

Why the Burness/Shameem case is not likely to be heard
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In August 2011, upon request by lawyer Shaista Shameem for the David Burness case, I provided a statement of my assessment of the proposal of the Fiji National Provident Fund Board to reduce the annuity rates of existing pensioners.

Despite being postponed from last year to February 8 of 2012, the legal case has not been heard, and no date is being set for the hearing- no doubt a consequence of the FNPF Transition Decree (see the last section of this article).

The pensioners may as well have an idea of what was presented in that Statement for the Burness/Shameem case, as it may explain why the legal case is not likely to be heard: the FNPF Board does not have a legal leg to stand on, whatever may be the horrendous legal and consultants' fees they are paying, using our savings.

There were four questions pertinent for the Burness/Shameem case, which I attempted to answer in my Statement:

Question 1 Can FNPF pensions be legally reduced?

Answer: The FNPF Act does not allow them to be reduced, ex post, after the 9-OP forms were signed and received by the FNPF.

Question 2 Can FNPF vary the pension rates differentially for high/low income pensioners?

Answer: The FNPF Act specifically states they cannot.

Question 3 Does FNPF have the capacity to pay existing pension commitments?

Answer: Yes. The provisions of the FNPF Act and the existence of the Buffer Fund, which has wrongly been denied interest payments from 1975 to the present, suggest without any doubt that they do have capacity to pay, for another 18 years or more.

Question 4: How should the FNPF problems be addressed within the laws of Fiji and according to the FNPF Act?

Answer: I explain that while there is indeed a problem of FNPF sustainability and has been since 1998, there are many reasons including possible actuarial errors by Mercer study) why an Expert Commission of Inquiry is necessary before any recommendations are made, which must be considered and acted upon only by an elected Government.

Question 5: Is the FNPF Transition Decree a denial of basic human rights to personal property?

Answer: YES.

Question 6: Is the FNPF Transition Decree a denial of the basic human rights of recourse to the courts?

Answer: YES

This statement on FNPF is not just because of pensioners' self-interest

FNPF has accused many pensioners of opposing the current proposals only because of their selfish concern over their pensions. I am indeed an FNPF pensioner, but I am on public record as writing on FNPF issues well before I became a pensioner.

These writings are pertinent as they not only help to explain FNPF's current predicaments, but also indicate that many of the long-standing problems were made known to successive governments and FNPF Boards, without any action being taken by them.

Innocent pensioners are now unlawfully being made scapegoats, essentially to pay for others' mistakes.

Some of my more recent articles have not been allowed into the Fiji media because of censorship by the current government, while pro-FNPF Board views have been freely allowed, and even financed by FNPF.

Essential background to the FNPF's current problems

I have written on many of the problems faced by FNPF, since a decade ago. Here is a quick summary and reference to the published articles.

FNPF has been larger, in total, than all the other private financial institutions put together. FNPF, is the biggest lender to the Fiji Government, as well as the largest player in the financial market. By purchasing majority shares in ATH, FNPF also became the biggest stakeholder in the telecommunications market, with its numerous monopolies, which have constrained the Fiji economy for decades, particularly in the last twelve years under FNPF influence.

In "The ATHL monopoly: between the devil and the deep blue sea", *The Fiji Times*, 6 March 2002, I wrote:

How FNPF's purchase, at an extremely inflated price, of majority shares in the ATH supermonopoly condemned to a quandary where to protect its investment, it would have to squeeze maximum dividends out of its ATH shares, and hence the maximum

from Vodaphone, Telecom Fiji and FINTEL (over which it only obtained “management rights”, not actual ownership of shares. The PS Finance then (Narube) was also then the Chairman of the FNPF Board.

In the "The Reserve Bank and the FNPF: funny business for the gov". *The Fiji Times*, 12 March 2002 I pointed out:

The massive conflicts interest for the Governor of the Reserve Bank who was also appointed as Chairman of FNPF and he also accepted Chairmanship of FINTEL: with the RBF forcing FNPF to bring back its investments (thereby losing revenue and risk minimisation for FNPF), RBF's role as regulator of Fiji's financial system while FNPF was a huge player in the financial market, etc. A similar conflict of interest was also always there with the Permanent Secretary of Finance, or other Permanent Secretaries being appointed as Chairman of the FNPF Board.

In “Communications Monopoly monsters at work” *The Fiji Times*, 21 May 2004, I wrote:

How the communications monopolies were doing huge damage to Fiji economically and socially, and FNPF, to gain short-term dividends, was harming itself in the long run by supporting monopolistic practices which squeezed the economy, reduced economic growth and job creation and thereby squeezed its own long-term growth in contributions from existing and new members.

In “Auditors between the devil and the deep blue sea”. *The Sunday Times*, 14 August 2005, I wrote:

that the implications of the Professor Michael White's analysis of FNPF accounts by auditors on how FNPF would appear to be far worse if proper accounting procedures were to be followed in respect of the massive premium paid by FNPF for ATH shares, and the likely loss of value once competition was brought into the telecommunications industry. This was a very prophetic article, as well the analysis by Professor White.

