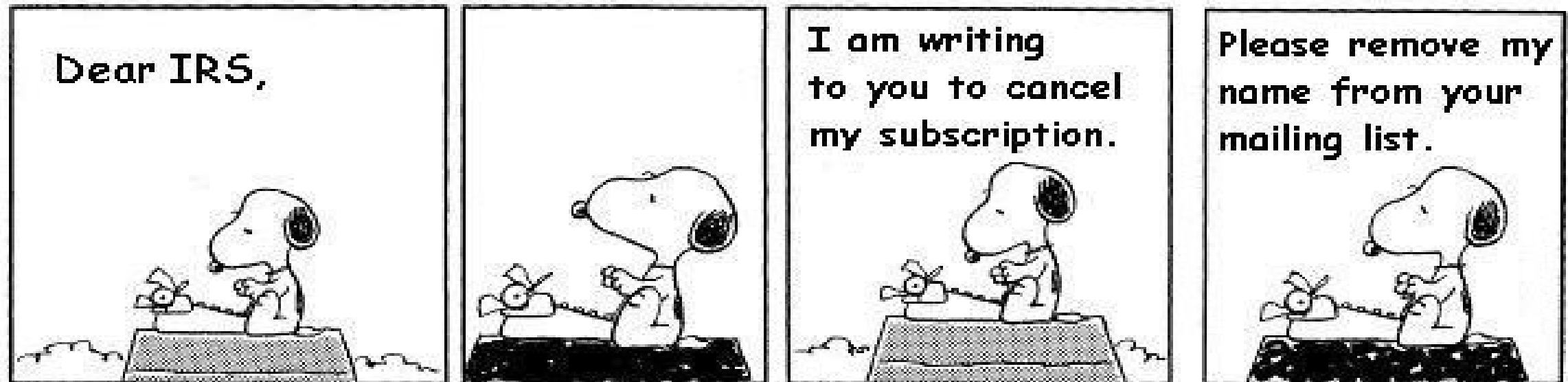
No exemptions – ??

[Move quickly or your babies will spend their first 10 years in jail?]



Law changes – 1A

So this is exactly what you can't do...



Law changes – 2

Businesses must notify FRCS of “change in status”

- *Every taxpayer that conducts a business* must notify FRCS within 21 days of:
 - any change in name, address, constitution or nature of taxable activity
 - any change in controlling interest
 - any other change or information required by an approved form [s.38A, TAA]
- Maximum penalty of \$25,000 or imprisonment for 10 years or both
- So if you change your Articles of Association – you must notify FRCS or go to jail – ???
- Meaning of business, controlling interest (not defined)

Law changes – 3

Omitting *any matter or thing* from your tax return is now a crime

- Now an offence to omit from any tax return or declaration, *any matter or thing required to be made in the tax return* [s.49(3)(b), TAA]
- Maximum penalty of \$250,000 [for once, you don't go to jail]
- aimed at taxpayers who don't declare assets (new requirement from 2018 income tax year) – ?



Law changes – 4 Offences by tax agents

- *Tax agents* (mostly accountants) help taxpayers prepare and file tax returns. Now they can be prosecuted
- Now an offence for a *tax agent* to:
 - prepare documents, make entries, declarations etc which are *false or misleading*
 - omit things which make documents *false or misleading*
- maximum penalty \$50,000 in fines, 10 years' imprisonment or both
- reflects FRCS obsession – tax agents “help taxpayers avoid tax”
- possibly unacceptable risk for accountants (who generally don't perform tax audits)
- how will this affect how your tax work is done?

Law changes – 5 – no EID

Export income deduction

- introduced in 2001 to encourage exporters
- in each year since 2001 exporting taxpayers incentivised by deductions (eg 50% deduction for the 2017 tax year) for qualifying exports
- no provision for EID for the 2018 tax year




MUNRO LEYS

WHAT'S HOT AT FRCS

What's hot at FRCS

Infringement Notices – 1

- FRCS's latest enforcement (revenue collection (?)) tool – the “FRCS parking ticket

	
FIJI REVENUE AND CUSTOMS SERVICE	
INFRINGEMENT NOTICE	
Date: 29/01/2019	Infringement Notice Number: TN134
1. Details of Offender	
Name:	[REDACTED]
Address:	[REDACTED]
TIN:	[REDACTED]
2. Details of Offence	
Description:	[REDACTED]
Particulars of Offence:	[REDACTED]
Contrary to: Regulation 28(3) of the Tax Administration (Electronic Fiscal Devices) Regulation 2017.	
This offence carries a maximum penalty. If you do not wish to contest this Infringement Notice, you are required to pay the fixed penalty of FJD50000 to the Fiji Revenue and Customs Service.	
The payment of the fixed penalty is due within 30 days from the date of issue of this Infringement Notice and is payable at any Fiji Revenue and Customs Service office. If you pay the fixed penalty, all liability in respect of the offence will be discharged and no further action will be taken against you with respect to this particular offence.	
If you wish to contest this Infringement Notice, you may elect to dispute this Infringement Notice in court within 30 days from the date of issue of this Infringement Notice.	
If you fail to pay the fixed penalty or dispute this Infringement Notice in court within 30 days from the date of issue of this Infringement Notice, you will be	
(i) liable to a late payment fee equivalent to 50% of the fixed penalty, in addition to the fixed penalty; and	
(ii) issued a departure prohibition order preventing you from leaving Fiji.	

What's hot at FRCS

Infringement Notices – 2

- Stated aim is “quick fine” for (potentially serious) offences
- As explained by FRCS to us – “like a parking ticket – pay the fixed penalty so you don’t have to go to Court”
- Trouble is – the fixed penalty is sometimes the maximum penalty - \$50,000 (!)
- Which means it is cheaper to go to Court and plead not guilty (because courts will generally not impose the maximum fine for a first offence)

What's hot at FRCS

Infringement Notices – 3

The process (whether it's lawful is another matter)

- FRCS issues an Infringement Notice [you can be notified by SMS or email]
- You must within 30 days either:
 - pay the fixed penalty [\$25,000/\$50,000/\$100,000]
 - *elect to dispute* the notice in a court
- If you do nothing:
 - 50% is added to your fixed penalty as “late payment fee”
 - you are issued a DPO. If you are a company, all your directors are issued a DPO until you pay
 - after 3 months, the Infringement Notice takes effect as a conviction.



What's hot at FRCS

Infringement notices – 4

99 different types of offence

Penalties (16 pages of prescribed penalties):

Section	Fixed Penalty Offence	Maximum Penalty: Fine Imprisonment	Fixed Penalty		
			Gross annual turnover less than \$500,000	Gross annual turnover between \$500,000 - \$1.5 million	Gross annual turnover more than \$1.5 million
49(1)	Failure to file a tax return	\$25,000 10 years	\$5,000	\$10,000	\$25,000
49(3)	False or misleading tax return	\$250,000	\$100,000	\$150,000	\$200,000
50	Failure to comply with obligations under: section 26 section 27 section 32 section 35(4) section 36 section 37A section 38 section 38A section 73(8)	\$25,000 10 years	\$5,000	\$10,000	\$25,000
52(1)	Use of false Taxpayer Identification Number	\$25,000 10 years	\$5,000	\$10,000	\$25,000

What's hot at FRCS

Infringement Notices – 5 – unresolved issues

- **how does a taxpayer *elect to defend*?**
 - FRCS: “You’ve got to file your own case in Court”
 - Munro Leys: “Wait a minute – this is your case!”
- [watch this space]
- **Imposition of late penalty fee and DPO**
 - Act doesn’t give regulations the legal power to do achieve this
- **Multiple Infringement Notices for the same offence** (eg failure to install VMS system after 6 months)
 - Recent Munro Leys/FRCS argument – FRCS withdrew second IN



What's hot at FRCS – 2

Transfer Pricing



FRCS currently focused on dealings between Fiji taxpayers and related parties offshore (looking for ways they claim Fiji taxpayers avoid tax)

- *Controlled transactions* – eg related parties loans, management support costs, services that Fiji taxpayers get from head office
- A branch is treated as a separate taxpayer from its parent
- Documentation requirement – if you are involved in *controlled transactions*, you must have a “transfer pricing policy”. If you don’t – minimum fine \$100,000

What's hot at FRCS – 3 – Customs audits

- **Classification of goods**
 - FRCS hunting for cases where wrong classifications/lower duty means less Customs duty paid
- **Concessions**
 - FRCS checking whether goods imported under concession are actually covered by the concession
- **Duty on royalties**
 - Do you pay a royalty to an offshore supplier for brand rights? FRCS may claim this is part of Value for Duty (**VFD**) of imported goods

Result: additional assessments or Customs Infringement Notices (CINS)

What's hot at FRCS – 3 – Customs audits

Managing Customs audit issues

- Check with Customs/tax advisers (accountants/lawyers) on any areas of doubt
- Do not assume your Customs agents know about all of these issues
[many of these issues are new to them and
may depend on information you have given them]



Surrounded

The risk you run every day as a Fiji director, officer and employee...

**Glenis Yee
(Partner)**

The background – 1

- Greater demands to comply with more complex laws – a global trend
- Regulators – make individuals personally responsible for compliance
- Fiji no different – but at times (as we shall see) a little bit extreme
- In Fiji, you can end up personally in court for your company's (alleged) misdeeds

The background – 2

In Fiji:

- you can end up in court personally liable for your company's (alleged) misdeeds:
 - even if you're not a director
 - even if you didn't know what your junior staff were doing
 - even if your company hasn't been found guilty (!)
- you can end up prevented from leaving Fiji because:
 - FNPF says your company didn't pay contributions
 - FRCS says your company didn't pay tax

Perhaps this is what our regulators think of us?