In “Stock markets, sharks, suckers and victims”. *Islands Business*, May 2006 I wrote:

While stakeholders in the Fiji Stock Exchange had been attempting to encourage the public to convert their savings into shares in the stock market, it points to the dangers lurking in the future, especially if governments, under pressure from WTO or just a good change in policy, try to reduce monopolies, such as cement producing companies, or ATH. There would be inevitable losses in share value, which stock market stakeholders were not pointing out. FNPF had even been encouraging, in my view wrongly, its members to use their FNPF money to buy shares in ATH, the monopoly.

Post 2006

Since the events of 2006, there have been massively increased government borrowings from the FNPF, and massive losses in some large investments. I have written the following articles, which have had direct or indirect bearing on the FNPF:

“Coups wolves circling FNPF” *Fiji Sun*, 14 March 2009 and *The Fiji Times* 13 March 2009.

Early warning: Fijian Holdings Limited, a company controlled by the Military Government, tried to borrow more than a hundred millions from FNPF, when private banks had refused. Thankfully, FNPF refused. More ominously, the Military Government wants to borrow hundreds of millions, basically to sustain their increased recurrent expenditure and military over-spending. The private banks, local or overseas, will not oblige. Should FNPF oblige? Will FNPF oblige? If FNPF continuously gives in to such lending pressures from Government, without economic growth, it will only encourage inflation to rise in the long term, thereby slashing the real value of everyone's savings and pensions. And if ever pensioners totally lose confidence in FNPF, it may become insolvent, with future pension rates slashed, and even existing pensions reduced in dollar terms. The key issue is that the FNPF Board is now controlled by an unelected Military Government's appointees and we the FNPF contributors who own the savings do not have a single direct representative on the FNPF Board who can be accountable to us.

In “Saving FNPF and Fiji” 12 May 2010 (Pacific Scoop-online media), I wrote:

Worrying news about Fiji National Provident Fund (FNPF) and the Reserve Bank of Fiji (RBF). FNPF announced a \$327 million “write down” in its investment value (with some \$300 million of that due to the Natadola loan). But FNPF also has some other large exposures which are not looking good: Momi, FSC and other private sector borrowers. And very strange that RBF has lent \$22 million to the Fiji Sugar Corporation (FSC). These are all extremely worrying developments for FNPF, RBF and for Fiji. Urgent need for Public Inquiry. How did these massive losses take place? Who should be held responsible? Might it get worse for FNPF? And how should FNPF management be strengthened to prevent further unwise decisions?

In “Helping FNPF, despite media censorship”. *Pacific Scoop*. 18 January 2011, I wrote:

With a stagnating economy FNPF revenues have been severely constrained. Few new jobs have been created and existing incomes have not grown; many loans are nonperforming; returns on FNPF investments have been declining; and large amounts of capital values have been written off because of mismanagement. But collectively, FNPF contributors and pensioners remain the largest group of spenders in the Fiji economy. This article constructively suggested how FNPF contributors and pensioners could direct their consumption expenditure towards FNPF investments (such as Holiday Inn, the Intercontinental, and Tappoo City), and change FNPF policies for the better. How FNPF management could encourage this by providing financial incentives and changing their management structure. Called on FNPF stakeholders (FNPF itself, unions, pensioners, civil servants etc) to conduct marketing campaigns in the aid of FNPF assets and loans

recipients.

In “Your money is not fully yours”. *The Fiji Times* 7 May 2011, I wrote:

..while Fiji citizens technically own their personal monetary holdings, they and their institutions (like FNPF) are not free to invest it where they wish to- they must obtain RBF permission to invest abroad. FNPF, which used to keep moderate amounts of their funds abroad in order to diversify their investments, have also been forced to bring them back, wherever there have been foreign exchange reserves crises, and suffered losses as a consequence. Whatever the FNPF loses in income, is gained by the RBF, which passes it on to the Government of the day, to spend and enjoy. Fiji citizens, who were forced to keep their investments in Fiji, have paid a heavy price, periodically.

In “FNPF sinks lower” *Pacific Scoop*. 26 May 2011, I wrote:

That the FNPF symposium being organized by the FNPF and the Military Regime was a farce. The FNPF management and Board, under orders from the Bainimarama Regime, will continue to hide all the reports that would reveal that the Bainimarama Regime is itself directly and indirectly responsible for a large part of the mess that the FNPF is currently in and the urgency of needed reforms; The Bainimarama Regime will continue to milk the FNPF cow, which, with increased contributions and reduced payouts, will give them even more of our savings to use as misuse, however they wish. The contributors to FNPF and the pensioners of FNPF, will have no choice in the matter. With media censorship, they cannot even publicly and freely discuss these massive changes to your pension fund.

I called on the contributors and pensioners of FNPF to demand the public release of all the reports by IMF, WB, ILO and recent independent consultants; demand the release of all the reports on the investigation into the investments at Natadola, Momi; demand that the majority of the FNPF Board Members must be democratically elected by the current FNPF contributors and with pensioners having separate elected representation; demand that the Chairman of the Board must be from these elected Members and definitely not some foreigner as currently; demand that any decision on changes to the FNPF must be made by the elected Board and not the current Board and Management; demand that FNPF must be allowed to invest as much of its funds abroad as is prudently advisable and that RBF must recompense FNPF for all the lost earnings because of foreign investments brought back; demand that the FNPF management swear oaths of allegiance to the real owners of the Fund- the contributors and the pensioners, and not to an illegal Military Government.

In “Consultants helping the Fiji military milk the FNPF cow”. *Pacific Scoop*. 2 June 2011 I wrote:

While consultants were recommending significant reductions to the annuity rates for future pensioners, serious questions may be asked, for example, whether the Mercer calculations are correct, especially their assumption of Fiji's future mortality patterns

following Australian patterns. While these consultants and FNP management talked about accountability and transparency, and the need to protect "whistleblowers"- they do not apply these same principles to themselves with their data and analysis. The Promontory recommendations on the "Restructured Board" are a total sell-out of sound principles of accountability of the FNP management and Board, to the real owners of the FNP. These consultants' direct involvement in the politically inspired symposium sadly shows how supposed independent experts will compromise their professionalism into illegal processes being stage-managed by this illegal Military Regime. These consultants' recommendations also make sure that they will continue to earn further consultancy fees well into the future. They continue to write further propaganda in the media.

In "End FNP subsidy to Fiji Governments- linking the many battles" *Pacific Scoop*. 20 July 2011 I wrote:

The FNP Board and Management conveniently ignore that FNP has been giving large subsidies (amounting to hundreds of millions over the last forty years) to successive Fiji governments through easily available loans, at interest rates much lower than that charged by commercial banks. The legal battle by current pensioners against FNP and the Military Regime, should point to these massive FNP subsidies to Fiji governments as a moral justification for Fiji Government to finance any future shortfalls in the liabilities to existing pensioners. To help FNP's revenues and current contributors and pensioners, these interest rate subsidies to Government should also be ended. For that to occur, both pensioners and contributors need to fight Battle 3, which is to have an FNP Board completely accountable to its members.

In "Battle to seek justice for Fiji pensioners strikes new legal defining point". *Pacific Scoop*. 1 August 2011, I wrote:

The Bumesshameem Law case is important for FNP pensioners, but it is far more important for the Fiji economy as a whole, because the planned FNP action strikes at the heart of private property and legal contracts, both of which are at the core of all business transactions in Fiji and globally. This case should therefore be of great interest to Fiji's business interests, Chambers of Commerce, Employers' Federation and all investors in Fiji (not that any of them would support the case financially). The resolution of this case will be a defining moment for Fiji's system of laws and justice.

In "FNP bakes pie-in-the-sky" *Pacific Scoop* Oct 27 2011

I warned about the dangerously large and risky FNP loan to Air Pacific.

In "The Transition Decree: last nail in the FNP coffin". *Pacific Scoop*.

What the Transition Decree implies.

First: FNPF does not belong to Government: but the contributors

It should first and foremost be pointed out that the Fiji National Provident Fund is not a “government owned public enterprise” belonging to the entire Fiji public and tax-payers.

FNPF rightly belongs to a subset of the public, the workers whose contributions have funded it. It is only a historical co-incidence that the Fiji Government has controlled it totally from its inception till now.

The Fiji National Provident Fund began well before Fiji’s independence in 1970. It was intended originally as a compulsory savings scheme for workers, with all the savings and interest thereon to be returned to the worker as a lump sum on retirement. I quote from the Legislative Council debates in 1968 and the statement by Hon AD Patel (Member for Social Services):

“A National Provident Fund is, in essence, a compulsory savings scheme for workers. Periodic contributions are deducted from the wages of individual members with a matching contribution for the employers. The funds accumulate for each member until he reaches a stipulated age or some other contingency arises. The amount credited to him, including interest, is paid out to the member”.

“Sir, this Fund will, in its initial stages, be essentially a compulsory savings scheme which will yield to its members, at the time of withdrawal, a lump sum.... When the amount standing to the credit of members becomes substantial, it will be possible to consider substituting the payment of annuities for the payment of the lump sum”.

The FNPF does belong to those people whose savings it contains- contrary to the pathetic allegations by paid consultants Tomkins and Rashbrooke .

The Changes to FNPF and mistakes made in 1998

The system was first changed in 1975 to introduce a pension annuity option, which was set at 25% for single pensions, to encourage retirees to take the pension rather than the lump sum.

Despite that high rate of pension, now generally acknowledged to be financially unwise for FNPF, there were very low proportions of uptake of pensions- way less than 15%.

In the late 80s however, the pension uptake proportion began to rise, and by early 90s actuarial studies recognized that the annuity rate had to be brought down from the 25% rate. The 1993 ILO study advised that the annuity rate should be brought down gradually to 10%.

However, in 1998, the elected Fiji Parliament decided to bring it down to 15%, but rather than immediately, as was suggested by me (then in Parliament), they decided (wrongly in my opinion) to bring it down gradually over a period of 10 years.

It would be a learning exercise for Fund members and pensioners and the current FNPF Board, for a Commission of Inquiry to clarify what exactly were the recommendations of the FNPF Board and management in that 1998 decision by Parliament.

The 1998 parliamentary mistakes

During my brief period in Parliament, I spoke on the FNPF (Amendment) Bill 1998 (Hansard, pp. 499 to 505).

The 1998 Bill sought to increase the contribution rate from 14% to 16%, stop the 2% deduction towards the Pension Buffer Fund, and to bring the annuity factor down from 25% to 15%, by one percentage point annually over a period of ten years.