Need to understand

- **Who is a director/officer?** (it changes from one law to the next)
- **Duties – Companies Act 2015**
 - Consequences
 - Relief
- **Indemnification/Insurance?**
- **Other Risks**
 - OHS - FCCC - FNPF
 - ACCC - FTR - Tax
- **Experience**



“I realise that you are new to the board, but we do not refer to non-executive directors as ‘little helpers’ ...”

Companies Act 2015 – who is a director?

- “director” means *a person occupying or acting in the position of director by whatever name called and whether or not validly appointed.*
- Unless a company’s Articles say differently, directors
 - are deemed responsible for managing the business of the company and
 - in doing so may exercise all the powers of the company not required to be exercised in a General Meeting.



Companies Act 2015 – what about officers?

- Directors' duties extend to **company officers**. Who is an *officer*?
- May extend upwards e.g. to shareholders/trustees
- May extend downwards, eg senior executives.

Companies Act 2015 – what about officers? – 1

An *officer* is:

- a) a director or secretary
- b) a person:
 - who makes or participates in making decisions that affect the whole of or a substantial part, of the business of the Company
 - who has the capacity to affect significantly the Company's financial standing; or
 - in accordance with whose instructions or wishes the Director of a Company are accustomed to act.

Companies Act 2015 – what about officers? – 2

An *officer* is:

- c) a receiver or manager, of the company of the property
- d) a liquidator of the company; or
- e) a trustee or other person administering a compromise or arrangement made between the company and someone else.

Directors & Officers' Responsibilities

- Broadly, to protect the interests of stakeholders (including shareholders).
 - Duty to act within powers
 - Duty to promote the success of the company: s.104
 - Duty to exercise independent judgement: s. 105
 - Duty to exercise reasonable care, skill and diligence: s.10
 - Duty to avoid conflicts of interest: s.107
 - Duty not to accept benefits from third parties: s.108
 - Duty to declare interest in proposed transaction or arrangement: s.109
 - Duty to avoid insolvent trading
 - Duty to notify the Registrar of Companies (various)

Penalties for directors and officers

- **Pecuniary penalties**
 - if contravention is serious – up to **F\$200,000** + compensation for company loss
- **Criminal prosecution** – liable **on conviction to imprisonment** for periods not exceeding **5 years**
- **Disqualification orders**
 - Where the Court is satisfied that a person has contravened the statutory provisions, it may **also disqualify** that person from acting as an officer of any company for periods of **up to 20 years**.

No one is spared (in NZ anyway)

Former prime minister Dame Jenny Shipley ordered to pay \$6m over Mainzeal collapse



Rob Stock • 12:01, Feb 26 2019



LAWRENCE SMITH/STUFF

Former prime minister Dame Jenny Shipley has been found liable for \$6m in damages over the collapse of construction company Mainzeal by the High Court in Auckland.

Mainzeal/Shipley – 2

- Mainzeal – formerly major NZ construction co.
- Collapsed in 2013 owing NZD110m
- Court found directors guilty of trading company while insolvent
- Court found that creditors would have been better off if company had gone into liquidation earlier
- One director liable for more – “induced” others to continue to trade
- Covered by insurance (but don’t always bet on that)

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Rob Stock - 12:01, Feb 26 2019



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Former prime minister Dame Jenny Shipley has been found liable for \$6m in damages over the collapse of construction company Mainzeal by the High Court in Auckland.

Relief

- Business Judgement Rule – duty to exercise reasonable care, skill and diligence (s.106)
- Section 672 relief

Power to grant relief

672.—(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the Court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the Court may relieve the person either wholly or partly from liability on such terms as the Court thinks fit.

Insurance/Indemnity

- If authorised by the Articles, the Company may indemnify an officer for:
 - any costs incurred in any proceeding that deals with liability for any acts or omissions relating to his capacity as a director and if judgment is given in their favour, they are acquitted or the proceeding is discontinued: s.122(2)
 - liability to third parties or costs incurred in defending a claim – limited to civil liabilities only: s.122(3)
- If authorised by the Articles, the Company may effect insurance for officer for:
 - civil liability (not being a liability to the company)
 - any costs incurred in any proceeding that in defending or settling a claim relating to that liability
 - costs incurred by an officer in defending criminal proceedings in which they are acquitted ((s.122(5))

Health and Safety at Work Act

- Section 67:

Where an offence against this Act committed by a corporation is proved to have been committed with the consent or connivance of, or to have been attributable to a wilful neglect on the part of, an officer of the corporation or person purporting to act as such an officer, that officer or person is also guilty of that offence and liable to the penalty for that offence.

- To establish the intention of a corporation, it is sufficient to show that a servant or agent of the corporation had that intention.
- “officer”, means –
 - a) a director, secretary or executive officer of the corporation;
 - b) any person in accordance with whose directions or instructions the directors of the corporations are accustomed to act; or
 - c) a person concerned in the management of the corporation.

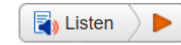
Fijian Competition and Consumer Commission Act 2010

- Section 133:

Where an offence against this Act ... is committed by a company.... every person who at the time of the offence was a director, shall be severally liable in prosecution and punishment... as if he or she had himself or herself committed the offence, unless he or she proves that the offence was committed without his or her consent or connivance and that he or she took all reasonable steps to prevent its commission

- onus is on you to prove that it was done without your consent or knowledge
- covers – directors, managers, secretary or similar officers

ACCC welcomes record penalties against Visy: Calls for stronger cartel law



2 November 2007

A record penalty of \$36 million was ordered today against Visy Board Pty Ltd and its director and owner, Mr Richard Pratt, following findings by Justice Peter Heerey of the Federal Court that Visy Board had engaged in price-fixing and market-sharing contraventions of the *Trade Practices Act 1974* with its rival, Amcor Limited.

This penalty incorporates a penalty against Mr Pratt for his role in approving the overarching understanding between Visy and Amcor.

The court also ordered separate penalties of \$1.5 million on Visy Board's former CEO, Mr Harry Debney, and \$500 000 on former Visy Board General Manager, Mr Rod Carroll, for their respective conduct in the contraventions by Visy Board.

The penalties plus payment of the ACCC's legal costs mean the bill will be well over \$40 million. The record penalties followed a settlement agreement between the Australian Competition and Consumer Commission, Visy Board and the individual respondents.

Justice Heerey found the record penalties are "*reflective of the fact that this must be, by far, the most serious cartel case to come before the Court in the 30 plus years in which price fixing has been prohibited by statute.*"

"This is one of the most serious, blatant cartels that the ACCC has litigated," Australian Competition and Consumer Commission Chairman, Mr Graeme Samuel, said today.



Financial Transactions Reporting Act 2004

- Section 40:

*If a body corporate commits an offence under this Act or any regulations made under this Act, an officer also commits the offence and is liable to the penalty prescribed for the offence, **whether or not the body corporate has been prosecuted or convicted**, if the officer fails to prove that he or she had taken all reasonable steps to prevent the commission of the offence by the body corporate.*

- Onus of proof on you to prove that you took all reasonable steps to prevent the commission of the offence
- Officer is defined as: “a director, officer, employee, agent or consultant of the body corporate.”

????

Financial Transactions Reporting Act 2004

- Not only banks. This law applies to:
 - Insurer
 - Insurance intermediaries (brokers/agents)
 - Lending
 - Credit institution
 - Lawyers/accountants – form companies, buy or sell real estate, manage trust funds
 - Real estate agents
 - Pawn brokers
 - Travel agencies
 - Money exchange
 - Car dealer
 - Any other prescribed business

Fiji National Provident Fund Act 2011

- Section 116(2)/(3):

Every officer shall be personally liable for the payment of mandated contributions... if the amount remains unpaid, the officer alienates, disposes of any monies received... or disposed of or parts with monies received or funds belonging to the employer and in the possession of the officer

- Not personally liable if you had no knowledge of the unpaid amount
- Officer in this case – director, MD, authorised officer, company secretary, treasure(r) or resident director or person with controlling interest in the company (shareholder!)
- Unless – insolvent or being liquidated – s116A

If a company that becomes insolvent or liquidated owes an amount as mandated contributions... each person who was a director at the time it become insolvent or was liquidated shall be personally liable for such amount.

Fiji National Provident Fund Act 2011 (cont.)

- Section 104(1): DPOs

If a person is liable to pay an amount... on account of mandated contributions and the amount is due and payable but not yet paid, and the CEO believes it desirable to prevent the person from departing Fiji... the CEO may by written order, prohibit the departure of the person from Fiji.

Fiji National Provident Fund Act 2011 (cont.)

- *Nair v Fiji National Provident Fund [2017] FJHC 736; HBM108.2017 (27 September 2017)*
 - Govind Nair (foreign national, director of GEL)
 - GEL neither insolvent nor liquidated and Mr Nair was in the process of negotiating a settlement
 - FNPF imposed DPO
 - Mr Nair challenged and Crt held that the DPO placed on him was “unlawful and unreasonable”
 - FNPF could not rely on s.116(A) and there had to be level of proportionality on the imposition of the DPO

Accident Compensation Act & (Employment Accidents) Regulations 2018

- Employers obligation to report and pay 2/3 weekly wages
- If the employer fails to report or fails to pay or dispute payment, then the employer commits an offence can be liable to pay \$10,000 in the case of an individual and \$100,000 in the case of a body corporate.
- If an employer commits an offence under Part 3 (Occupations Diseases) of the Regulations, then the Permanent Secretary can issue “a fixed penalty notice”.
- If a company receives an infringement notice and does not challenge or pay it, then if it is a company, the Director of Immigration must issue to all directors of the company, a DPO.

Tax Administration Act 2011

Section 41(5):

- *Every representative is personally liable for the payment of any tax due by the representative in that capacity if, while the amount remains unpaid, the representative alienates, charges or disposes of any monies received ... in respect of which the tax is payable or disposes of or parts with any monies or funds belonging to the taxpayer that are in the possession of the representative or which come to the representative after the tax is payable....*
- “representative”— CEO, MD, authorised officer, company secretary, treasure(r) or resident director or person with controlling interest in the company (shareholder!)
- *If the company becomes insolvent or is liquidated owes VAT, GTT, STT or withholding taxes or any other taxes For which it is liable to account, each person who was a director of the company at the time it become insolvent or liquidated is personally liable for such amount*

Tax Administration Act 2011 (cont.)

- Section 58(1)
- *If an offence under a tax law is committed by a company, the offence is treated as having been committed by every person who at the time the offence was committed, was the CEO, authorised officer, company secretary, treasurer or any similar officer*
- But if the offence was committed without the person's consent or knowledge and the person exercised reasonable diligence to prevent the commission of the offence, then the provision above does not apply

Tax Administration Act 2011 (cont.)

- Section 60B /C
 - Infringement notice provisions “fixed penalty orders” “on the spot fines”
- **Tax Administration (Infringement Notices) Regulations 2018**
 - If a company receives an infringement notice and does not challenge or pay it, then if it is a company, the Director of Immigration must issue to all directors of the company, a DPO.

Experience

Fiji National Provident Fund issues departure prohibition order to some overseas companies

5:24 pm GMT+12, 17/06/2018, Fiji

International companies currently operating in the country have been put under the spotlight as the Fiji National Provident Fund (FNPF) monitors their employee's deduction.

The FNPF has revealed a few of these companies have been issued a Departure Prohibition Order after it was discovered they were not deducting their employees FNPF contribution.

FNPF Manager Compliance Ratu Peni Gonelevu has confirmed these companies have ceased operation to enable them to clear their debt.

"For the overseas companies we have a few that businesses have been closed down and they were warned and they have departed but their names have been loaded on the departure prohibition order and if they do come in will get them to pay and clear all the debt."

Gonelevu adds they have introduced a compliance programme to stop this unscrupulous act.

The FNPF is calling on employees to assist in identifying the companies that are not complying.

SOURCE: FBC NEWS/PACNEWS



Exposure to Director Liability



What makes a good director?



Online documents, online safety, online everything

Evidence, e-commerce and saying only “nice” things in 2019

**Nicholas Barnes
(Partner)**

2018 *This Is What Happens In An Internet Minute*



ANOTHER MINUTE
ANOTHER FACEBOOK SCANDAL



ITS AFTER 10PM!

DO YOU KNOW WHERE YOUR PERSONAL DATA IS?



RECENT STORY IN WALL STREET JOURNAL (FEB THIS YEAR)

- Facebook is secretly accessing personal information.
- 11 popular apps – serving tens of millions of users literally spewing data to Facebook servers with little indication to the users of what was going on.
- Apps use a Facebook provided tool called App Events to collect and send info back.
(Data)

FACEBOOK IS FREE?



RECENT STORY IN WALL STREET JOURNAL (FEB THIS YEAR)

- Data from that App is then used to power Facebook's Advertising Algorithms.
- This is how when you look at a shirt online next time you are on line – the advert pops up
- But sensitive data was also being collected and sent back to Facebook servers.

SO FOR INSTANCE...

- ‘FCO PERIOD AND OVULATION TRACKER’ was sending all that data right back to Facebook.
- Facebook said if it finds sensitive data it’s deleted (But that can’t be verified – even if correct the info has still been sent and presumably viewed.)

UK

- Facebook has been fined £500,000 by the UK Information Commissioner's Office after Facebook allowed third party developers to access user information without sufficient consent from individuals.

Italy

- Earlier over 2017-2018 Italy's Competition Authority fined Facebook 10 million Euros for using people's data for commercial purposes contrary to Italy's laws.

France

- In January 2019, France's data watchdog CNIL fined Google 44 million Euros under the GDPR.

GENERAL DATA PROTECTION REGULATIONS (EU)



What does the GDPR do?

- It is the EU's newest stringent data regulation law
- It outlines the rules and regulations surrounding “personal data processing” of EU residents by “data controllers”
- It is designed to ensure **global compliance** and due diligence in protecting EU residents' personal data

What does the GDPR do?

- It gives additional privacy and freedom of information rights to natural persons such as the right to be forgotten.
- It gives EU electronic communications regulators greater prosecutorial powers

Who is impacted? (data controllers and processors)

- Designed predominantly for network and cloud service providers, social platforms such as Facebook, Twitter and Google, and personalised advertisers
- Generally – **ANY** organisation that handles (whether online or not) **personal data** of European Union residents (not necessarily citizens)
- GDPR requires compliance from non-EU entities as well who offer goods or services to EU residents or monitor the behaviour of EU residents, for example for personalised advertisements.

What is data “processing”?

- Collecting
- Recording
- Organising
- Structuring
- Storing
- Adapting



What is data “processing”?

- Altering
- Retrieving
- Using
- Transmitting
- Disseminating
- Restricting
- Erasing
- Destroying



- **You need consent to process personal data**
- **“Consent”** must be:
 - freely given
 - Specific and unambiguous
 - a clear affirmative statement or action to signify agreement
 - not just clicking a “box”
 - easily withdrawn

— CONSENT 101 —

**IF IT'S NOT A
HELL YEAH
IT'S A NO.**

GDPR ...

- It's only in Europe so I don't need to worry.
- WRONG
- If you trade with a European company/business you may well find yourself needing to comply with GDPR.

GDPR ...

- There are standard contractual clauses for the transfer of personal data to third countries (i.e. outside EU)
- That means you must have in place “*appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access and which provide a level of security appropriate to the risk represented by the processing and the nature of the data to be protected.*”

ARE YOU PREPARED FOR THIS REQUEST

Dear Santa!

My name is _____. In my childhood I used to write to You.
I would like to have now - under GDPR article 15 - my personal data.



Can you please send me

1. all data gathered by Santa's little helpers (with clarification like nasty/well behaving);
2. list of third parties you have shared my personal data with (mom, dad, grandparents or other relatives).

Thank you!

www.MyData2018.org

FIJI ONLINE SAFETY



“If you have nothing nice to say, don’t say anything at all, says Commissioner for Online Safety Act Anne Dunn.”

– *Fiji Sun* (online) 3 January 2019



Online Safety Act 2018 – came into effect on 1 January 2019

- Based upon NZ Harmful Digital Communication Act 2015
- The Act establishes the Online Safety Commission

Objectives of the Act

- Promote responsible online behaviour and online safety.
- Promote a safe online culture and environment that addresses Cyberbullying★, Cyberstalking★, Internet Trolling★ and exposure to offensive and harmful content, particularly in respect of Children.
- Not defined in the Act
- Deter harm caused to individuals by electronic communications
- Provide an efficient means of redress for such individuals

- “*electronic communication*” is defined to mean any form of communication transmitted or communicated electronically and includes any text message, writing, photograph, picture, recording or other matter that is communicated electronically
- “*Harm*” is defined as Serious Emotional Distress.

WHAT IS SERIOUS EMOTIONAL DISTRESS?



MUNRO LEYS



NZ caselaw provides some guidance

“The intended harm must be more than trivial. Being merely upset or annoyed as a consequence of a digital communication would not be sufficient to invoke the sanction of criminal law.

But not so far as a mental injury or recognised psychiatric disease.

OFFENCE OF CAUSING HARM BY POSTING AN ELECTRONIC COMMUNICATION

- Defendant intended to cause harm.
- The communication (i.e. posting) would cause harm to an ordinary reasonable person in the victim's position.
- The communication caused serious emotional distress.

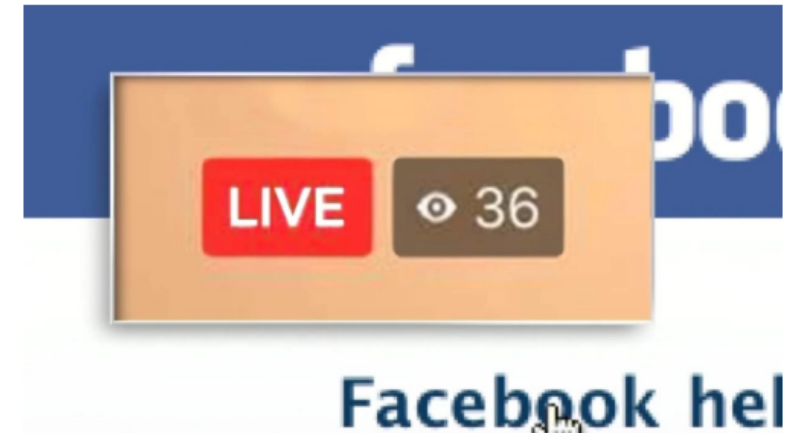
- FINE - \$20,000
- PRISON – 5 YEARS
- BODY CORP - \$100,000
- DIRECTOR - \$50,000 +/-or PRISON - 7 YEARS



- There is also an offence of posting an Intimate Visual Recording (includes threats to Post)

Wellington man gets supervision for filming sex with Finnish tourist and mate

13:03, Apr 05 2017



The man streamed a threesome live on Facebook in October 2016. He has pleaded guilty to making an intimate visual recording.

A Wellington man who filmed his threesome with a Finnish backpacker and a mate, and briefly livestreamed it on Facebook, has been given supervision.

On Wednesday, Wellington District Court judge Tim Black ordered the man to complete nine months of supervision in order to address his alcohol problem.

The man pleaded guilty to publishing an intimate visual recording in October 2016. His name was suppressed.

The judge said the man and his friend had met the Finnish backpacker while drinking and swapped phone numbers.

What does the Commission do?