The FNPF management, in their recent publicity campaigns, has very selectively quoted from my Parliamentary contributions to justify why they should today reduce existing pensions (and why they should reduce future pensions) to 9%.

Yet nothing in my 1998 Parliamentary contributions was of relevance to the current debate about reducing existing pensions already contracted and agreed to by FNPF, from 15% and above, down to 9%.

In my contributions I pointed out that while FNPF till then had been well managed, and it had become the largest financial institution in the country, there were problems emerging. While the number of employers was rising, the growth rate in the number of employers has been declining; the growth rate of employees was also declining; the growth rate of dollar contributions had also been falling; the growth rate of the investment portfolio has been falling. The interest rate credited to the members has been falling (from 10% to about 8% then) (now less at around 5%). There were large liquid balances being built up. Loans to the Fiji Government and other public enterprises were excessive. If loans to statutory and government-owned enterprises were included, they amounted to 88% of all of FNPF's loans in 1997, and they are not capable of paying the best interest rates. There was a corresponding decline of loans to private sector which could pay higher interest rates. FNPF's prime responsibility was not to the country or to Government, but to its contributors (members and beneficiaries).

I pointed out that there was an inherent conflict of interest between the role of the Permanent Secretary of Finance as the "borrower" from FNPF, and his role as the Chairman of the FNPF Board, which approved loans (volumes and interest rate) to Government. I pointed out that "the primary responsibility must be to those people who have deposits in the Pension Fund. His primary responsibility is not to Government as manager of public finance policy, taxation and government expenditure.

I made two essential points on the pension rates being proposed in the transition state. The first was that I felt, as did the actuarial studies, that 25% of the final balance was too generous a provision. Secondly, I urged the Minister of Finance to bring the pension rate down, not gradually but immediately to what was felt was the sustainable rate- at that time, considered to be 15%.

It is my considered view that the annuity rates above 15% should not have been offered by the FNPF Board, the necessary legislation should not have been introduced by the Government of the Day, and Parliament should not have passed the FNPF (Amendment) Bill as it stood.

BUT, the historical reality and the legal facts are, that these rates above 15% were verified by Parliament in the Laws of Fiji, they were explicitly offered by FNPF on their 9-OP forms, and a small proportion of retirees took up the offer of life pensions, through lawful contracts with the FNPF.

In the 25% annuity example I used in Parliament in 1998 I did not pay any attention to “the risk of dying early and losing all”, the eroding role of inflation, and that the lump-sum left with FNPF would earn interest over time.

I may also point out that when Parliament in 1998 discontinued the 2 cent in the dollar contribution to the Pension Buffer Fund, that it was probably the correct decision. But it also meant that the liability for the pensions then fell jointly on the General Reserve AND the Buffer Fund. This has not been acknowledged by the FNPF management and the Board, with FNPF accounts still showing the Buffer Fund and the General Reserve separately.

It is another mystery why the remaining Buffer Fund while kept separate, was not credited with the interest which other Members' Funds were. This would have been the right thing to do, as the FNPF has always been using that Buffer Fund money for investment purposes, and earning money, with interest being credited only to contributing members, while the General Reserve has also been increased.

The deadly gamble: lump sum or annuity with the “risk of dying early and losing all”

It is important to ask: why is it that while professional qualified actuaries have concluded that the annuities between 15% to 25% have been excellent value, the historical reality with FNPF has been that the vast majority of retirees (more than 70%) have not been taking up these supposedly “good” pension offers.

In the early years when the annuity rate was as high as 25%, less than 10% of retirees were taking the pension. Even in recent years, less than 30% were. i.e 70% or more were taking up the lump sums.

For actuarial experts, choosing between a lump sum or some annuity rate until you die is their daily “bread and butter” work. But most ordinary retirees are totally lost in front of this kind of choice between taking the lump sum or the pension. It requires an incredibly difficult financial assessment of the risks and returns of that choice- and no advice is ever available to our ordinary people, even the educated ones.

Effectively the FNPF has been offering a “gamble” to retirees:

A. You can take your life savings as a lump sum, invest it or consume it, or do with it what you will, and it is yours and your family's, whether you live or die, or you can choose

or

B. Leave that life savings with us we will give you this annuity (dollar value per month) until you die. If you die early, sorry, that's it. There is no more money for your family thereafter (except for that current year of annuity). Tough luck if you only get back a quarter or a half or two thirds of your life savings.

One can imagine the thousands of households where this decision has had to be made; with one partner saying “let's stake the pension- it is really good” and the others saying ‘what if you/I die?’

Since 2006 it has become clear that the pension fund investments and bans are not doing well, and may be subject to further stresses and strains in future there are questions. I have myself been pressured to advise close friends (some well-educated, including lawyers) that the 15% tax free annuity was still a good return, provided it was not eroded by high inflation in the future, and unfortunately, there was no guarantee that would not happen.

I suggested that they could leave just enough in the pension fund to receive an annuity that was enough to maintain them, and that they use the remaining lump sum, to diversify their investments which would be available to their families should they die.

It never entered my mind then that a future FNPF Board might try to reduce annuities already agreed upon and signed, as indicated by the current proposed Review.