(Apart from making sure we all only post nice things)

The Commission –

- Promotes responsible online behaviour and online safety through advertisements and awareness programs
- Receives complaints in relation to electronic communications that causes or intends to cause harm (serious emotional distress)
- Assesses and provides advice to complainants or to other prosecutorial authorities
- Investigates and seeks to resolve complaints through ADR

Complaints

- An individual may lodge a complaint with the Commission if the individual has reason to believe that he or she is the subject, or targeted recipient, of electronic communication intended to cause or likely to cause harm.
- Upon investigation the Commission may give notice requesting the removal of the electronic communication

What should you do as an employer?

- Develop adequate policies to deal with online safety incidents at work including cyber bullying or even bullying through emails
- Immediately remove from your network any electronic communication that may cause “harm”
- You can use reasonable disciplinary measures such as warnings and for serious cases you may consider summary dismissal (subject to a fair hearing)

Electronic Transactions Act 2008

- Can I contract online?
- Can I store my business records electronically?
- Can I agree this matter this by e-mail?
- Yes, well maybe.



Objectives of the Act among other things is to:

- Recognise the validity & promote the development of electronic communications in commercial and non commercial dealings & in dealings with Govt entities.
- To remove the uncertainty about using electronic methods to satisfy various legal requirements about documents and record keeping

- So far so good.
- Section 5 of the Act states,
A data message, electronic document, electronic record or other communication must not be denied legal recognition, effect, validity or enforceability on the ground that it is in electronic form.
- Ok got that sounds good



- Then comes section 5A
- Requirements for original form provides that if a law requires something to be presented stored, retained or generated in its original paper form that requirement is satisfied by the electronic equivalent.
- Great. But.....hang on.....



The requirement is satisfied IF

- There exists a **reasonable assurance** with regard to assessing the integrity of the said information from the time such information was first generated in its final form as a data message, electronic document, electronic record or any communication or otherwise.
- And the said information contained in the data message etc.. is available and can be used for subsequent reference.
- **So what is a reasonable assurance?**



- The standard for reliability of the assurance shall be assessed having regard to the purpose for which the information in a data message, etc was presented, stored , retained or generated and all other relevant circumstances, and
- The criterion for assessing the integrity of information in a data message etc is whether the same has remained complete and unaltered, apart from the addition of an endorsement or any change which arises in the normal course of communication , storage or display,

What does this mean?

- For instance does it mean that you can keep electronic copies of your business records for the required period rather than having to store the original paper copies?
- In my view YES
- Provided you are able to provide a reasonable assurance about the integrity of those records.

What would that assurance look like in practice?

- Have a clearly documented written data/record keeping storage policy.
- Policy should;
 - outline the steps in the process from paper to electronic (PDF format) including the software used and ways of identifying the timing in the process
 - state the purpose of keeping the records i.e. business record keeping
 - describe the likely or changes that do occur to the document during the communication/storage/display process
- MAKE SURE YOU FOLLOW THE POLICY.

What about contracts and transactions?

- Yes
- Section 5 applies to transactions except to the extent;
 - the parties agree otherwise
 - a written law provides otherwise
- Its not excluded by this Act

Section 18 evidence

- Any information contained in a data message etc
- touching any fact in issue or relevant fact; and
- complied, received or obtained during the course of any business, trade or profession or other regularly conducted activity, shall be admissible in evidence
- Shall be admissible in evidence provide there is no reason to believe the information is unreliable or inaccurate

Exclusions: Things that can't be produced electronically (yet)

Documents

- Wills, negotiable instruments, indentures, declaration of trust or powers of attorney, contracts for the sale or other disposition in (Land) immovable property, instrument for conveyance or registration of land and securities over, documents of title, affidavits, statutory declarations or other documents given on oath or affirmation.

Exclusions: Things that can't be produced electronically (yet)

Legislative requirement

- Requirements that notice be given to the public, requirement that information be given in writing or by registered post, requirements that notice be attached/ left or displayed search and entry warrants and last but not least

Exclusions: Things that can't be produced electronically (yet)

Judicial proceedings

- So sorry us Fiji lawyers will continue to kill trees to argue your cases

MORNING TEA

Human rights and business

They're meeting in the middle – what this means for you



Liliwaimanu Vuiyasawa
(Solicitor – Public Issues)

Staying ahead of the game

- Previously – business is “over here” and human rights is “over there”
- Customers are now becoming more demanding – “ethical tourism”, sensitivity to low-cost labour, child labour and slavery issues (think CNN and the “Freedom Project”)
- Companies now run public relations /reputational risks
- Large institutions (OECD, UN) are now actively benchmarking human rights performance



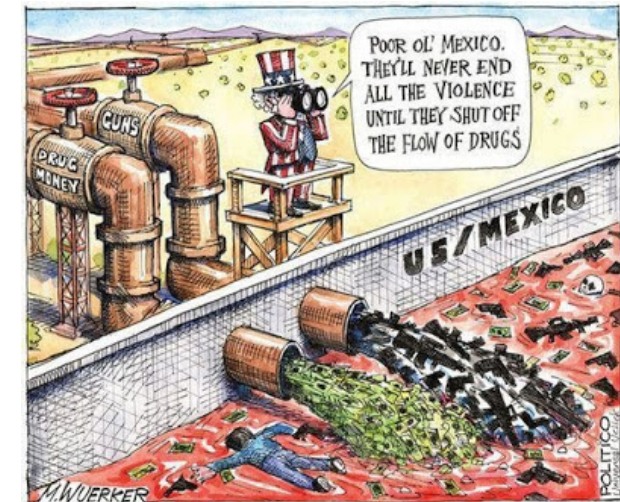
Human rights v business – around the world – 1

United States

- Energy Transfer sued environmental NGOs/activists for \$900 million “racketeering and defamation” in action blocking Dakota Access Pipeline
- Court dismissed lawsuit, favouring free speech

Europe

- NGOs in the Netherlands ready to sue Royal Dutch Shell for acting irresponsibly in the context of climate change



Human rights v business – around the world – 2

Cambodia

- Tate & Lyle (which buys Fiji's sugar) sued by villagers for loss of livelihood and land
- Boycott call – Sugarwise [international NGO] has called on Coca Cola, Pepsi, Cadbury, other major sugar buyers to switch away from Tate & Lyle
- European Parliament adopted resolution calling on Cambodian human rights commission to investigate escalation of human rights abuses



Human rights v business – around the world – 3

Cambodia/Thailand

- ILO investigating multinational beer companies that hire “beer promotion women” vulnerable to rape, sexual harassment and human trafficking



Human rights v business – around the world – 4

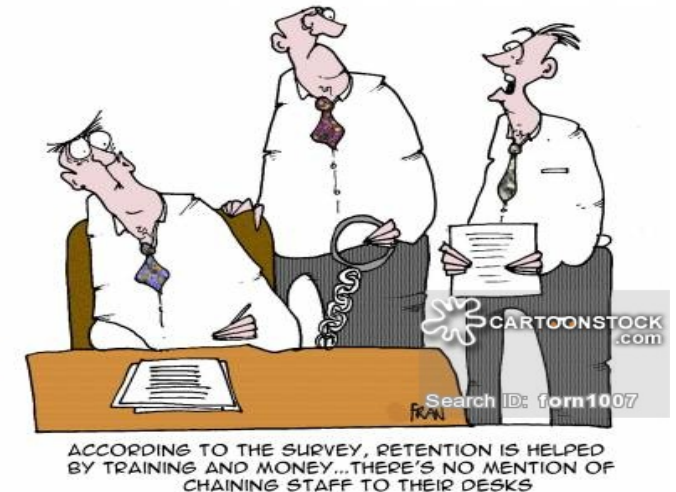
Brazil

- Since 2003 NGOs have published a “Name and Shame” list for businesses involved in widespread environmental destruction/forced labour
- Blacklisted companies can no longer receive loans from state-backed banks

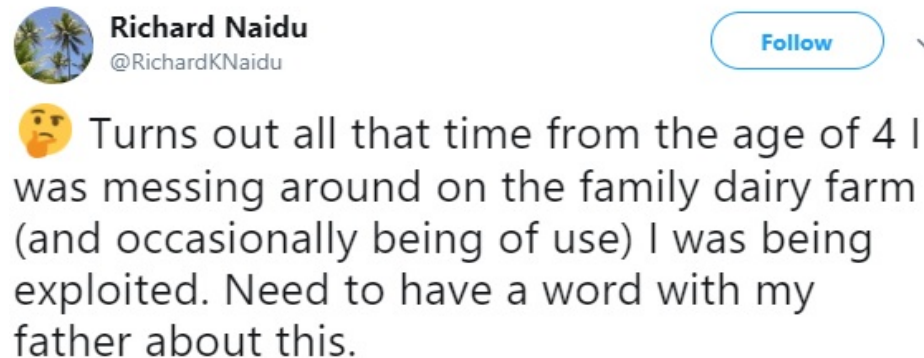


Fiji is not immune

- Hotel workers' union and NGO launched campaign against hotel manager for poor working conditions and allegedly ill-treating staff – hotel manager removed as a result
- Rarawai Cane Producers' Association suspended yet again from Fairtrade accreditation by FloCERT (Fairtrade certifying organisation) for alleged child labour practices



Not everybody agreed?



11:58 am - 25 Feb 2019 From [Fiji](#)


It doesn't matter who's right or wrong – the damage is done!

Hotels and multinationals also scrutinised

- Deutsche Bank withdrew its investments in Station Casinos LLC, Nevada due to serious human rights concerns related to casino/hotel workers' health and safety, violating workers rights to freedom of association/collective bargaining
- Deutsche Bank under fire from other OECD member states for failure to address human rights abuses given its commitments under international instruments and its own human rights policy



Keep a lookout! New and proposed laws/guidelines

- UN Human Rights Council - **Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework** [2011] – sets global standard for preventing and addressing adverse human rights impacts linked to business activity includes remedies for victims
 - OECD **Guidelines for Multinational Enterprises** – forum of 30 member countries sets standards for responsible business conduct on issues such as human rights, labour rights and the environment
 - These documents set trends
 - Stay ahead of them
- 



National laws

- US – passed the *California Transparency in Supply Chains Act* [2010]
 - Congress now considering *Business Supply Chain Transparency on Trafficking and Slavery Act*
- UK – *Modern Slavery Act* [2015]
- Brazil – *National Slave Eradication Pact*

If we are exporting to/importing from/interacting with businesses in these countries – potential impacts for us



Corporate Human Rights Benchmark

BAND RANGE	COMPANY	INDUSTRY	BAND RANGE	COMPANY	INDUSTRY
80-90%	Adidas	AP	20-30% (cont.)	Rosneft Oil	EX
70-80%	Rio Tinto	EX		McDonald's	AG
	BHP Billiton	EX		Pernod-Ricard	AG
60-70%	Marks & Spencer Group	AP&AG		Kroger	AG
	Unilever	AG	10-20%	The Hershey Company	AG
	Vale	EX		Suncor Energy	EX
	ENI	EX		Exxon Mobil	EX
	VF	AP		Ahold Delhaize	AG
50-60%	The Coca-Cola Company	AG		PTT	EX
	Kellogg	AG		Grupo Mexico	EX
	Royal Dutch Shell	EX		LVMH	AP
	Inditex	AP		Aeon Company	AP&AG
	Freeport-McMoRan	EX		L Brands	AP
	Anglo American	EX		Target	AP&AG
	Gap	AP		Sysco	AG
40-50%	Hennes & Mauritz	AP		Compass Group	AG
	BP	EX		Norilsk Nickel	EX
	Hanesbrands	AP		TJX Companies	AP
	Total	EX		Anadarko Petroleum	EX
	Nestle	AG		Marathon Petroleum	EX
	Repsol	EX		Yum! Brands	AG
	PepsiCo	AG		Canadian Natural Resources	EX
	Diageo	AG		Kohl's	AP
	Petrobras	EX	0-10%	Tapestry	AP
	Woolworths	AG		Phillips 66	EX
30-40%	Glencore	EX		PetroChina	EX
	ConocoPhillips	EX		BRF	AG
	Next	AP		Costco Wholesale	AP&AG
	Ecopetrol	EX		Starbucks	AG
	Danone	AG		Nordstrom	AP
	Heineken NV	AG		Falabella	AP&AG
	Equinor	EX		Devon Energy	EX
	Tesco	AP&AG		Oil & Natural Gas Corporation	EX
	Nike	AP		Gazprom	EX
	General Mills	AG		Ross Stores	AP
	Under Armour	AP		Kraft Heinz	AG

- Leading companies are making commitments to improving conditions in their supply chains/service delivery/working conditions.



Human rights is actually a component of a lot of things you're already doing!



Implementing human rights policies – what others are doing

- **Radisson Hotel Group**, *Human Rights Policy Statement* – commitment to promoting human rights in its business operations – ethical business conduct, protection of children, combating human trafficking, protecting employee rights
- **adidas Group** (highest rating under CHRB for best human rights performance). Developed “Workplace standards” for its supplier businesses – promoting employee welfare, safety and health at work and environmental protection
- **ANZ** – Employment Opportunities Policy – seeks to eliminate and prevent discrimination/harassment, workplace bullying and victimisation

Why should your business care about human rights

- Increasingly important to our customers/clients
- Emerging trend – governments passing laws requiring companies to respect human rights in the supply chain
- Reputational damage loss of customers/investors
- Risk of customers/other businesses boycotting your products
- Important to workers – collaborative approach on improving working conditions
- Increased credibility – businesses as powerful human rights advocates
- Embracing human rights is a powerful recruiter – employees want to work for a “good” organisation

A few first steps:

- Identify your **red flags**
 - employment conditions (wages, work conditions)
 - attitude to equality/diversity issues – equal rights, non-discrimination
 - environmental issues
 - are your managers on board? Do their attitudes pose a risk?
- Do you have suppliers who pose a risk to your business?
- Include human rights criteria in existing auditing and control systems – set the standard



Search and seizure

What to do when the regulators turn up at reception

**Ronal Singh
(Senior Associate)**

Regulators are becoming increasingly aggressive

- Fiji Police Force
- Fiji Independent Commission Against Corruption (FICAC)
[Focused on crime]
- Fiji Revenue and Customs Service (FRCS)
- Fijian Consumer and Competition Commission (FCCC)
- Labour Department
- Fiji National Provident Fund (FNPF)
[Focused on compliance (and fining you)]



#116764623

Enthusiasm not always matched by skill or legal understanding

Policeman: Here is a search warrant

Fiji Times: What are you searching for?

Policeman: The *Fiji Times* weather page on 6 August 2017

Fiji Times: So why didn't you just ask us for a copy?

Policeman: Here is a search warrant

Fiji Times: What are you searching for?

Policeman: A copy of your “flats to rent” classified pages on 5 July 2017

Fiji Times: ??



[True stories – and we still don't know the answers]

Increased aggressiveness = room for mistakes

- Regulators should be specific about what they want. They can't go on "fishing expeditions".
- Where you have contractual obligations of confidentiality you must be specific about what you disclose. If you give up a third party (eg customer/supplier) information when the warrant did not require it, you could be sued. **Be careful when asked for "voluntary disclosure"**

“I haven’t done anything wrong, so I will just deal with it”

- There are so many things you now have to do, you’ve probably done some (minor) thing wrong (!)
- Current regulatory culture punishes minor mis-steps
- Regulators have poor understanding of how business works
- Regulators generally assume everyone is a crook/labour exploiter
- Defending charges in court is expensive
- Pleading guilty to get rid of expensive litigation = reputationally damaging

Put yourself in the best position to deal with legal proceedings

So

1. What are the regulators' rights?
2. What are your rights?
3. What are the dos and don'ts?



Hmm...This looks worse than I had thought.

Regulators' rights - 1

- **Generally** - regulators have rights to full and free access to any premises, place or property
- Some limits on right of entry to private homes (FNPF, Labour Department)
- **Generally** (not always) regulators need a warrant or similar document
- Rights must be exercised reasonably/lawfully – regulators must follow a fair process

Regulators' rights – 2

Police rights

- Police can enter premises to search. Normally they need a warrant.
- However, in some cases they can enter (by breaking and entry if necessary) without a warrant
- FICAC has similar rights

Regulators' rights – 3

Rights to seize documents and other goods

- May include right to seize/retain documents, accounts, or data storage devices (including computers) for as long as they require

[generally they will try to hand computers back ASAP – but they may want to copy the hard drive]

- Alternatively, may copy accounts, documents, records, or information stored on a data storage device to which they have access

Regulators' rights – 4

Rights to interview, etc

- Generally – a right to interview you, your employees and other persons acting for you “*either alone or in the presence of another person*”
[note however – you don't have to answer]
- Labour Department can ask you to provide documents and “*produce any worker*” (to be questioned)
- FNPF can “*take photographs, make video or audio recordings and make sketches of the premises*”

Your rights – 1

- **Constitutional rights protecting**

- Freedom from unreasonable search and seizure
- Right to silence
- Right to legal advice

(these rights have some restrictions, but a good starting point)

- **“Judges’ Rules”**

(old common law rules – still referred to by Police and judges)

Regulators generally trained on constitutional rights (but maybe some of them failed the course)

Your rights: Constitutional rights – 1

- Section 12 Freedom from unreasonable search and seizure
 1. *Every person has the right to be secure against unreasonable search of his or her property and against unreasonable seizure of his or her property.*
 2. *Search or seizure is not permissible otherwise than under the authority of the law.*

Your rights: Constitutional rights – 2

- **Section 13(1)(a)(ii) Right to remain silent**

You can refuse to comment or provide an answer when questioned, before or during legal proceedings.



Remember...

You must provide your name and place of residence when asked by a police officer.

(Section 19, Criminal Procedure Act)

Your rights: Constitutional rights – 2

- **Section 13(1)(c) Right to seek legal advice**

You have the right to contact and consult your lawyers

Use it:

1. Your lawyers can advise on process and rights
2. If your lawyers are there at the beginning they can protect the legal rights you need later
3. Your lawyers know and have experience of the regulators – they can use other cases to remind regulators where there is no case against you
4. Often just our presence will make the regulator behave.