I suspect that most ordinary Fiji retirees are “risk-averse” and choose not to risk losing their entire balance if they die early. This is why the majority of retirees have been taking the lump sum option even though actuarial experts and economists might suggest that the annuity at 25% or 19% or 15% is financially a much better option. This is similar behavior to that of risk-averse peasant farmers who will not take loans on their land as collateral, in case they lose their only asset. Bankers and economists may advise farmers otherwise.

The paradox of 15% to 25% annuities being “financial heaven” for some, “financial disaster” for others, BUT “a bad business decision by FNPF Boards and management”.

For that minority of retirees (say 30%) choosing the pension annuities between 15% and 25%:

- some proportion would have found them excellent value (and some very high income earners may well be the target of FNPF proposals)
- some proportion will die “before they recover their life savings” and their families will have lost out (FNPF generally ignores these dead pensioners)
- nevertheless, the actuarial studies are probably correct in saying that FNPF

Boards and the Fiji Parliament have been making “wrong business decisions” in offering 15% or higher annuities.

But none of the above justifies FNPF breaking contracts with existing pensioners.

The major questions to be answered for the Burness/Shameem case:

Question 1 Can FNPF pensions be legally reduced? Answer: No.

These are the basic facts that cannot be denied.

(a) The current pensions have all been offered by a FNPF Board and a Fund totally controlled by Government.

It is abundantly clear that

(i) all the FNPF Board members have been appointed by Government.

(ii) the Chairman of the Board has always been appointed by Government.

(iii) the FNPF Board has the statutory power to make all the decisions, except where they have to be made by parliament or under regulation

(iv) in all cases decisions on annuity rates have been made by an elected parliament on the recommendations of the FNPF Board

(v) While Employers may have nominated their representatives through various Employers' associations and such, the appointments are made by the Minister.

(vi) Unions have often nominated the employee representatives, but it has been the case that various governments over the years have also selected certain union representatives of their own choice.

In 2006 this trend continued, following which the FNPF Board was changed, and then changed again. The Chairpersons of the FNPF Board who have always been appointed have been either Permanent Secretaries of the Ministries of Finance, or Public Service Commission, or Labour, and, once, the Governor of the Reserve Bank. One of the rare exceptions is the current Chairperson (whose citizenship should be clarified to Fund Members). He certainly is not a representative of either the Employers or Employees.

All Government employee FNPF Board Chairpersons, being selected by the Minister of Finance have serious conflicts of interests with their duties to the Fund and their responsibilities to the Minister, thereby becoming both the “lender” and the “borrower” at the same time. I have publicly pointed out these conflicts of interest even before 2006.

(b) The FNPF Board has been the ultimate decision-maker on:

(i) all large lending decisions (volume of lending and interest rates to be charged) including how much to lend to Government annually.

(ii) the annual decision on the interest rate to be credited to the FNPF Members.

(iii) the three critical decisions made, two with the approval of Parliament, on the pension annuity rates for single and double pensions: the first being the original decision to pay 25% annuity on single pensions; the second being the 1998 decision to reduce pensions gradually from 25% to 15%.

(iv) all large investment decisions, including the questionable price paid for the majority shares in ATH which independent assessors thought may have been more than \$100 million or probably up to \$150 million in excess; and the cost blowout at Natadola and Momi.

The FNPF management would presumably have been asked to give advice on all such proposals and bills before Parliamentary decisions. These decisions would have been made only with the advice of the Board, but transparency in such advice has always been a missing element in the past. Any future Commission of inquiry can clarify what exactly was the advice given by FNPF management and FNPF Board, particularly whenever any decision based on it went against the actuarial advice (as in 1975 when the 25% annuity was decided, and in 1998 when the gradually reducing annuity from 25% to 15% was decided).

(c) The Government has exercised total control, deemed excessive by FNPF consultants.

The question that also needs to be put is to what extent the various governments had influence, or even interference, with the FNPF Board decisions? Only an Inquiry can determine that, particularly when FNPF's most recent consultants (Promontory) clearly hint at it, as evidenced by the following statement in the Report of Promontory that was made available to me recently:

Paragraph 90 of the Report:

"In discussion with stakeholders... appointments have been seen as highly politicized and blamed for some of the poorer investment outcomes. A common theme was that Government had interfered too much with operations and decision-making of the Fund.

Further in Paragraph 91:

"Policy Principle: the FNPF Board should comprise a majority of independent members. The Board's primary fiduciary responsibility is to act first and foremost in the interests of the fund members, not representative groups, Government or even the wider interests of Fiji."

Promontory advised that any new legislation needed to spell this out explicitly and the law be strengthened in this regard.

It can be seen therefore, even from a Report that was commissioned by the FNPF itself, as well as the appointments process to the FNPF Board (not necessarily a defect in the law, but as part of the political process), that FNPF contributors (members) and current pensioners have had no say whatsoever in any FNPF Board decisions and were not briefed on the important and significant investment decisions that FNPF Board were making over the years. The pensioners have been passive recipients of FNPF Board decisions.

The fact that they were given a written undertaking to receive a certain definite amount of pension for their lifetimes, was something that the Board itself decided through Parliamentary approval.