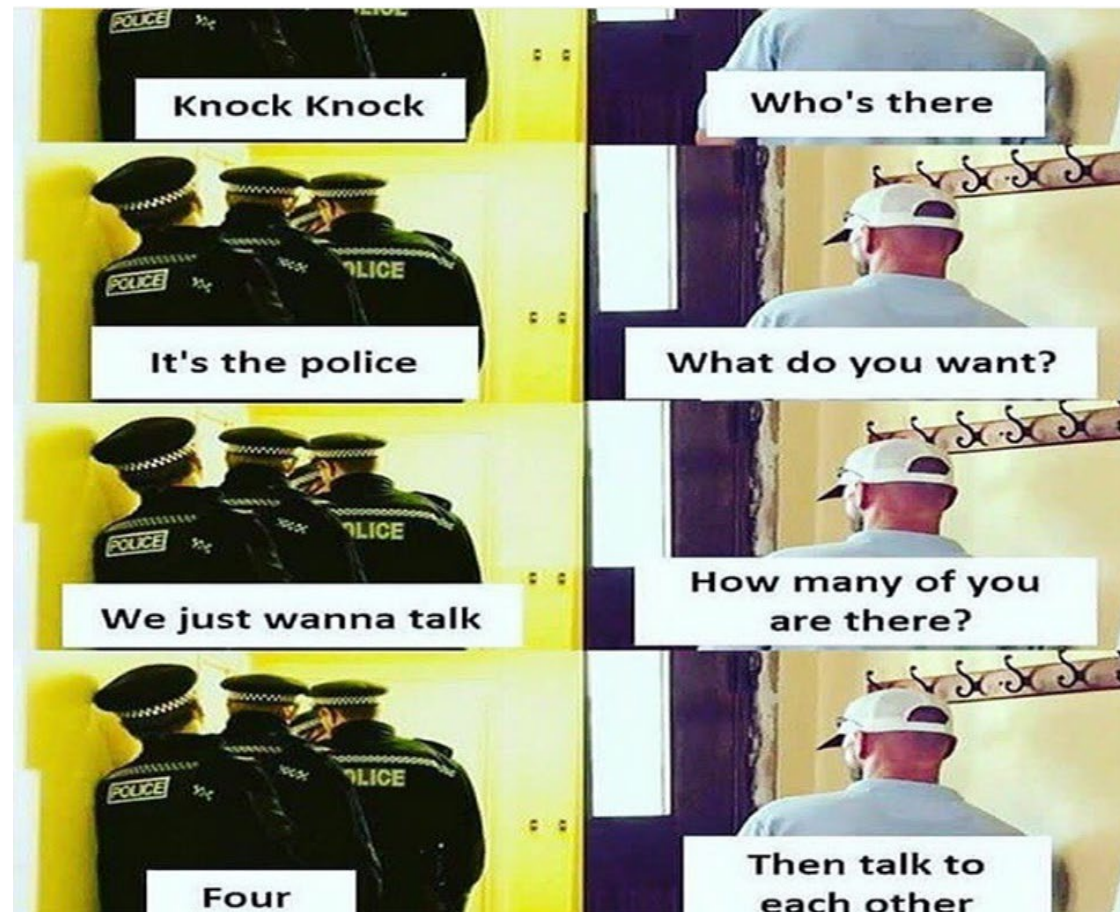
Your rights: Judges' Rules

- Allows the police to question any person with a view to finding out whether, or by whom, an offence had been committed but
 1. requires the police to give a caution when they have evidence to suspect that a person has committed an offence
 2. requires a further caution when a person is charged
 3. requires a record of questioning to be kept (and which is given to the accused as a disclosure)
 4. no statement or evidence is admissible in court proceedings unless obtained voluntarily.

dos
&
don'ts



This is probably a “don’t”



REGULATORS APPEAR WITHOUT WARNING – BE READY!

1. Front office staff – need training/written procedure
2. Who in your organisation is to take charge?
3. Who is the second alternative if the first one can't be reached?
4. Is your lawyer's contact name and number in easy reach? (it's not the time to be shopping for the best lawyer)




IF YOU'RE IN CHARGE – 1

1. Ask for ID (there have been impersonations)
2. Identify all officials and who is in charge
3. Record all names, ranks and ID numbers
4. Record everything that happens, including the time it happens
5. Ask to copy the search warrant/other document served on you (if regulators see you are doing this they will be better behaved)
6. Guide regulators to a separate space
7. Be polite (but firm). **Keep communication to a minimum**



IF YOU'RE IN CHARGE – 2

8. Contact your lawyer (very important!) 
9. Send your lawyer the search warrant/other document (so he/she knows the law before arriving)
10. If there is a search – be present during the search
11. If more than one officer is searching – assign a senior staff member to each person searching
12. Keep a continuous record of what is happening



IF YOU'RE IN CHARGE – 3

- DON'T

1. Panic (and rush your responses)
2. Insult/threaten investigating officer (*or offer them lunch money*)
3. Believe them (when they say “it’s just a small thing”)



WHAT YOUR LAWYERS WILL DO WHEN THEY ARRIVE

- communicate with the officials
- manage the process (including what may be searched for/seized and what may not)
- if there is a search, ensure a proper receipt is obtained for documents taken)
- advise you
- arrange next steps after the search

NOT ALL REGULATORY QUERIES INVOLVE A SEARCH

(A summons/inquiry may arrive by letter, with a deadline)

- **Don't try to respond without professional advice**
(sometimes the first letter is just the beginning – and remember “the first 10 mins is free”)
- **Get it to your professional adviser immediately**
(sometimes responses to regulators take longer than you think)
- **If you won't be able to meet the deadline tell your adviser**
(she/he can negotiate an extension)

Accidentally on purpose

Some nasty surprises for employers under the new ACCC scheme

Jon Apted
(Partner)

RECENT EMPLOYMENT LAW DEVELOPMENTS

- New leave entitlements
- ACC replaces Workmen's Compensation
- And in other news



FAMILY CARE LEAVE

Who is qualified?

- An employee who has completed **at least three months' continuous service** with an employer

How much?

- May take “not less than 5 working days [of paid leave] during each year of service”
 - Like sick leave, all available immediately – should not be pro-rated

What for?

- “Provide care or support” to a member of his or her “immediate family” or “household”
- Different from other countries where family care or carer's leave comes out of sick leave and has a broader definition of “immediate family”
- Australia – 10 days paid sick leave
- New Zealand – only 5 days paid sick leave

Family Care Leave 2

Who is your “immediate family”?

- Your spouse, *de facto* partner, child, parent, or sibling

What about your “household”?

- “The occupants of a dwelling-house who are financially dependent on each other or an occupant of the dwelling-house” i.e. any one who lives with you



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Conditions?

- Worker must notify the employer, “as soon as reasonably practicable,” of his or her absence or intended absence, and the reason.
- No requirement for medical certificate (unlike sick leave or NZ family care leave)
- Unused family care leave automatically lapses at the end of the applicable year of service.
- Like sick leave, not entitled to receive payment for unused leave upon termination.

Family Care Issues

- Defining “care or support”
- Proof – impossible except for worker’s children
- Impossible for employers to plan
- Can be expensive and inconvenient for employers who already give generous annual and other leave
 - should Employers offer to pay out unused family care to deter “use it or lose it” attitude?



INCREASED MATERNITY LEAVE

- From 84 to 98 days paid maternity leave (14 weeks)
- From 49 days (7 weeks) before to date of confinement



PATERNITY LEAVE

How much?

- “Not less than 5 working days” of paternity leave

When?

- when (i) his spouse or *de facto* partner is entitled to maternity leave or would be so entitled if she were employed

De facto

- Both must be at least 18 years old and have lived as spouses for more than one year (but employer can accept shorter period)



Paternity leave – 2

Conditions

- He is or will be “a primary caregiver” of the child meaning that he is/will be “a person who is responsible for the care, development and upbringing of” the child
- He provides the employer with a certificate signed by a registered medical practitioner or registered nurse specifying the child’s due date.

When can it be taken?

- Any time during the period beginning three months before, and ending three months after, the due date specified in the certificate
- No accrual



New Leave Entitlements - Tax Benefit

- 150% deduction for family care and paternity leave
- So government subsidising about 10% of cost of new leave



NEW LAW ON WORKERS' COMPENSATION

- Workmen's Compensation Act (“**WCA**”) repealed from 1 January 2019
- replaced with new scheme under Accident Compensation Act 2017 and Regulations (“**ACA**”)
- **WCA still applies to accidents before to 1 January 2019**



What the WCA did – 1

- “No fault” compensation for “*accidents arising out of and in the course of employment*” in comparison to *negligence* claim which requires proof of “fault”
- Compensation payable even if worker was disobeying instructions but doing work, but not if resulted from “serious or wilful misconduct, unless Court ordered otherwise
- No liability if worker had falsely represented that they were not or had not previously suffered from similar injury
- Workers had to notify the Employer of the accident as soon as practicable and compensation had to be claimed within 3 years

What the WCA did - 2

- Required employers to make 2/3 wages payments if worker was *unable to earn his/her full wages* for more than 3 days
- Applied in cases of *temporary incapacity* or *before permanent incapacity* was assessed
- Maximum was 260 weeks' wages or the lump sum maximum amount for permanent incapacity
- Lump sum for permanent incapacity (maximum \$67,000) or death (maximum \$50,000)
- Payments on death to "dependents" subject to Court order

WCA - 3

- Employers had to report accidents at work and deaths by any cause but did not have to make periodical wage payments or lump sum compensation if they did not believe that they were liable
- Onus was on MOL to claim and take it to Court if employer did not pay
- WCA was a “code” with detailed provisions for medical reports, review etc
- Almost all employers were insured for WCA and also for common law “fault” negligence claims
- So - “no worries except paying premium”



*"The insurance company won't pay for your skateboard accident.
They said that stupidity is a pre-existing condition."*

The new ACA

- Lump sum payments for permanent incapacity now paid by Accident Compensation Commission Fiji (“**ACCF**”)
- But while periodical payments are still payable, they are payable by employer – and there are no clear rules about when you should pay or stop paying
- All insurance cancelled by insurers as at 31 December 2018 in respect of accidents from 1 January 2019



The new ACA

“Accidents”

- Act set up ACCF to pay compensation for “personal injury” arising out of an “accident” as defined in Schedule
- Originally only motor vehicle accidents were listed and Act drafted around the concept
- Minister has power to add to Schedule and has now added –
 - “accidents arising out of and in the course of employment including any incident that causes a prescribed disease”
 - “accidents on school premises at school events”
 - 6 pages of “prescribed diseases” – covers every conceivable disease

Accident Compensation (Employment Accidents) Regulations 2018

- Very “bare bones” legislation
- Employer must report accidents causing injury “*arising out of and in the course of employment*” to PS and the ACCF within 14 days of becoming aware
- Must report death “*arising out of and in the course of employment*” to PS and the ACCF within 7 days
- Problematic requirement – because whether an accident “*arises out of and in the course of employment*” can be arguable

2/3 Wages Payable - 1

- Regulation 6 – *“If a worker suffers any personal injury as a result of any accident arising out of and in the course of employment, the worker’s employer must pay the worker a weekly payment of two-thirds of the weekly earnings which the worker was earning at the time of the accident”*
- Only condition is that the aggregate should not exceed the lump sum payable or 260 weeks
- Regulations do not refer to temporary incapacity or incapacity or inability to earn at all
- Not clear at all about how this applies for prescribed diseases



'We're going to need a bigger rug or we're sunk.'