(d) Contrary to FNPF's claims, Section 63 of the FNPF Act does not allow FNPF to reduce the annual annuity amount or overall percentage

Section 63 of the FNPF Act states that the FNPF Board may "prescribe the amount, frequency of payment and duration of any annuity payable under the provisions of paragraph (b) of section 64" (my underline)

The FNPF Board and its lawyers claim to think that this section gives the Board an authority to reduce existing pensions. This would be a completely wrong interpretation, as that section simply refers to Section 64 (b) which gives powers only over the method of dispensing the annuity, not the total amount itself or the overall percentage of the final balance, which can only be, and has been decided by Parliament, as a specified percentage of whatever balance the pensioner leaves with the Fund.

Once that percentage has been fixed (and the OP-9 form specifies both the percentage and the corresponding dollar amount), the amount of the total annual annuity in dollars and cents cannot be changed- as that would be changing the percentage of the final balance being given to the pensioner, which has already been determined by Parliament, and offered to the pensioner in an explicit, irrevocable contract on the OP-9 form.

Note what is stated by the Fiji National Provident Fund (Annuities) Regulations 1999

Regulation 16: Once the form has been signed and the annuity option chosen, and received by the FNPF, "the General Manager must make payment of the annuity selected by the person". (I repeat, **MUST**).

Regulation 17: The option, once chosen by the pensioner, is "irrevocable".

Regulation 18: The duration of the single annuities is "the lifetime of the pensioner", and of the joint annuity, is the "lifetime of the last surviving spouse".

These regulations specify exactly what percentage of the final balance will be paid annually by the FNPF as annuity, but only as approved by an elected Parliament. The FNPF Board has no powers in this regard.

(e) No consultant has advised that the existing pensioners' contracts be altered in any form as a solution to FNPF problems.

The most recent report that has been discussed in the public domain and called The Promontory Report referred to the above issue at paragraph 25:

“There have been some suggestions that existing pensions should be withdrawn, capped or reset at a discount. ... Any retrospective adjustment of existing pension benefits would be difficult under contract law.... While an adjustment to existing pensions remains a possibility, it is not further considered in this paper”.

Promontory points out, in fact, that FNPF has commissioned actuarial work to value the current pension obligations with the view of setting aside enough assets to support the existing pension liabilities as they are run off, and to identify actuarial assumptions for new conversion rates to ensure that they are sustainable”.

Promontory based the rest of their analysis and recommendations on FNPF not breaking its contracts with existing pensioners. The implications of amending or canceling such a significant aspect of law, namely the sanctity of contracts would be serious enough for an international consultancy firm to not recommend this, if it wished to safeguard its own international reputation. Indeed, the Promontory report deals mainly with the problem of funding future pension annuities, which they recommended to be reduced towards 9% or thereabouts as has been widely advertised.

It should be noted and emphasized that Promontory clearly separated the problem of funding existing pensioners with the problem of funding future pensions, whose annuity rate may be reduced by any legitimately appointed Board, which I shall address further below briefly.

No IMF or WB Report has recommended that FNPF should reduce the annuity rates of existing pensioners. i.e. they only support the reduction of future pensions that may be offered to make FNPF more viable.

(f) FNPF's does have the capacity to contract legally, and be taken to court.

FNPF is a corporate body and legal entity.

Article 4 of the FNPF Act states that the FNPF Board shall be a body corporate and shall, by the name of "The Fiji National Provident Fund Board", have perpetual succession and a common seal The Board may sue and be sued in its corporate name and may enter into contracts.

By law, a legal corporate body (FNPF) makes a clear explicit offer (on Form 9-OP) to the retirees that should they choose the pension option (whether single, joint or combination) and leave their savings with the FNPF, they would receive in return an annuity (expressed explicitly in dollars as a fixed percentage of their final balance) until they (or their nominated partner) died

Nowhere in the contract (the 9-OP form) is there any clause which warns the pensioners that their pension rate may be changed in the future by the FNPF Board at its discretion.

The Board's powers to vary the annuity rate, already offered to and accepted by pensioners is therefore totally without any legal foundation.

(g) Legal pension cases in US do not support the FNPF cause

It is acknowledged, as FNPF has also pointed out, that pension funds the world over are having to tackle the problems of unfunded future liabilities. The United States is one country where there have been many legal cases both at the state and federal level.

But comparing the pension schemes of the United States with Fiji is not particularly useful because of the very different processes and choices offered to the type of benefits.

Not only are most of the US systems state funded and controlled, but the schemes essentially are based on setting pensions relating to the last few years of salaries before retirement, and the Cost of Living Adjustment (COLA) that would be applied following retirement.

There is, moreover, no "choice" at the end of the retirement whether to take a lump sum or pension: the pension has to be taken and most are vested (full or part) in surviving partners, should the pensioner die.

The American cases have focused on whether current workers' future pension rights (such as reference salary or COLA adjustment) could be changed by employers in the middle of their careers.

The experience of US legal cases has been, that legislative attempts by States to take away or reduce pensioners' rights after they had been granted and were being enjoyed, would be struck down on either the Contracts Clauses or the "Taking Clauses" in the US law.

In many recent United States **legislature's** attempts to reform pension schemes workers and pensioners have been filing lawsuits arguing that decreasing their pension benefits violated the U.S. Constitution and/or state constitutions, most of which protect "contracts" from being unilaterally altered by the government while "Taking Clauses" protected their personal property.