2/3 Wages Payable – 2

- Makes no provision for wilful misconduct or pre-existing conditions
- Unlike WCA, does not say that worker needs to be missing out on wages i.e. only while worker cannot earn
- Does not say when payments are to stop
- Written as if payable as soon as there is injury at work and continues for 260 weeks or amounts to the maximum lump sum
- Can be significant amount of self-insurance
- Do not get wages back out of permanent disability lump sum



'We're going to need a bigger rug or we're sunk.'

Disputing Liability

- Employer can write to PS to dispute the liability to pay – but only on ground that *“the accident did not arise out of and in the course of employment”*
- No prescribed time period limiting when you must dispute liability to pay but advisable to do so immediately
- Employer can't seem to dispute that:
 - worker was not injured or
 - injury is less serious than the worker claims or
 - worker has sufficiently recovered
 - worker can do lighter duties



"Your x-ray showed a broken rib, but we fixed it with Photoshop."

Disputing Liability – 2

- PS has 7 days to accept or reject an employer's dispute and must reject the dispute if it's "frivolous"
- If PS accepts, he refers it to ERT to decide
- ACCF also awaits outcome of case for lump sum compensation
- If PS rejects dispute, employer must make the weekly payments!



ACCF

- Only pays lump sums
- Permanent partial incapacity – maximum \$75,000
- Permanent total incapacity – maximum of \$150,000
- Death – \$75,000
- But applications for compensation on death must be made by “personal representative” and compensation now payable to worker’s “personal representative” (assuming there is one) i.e. estate, not dependents – makes sense for compensation for car accidents but not worker’s compensation
- Funded by TPAF levies – but scheme can’t logically be limited to workers of employers who have paid their levies
- ACCF will also pay negligence claims (complicated procedure)

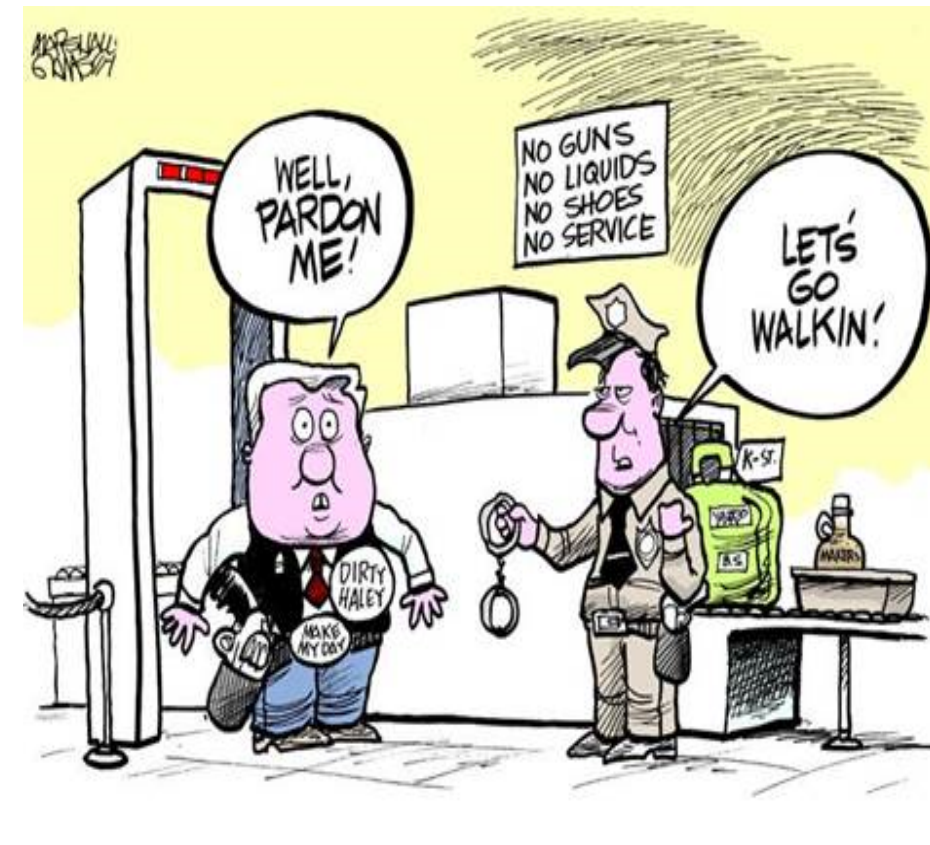


THE SCARY PART – OFFENCES

- if employer fails to report injury or death, “arising out of or in course of employment”, PS issues demand notice to report
- failure to comply with demand notice is an offence – maximum fine \$10,000 (individual), \$100,000 company
- difficult cases where employer does not believe injury occurred out of or in the course of employment since reporting acknowledges that it did
- failure to pay 2/3 weekly payment or dispute liability – also offence – same penalties
- no demand notice provision for failure to make weekly payment

FIXED PENALTY NOTICE FOR OFFENCES

- Ministry can issue fixed penalty notice to pay \$1,000 or \$10,000 for offence
- 30 days to pay or “elect to dispute the fixed penalty notice in Court”
- If you don’t do either, individual or directors “**shall**” be issued with a DPO
- Must also pay late payment penalty of \$500



Fixed Penalty Notice For Offences – 2

- Can either pay lump sum/instalments
- If you wish to dispute, you must notify the Ministry before you pay the fixed penalty
- Why do both? (if you are stopped at airport)
- Not clear how you “dispute” – do you apply to the Court or just notify the Ministry, which must then prosecute you?
- If you fail to do anything within 3 months – it is a conviction and PS can apply to Court for maximum penalty
- Probably unconstitutional breach of freedom of movement, presumption of innocence and separation of powers



And in other news

- *The case of the Mexican chef*
reminder that –
 - probation periods should ideally be set out in the contract
 - employers should ensure they have acknowledged copies of Handbooks
 - your published probation procedures should be followed
- ERC decides it has power to hear an unfair dismissal claim which is not reported as a grievance to Mediation Services – means liability is not limited to \$40,000
- Legality of compulsory retirement clauses still not clarified