In the case where the pension was pegged to an employee's last salary, the courts have found that the pensioner was entitled to the real value of the pension, so that should the salaries of his last position increase because of inflation or improving economic conditions, then the pension should be suitably adjusted upwards. Such adjustments are not considered for FNPF pensions and therefore are not relevant to the present case of Burness v FNPF and Ors.

Some United States courts have suggested that States could change superannuation schemes going forward and reduce future benefits associated with future employment, as long as workers' already earned superannuation benefits were not reduced.

These situations are vastly different from that of the current FNPF pensioners' contracts and property rights which have all been determined:

(a) *at the point of retirement,*

(b) *with reference only to an explicitly stated proportion (ranging from 15% to 25%) of the Final Balance (or some portion of it), stated explicitly as a fixed monthly amount in nominal dollars, AND*

(c) *with no adjustment for COLA.*

None of the US state superannuation schemes suffer from the weakness that the FNPF scheme has of pensions being continuously eroded by inflation. Note that Fiji's recent history of inflation has been that any pension granted for example in 1996 (eighteen years ago- the average life expectancy at 55) would be worth some 42% less in real terms this year.

Question 2: Can FNPF vary the pension rates differentially for low and high incomes?

The FNPF Board has announced by way of paid advertisement in the daily papers that they will not reduce the existing pensions of some 89% of pensioners whose pensions are "below the poverty line", but they will reduce those of the other 11% earning higher pensions.

However, the FNPF Board is prevented from varying pension rates differentially by the FNPF Act.

Section 12 B of the FNPF Act which outlines the duties to be exercised by the Board as Trustees require that the Board must abide by all rules and principles of law which impose any duty on a trustee exercising a power of investment including all rules and principles which impose

(a) to exercise the powers of a trustee in the best interests of all beneficiaries of the trust;

(b) *to act impartially towards beneficiaries and between different classes of beneficiaries.*

The FNPF Act does not stipulate a "poverty line" to be used to determine differential annuity rates for pensioners. Therefore no part of the FNPF Act authorizes the FNPF Board to reduce the pension of one group of pensioners who are allegedly "above some poverty line", which is moreover to be decided by the Board. On what economic criteria and whose judgment is the "poverty line" to be assessed?

Furthermore, the FNPF Board's argument is quite internally untenable in the first place in that many pensioners supposedly receiving pensions "below the poverty line" would have taken or withdrawn part of their savings for housing or education or other reasons allowed in the FNPF Act, and also partly as a lump sum upon retirement. The actual pension being paid as an annuity may not be used to differentiate between "better off" pensioners and "worse off" pensioners,

as appears to be behind the intentions of the FNPF to reduce some pensions and not some others - clearly discriminatory in the economic analysis that it applies to this point.

Form 9-OP does not state that, in future, the Board might reduce the pension incomes for some and not others. So far, the assessments on non-sustainability which have been made by all the actuaries have been on the grounds that the percentage rates of annuity which have been set, have been too high and unsustainable. The actuaries have never stated that the FNPF is unsustainable because of the high dollar value pensions to some pensioners, whose annuity rates have been unduly high, but that it was all right to give the high pension annuities to those earning low dollar amounts.

Indeed there has never been, and never likely to be, an actuarial recommendation that higher annuity rates should be paid to those ending up with low final balances in their accounts, and hence only capable of receiving low pension rates, but not to those receiving higher dollar values. If some current pensioners have been receiving large amounts annually long after they retired, this is entirely due to: (a) their large final balances and (b) the annuity factor that FNPF offered them in place of lump sum withdrawals

Both FNPF Boards and the Governments of the Day that passed the necessary legislation and offered these contracts were responsible for this. Is it "unfair" that some persons have received multiples of what they had as the final balance in their accounts because they have lived long enough after retirement? That should have been expected in any case, because some would live longer and some would die earlier than what so-called life expectancy was deemed to be.

In 2009, under the chairmanship of Pramesh Chand, who was simultaneously a government employee and Chairman of the Board, FNPF has been expressing the view that those who lived longer are now "unfairly" drawing on the Fund and on current members' contributions. Such a position is not economically justified nor rational. It appears to be prejudice rather than based on sound economic analysis and actuarial principles that some of those receiving annuities, will live longer than the average, and some die before the average expected date of death.

Part 2 of the Transition Decree made the claim that "the Board will be non-discriminatory".

Yet Clause 8 of the Transition Decree (titled "Top ups") is all about arbitrarily discriminating between different classes of retirees - whether they are currently receiving less than \$100 per month, receiving between \$100 and \$300 per month, and more than \$300 per month.

Subsection 8 (2) states that for those pensioners currently receiving less than \$100 per month, and who wish to convert their lump sum to the new annuities offered which will of course be less than \$100 per month, the Board will arbitrarily offer \$100 per month i.e. the FNPF now will become a welfare organization, (without the permission of the pensioners) subsidizing current low annuity pensioners at other pensioners' expense. So cross-subsidization will continue, whatever the Decree daims.

I doubt that the drafters of this Military Decree ever thought about those retirees who might currently have an annuity less than \$100 per month, only because they took a partial lump sum upon retirement.

Subsection 8 (3) states that if any pensioners are currently receiving more than \$100 and they leave all their lump sum entitlement with the Fund and take the new annuities being offered, then they will receive either their current annuity or \$300, whichever is the lesser. i.e. those pensioners currently receiving between \$100 per month and \$300 per month will be left alone.