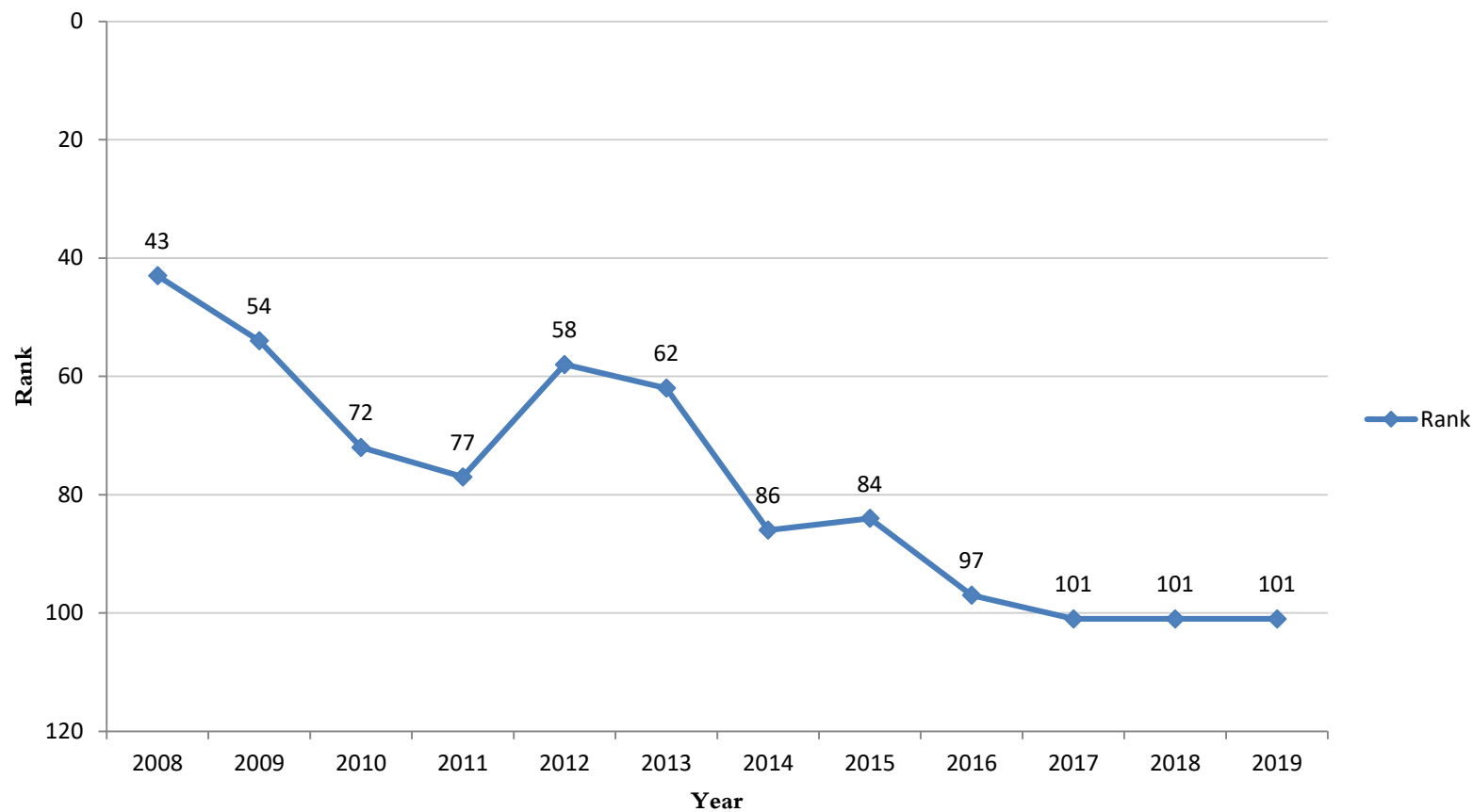
Here we go again

**The “DRAFT FIJI DIRECT INVESTMENT ACT” – light
at the end of the foreign investment tunnel?**

**Richard Naidu
(Partner)**

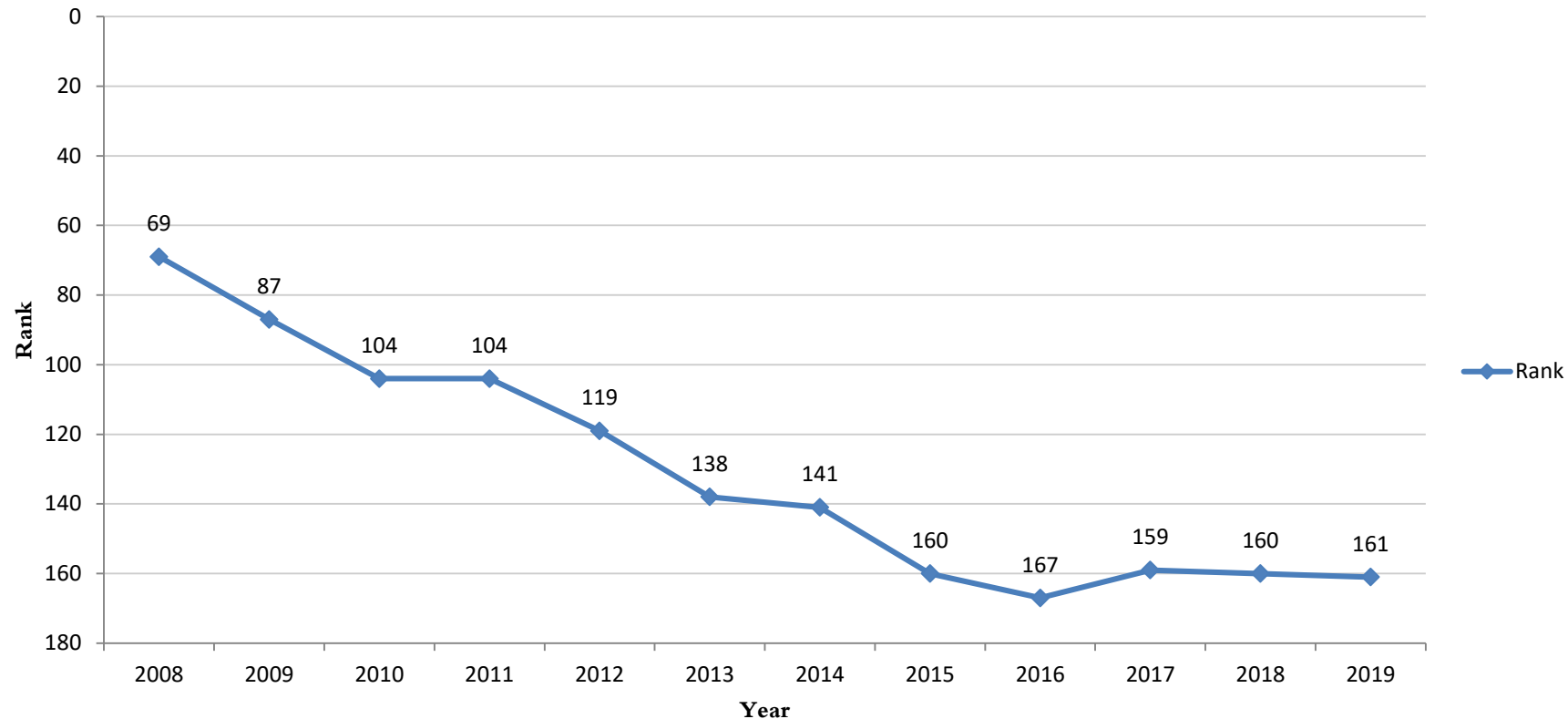
2019 ease of doing business update

www.doingbusiness.org (190 countries)

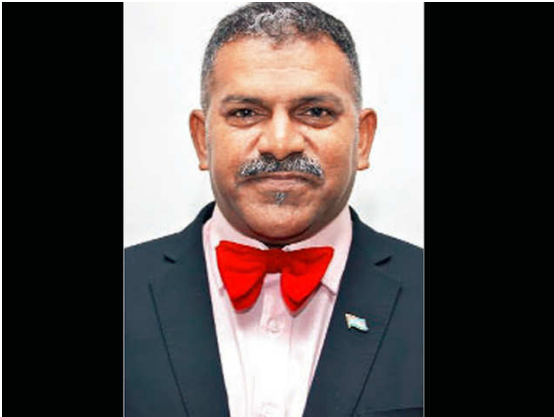


2019 ease of starting business update

www.doingbusiness.org (190 countries)



Ease of doing business 2018 – Minister of Trade responds in Parliament:



survey reflects the views of “anti-Government agencies”

“the World Bank is not always correct”



But wait! Is there light at the end of the tunnel?

DRAFT FIJI DIRECT INVESTMENT ACT 2018 (February 22, 2018) ¹	
Table of Content	
Section	
PART 1 GENERAL PROVISIONS	
1. Short title	
2. Commencement	
3. Definitions	
4. Purpose	
5. Scope	
6. List of reserved and restricted areas	
PART 2 ESTABLISHMENT OF FOREIGN INVESTMENTS	
7. Foreign investor and investment registration	
8. Reporting requirement	
9. Protection of essential interests	
PART 3 INVESTOR RIGHTS AND OBLIGATIONS	
10. National treatment and Most-favoured nation clause	
11. Minimum standard of treatment	
12. Freedom to invest	
13. Freedom to manage one's own business	
14. Protection against expropriation without compensation	
15. Access to freely convertible currency	
16. Transfer of funds	
17. Access to land	
18. Right to employ staff	
19. Responsibilities of investors to comply with Fijian laws	
PART 4 INVESTMENT INCENTIVES	

Draft “Fiji Direct Investment Act 2018”

- Now circulated for initial consultation (selected stakeholder groups)
- World Bank input (?)
- Initial draft submitted to Govt in April 2017; next draft February 2018 (it’s taken two years to escape)
- Proposes a significant (?) change in direction for regulation of foreign investment – but will it happen?

Foreign Investment Act 1999

- you must apply for your FIR C
- reserved/restricted activities
- there will be a “Foreign Investment Policy” (?)
- you must apply to change your FIR C if ownership changes
- you must apply to change your FIR C if activity changes
- we’ll cancel your FIR C (and confiscate all your assets) if you breach your FIR C
- we can “monitor” you (and fine you if you don’t co-operate)

Draft Fiji Direct Investment Act

- You must register
- Reserved/restricted activities but “exception only” basis
- No less favourable treatment for foreign investors than domestic investors
- Foreign investor rights (they don’t change very much but they sound nice)
- Freedom from expropriation
- “Investment Ombudsman” (?)

The commentary doesn't mince words

- “Screening [foreign investors] is inherently discriminatory...based on the false premise that the potential economic impact of the investment will be different just because of the foreign origin of the investor”
- “Discriminatory screening of foreign investment is far from good regulatory practice. Eliminating FDI screening would not mean Fiji must give up any right to regulate; it would mean rather that Fiji would have to pursue its legitimate public policy objectives by focusing on **efficient** means to achieve such objectives rather than on the distinction between nationals and foreign investors”

The costs of “screening”

- “...only 20% of states in the world impose a screening system for approval of foreign investment. Fiji is among those states. No high-income OECD, Eastern European, Central Asian, Latin American or Caribbean states impose such a requirement.”
- “From the investor’s perspective, screening adds to their investment costs in the form of time delays, onerous compliance requirements and what are generally described as “hassle costs”
- “IF should compile a list of the reasons why it [screens foreign investment]...such an exercise will clarify the rationale for eliminating screening and build buy-in for the reform”

But reforming investment laws won't fix this:

Companies Office: “We can't register your company until we have a resident director”.

Expat: “That's me”.

Companies Office: “You'll need a work permit”.

Expat (to Immigration): “Can I have a work permit?”

Immigration: “Register your company first”.



And it won't fix this:

Australian charity, island owner, wants a foreshore lease:

Lands Dept: “You must have a TIN”

FRCS: “To have a TIN, you must have a FIR C”

Investment Fiji: “To have a FIR C, you must be a company”

Client: “But we're not a company, we're a charity”

IF: “But you have to be a company”.



And, they've finally reached the lawyers:

Lawyer to FRCS: "Please give me a TCC."

FRCS: No. Your company didn't file a tax return".

Lawyer: "That shelf company? I quit when the client took it!"

FRCS: "Well it's not on file at the Companies Office".

Lawyer: "Here's the #\$\$%^ 10-year old company search!"

FRCS: "OK. Here's your TCC, carry on".



So, will our investment laws change a little bit?

- 2 years in, not moving at rocket speed
- Take a look at the document, offer your views
- Beg for action?



- Note: The material set out in this presentation is of a general nature. It is not a substitute for specific legal advice in a given situation and should not be relied on as such. Munro Leys cannot accept responsibility for any such reliance.