Subsection 8 (4) then states amazingly, that if you are currently receiving more than \$300, and leave all your lump sum entitlement with FNPF and take the new annuity rates that apply to you, then you will arbitrarily have your lump sum increased by \$10,000 or 25% of your existing lump sum, whichever is less.

Why are they giving this small “bonus” lump sum option rather than just raising the annuity rates? Because they want future retirees to receive the lower annuities. They will give a small lolly to existing pensioners, whose contracts they know they are breaking.

So for any particular retirement age in the past, pensioners will lose a higher proportion of their annuity, the higher was the lump sum they left in the Fund: i.e. the more you trusted the Fund, the bigger is the percentage you will be losing.

For a lump sum of \$100,000 you will lose 36% if you have just retired, the loss increasing to 50% if you are age 66, and then decreasing to 46% if you are about 72 years old now.

How astonishing for a Decree that claims that the FNPF will be non-discriminating. This Transition Decree, contrary to its claims, is discriminating between all kinds of retirees, discriminating by age and by lump sum originally left in the Fund.]

Question 3 Does FNPF have the financial capacity to pay existing pensions at their current rates? YES. For many reasons.

Source A : Buffer Fund properly credited

The FNPF Act provided for a Pension Buffer Fund which was expressly set up for that purpose in 1975 with members injecting 2 cents in the dollar between 1975 and 1998, when the injection was stopped by Parliament. This Buffer Fund was then absorbed into the General Reserve in 2000. However the account was still maintained, and received all the balances of members who chose the pension option (ie the purchase price from the pensioners of their annuities).

Of course this 2% deduction may have been unfair or even an infringement of the property rights of those who chose the lump sum option because they then lost totally that 2% they had contributed- I will refer to this again below, as one of the “difficult” questions that may be addressed by the Commission of Inquiry.

But not only was the Buffer Fund amount substantial, the FNPF Board quite wrongly neglected to pay interest on this Buffer Fund even though the Buffer Fund monies were being invested by the Fund and continued to earn income for the Fund (but that income went only to Member Funds and General Reserve).

Had the Buffer Fund been credited with interest, my calculations on this show that even without the 2 cent injections from 1975, the Buffer Fund would in 2010 have amounted to \$870 millions, which would cover 18.6 years of the current annual pensions payout of around \$47 million.

Of course, correspondingly less would then have been then credited to the General Reserve and the Members Funds.

It should be noted that the current group of pensioners (earning between 15% and 25%) will be gradually reducing in numbers, with those earning the highest annuities in general dying earlier.

The pension bill will therefore be gradually reducing in dollar terms, and faster in real terms, given that these payments are not indexed to inflation which is currently running at 10% annually. The properly augmented Buffer Fund could probably fund this current (but gradually reducing) group of pensioners for more than 18 years. The actuaries should have done this calculation for FNPF which should release these figures to the public: what will be the time trend of liabilities posed by the current pensioners on FNPF at 15% to 25% without adding to their numbers be from now on?

Source B: Savings from pensioners who die too early

The FNPF has been enjoying the "savings" from all the pensioners who die before they "exhaust their final balance" (the FNPF has given no data on this).

Why is it that while FNPF has given numerous tables alleging cross-subsidization of existing pensioners by current contributors when they live "beyond their alleged expected lifetime", yet it has never acknowledged nor given any data whatsoever on the numbers of *pensioners who have died before they could "get back their money"*?

These "savings for FNPF from those who die early" will partly cover the costs of those annuities where pensioners live on, and this information needs to be disclosed by FNPF to the beneficiaries whose right it is to know what alternative mechanisms FNPF has explored instead of the proposal they make that pensions must be reduced.

Source C: General Reserve

The General Reserve may be called on **if and only if** the funds from A and B above were not enough. Note that the General Reserve has also been contributed to by pensioners and after the Buffer Fund "2 cent in the dollar" injections were discontinued in 1998, was expected to be the final guarantor of pensions.

Source D: Borrowings from Government

The FNPF also has at its disposal an external source to fund any shortfalls in the existing pensions: The FNPF Board is authorized under Section 10 of the FNPF Act which states:

“If the Fund is, at any time, unable to pay any sum which is required to be paid under the provisions of this Act, the sum required shall be advanced to the Fund by the Government and the Fund shall, as soon as practicable, repay to the Government the sums so advanced”

Consequently, the FNPF Board can make a case to the Government of the Day, that given that it has been past Governments who have been responsible for the unnecessarily high annuity rates offered to pensioners, they could set aside whatever complementary resources are needed to cover any deficit faced by FNPF, as estimated by the actuaries. This will also have an element of economic fairness in that it will be taxpayers at large who will bear the burden, if it can be called that, given that investments of the Board have not always been transparently undertaken, nor based on sound investment strategies or advice.

This last solution, will also ensure that any additional burden posed by existing pensioners (and the evidence suggests that there should not be any required beyond a properly augmented Buffer Fund), are not borne by the current contributors, who I acknowledge will probably face a reduction in their annuities in future.

FNPF has been a "cash cow" for all governments. How about reversing the flow of milk?

Argument E: Suing FNPF Boards at fault

Section 8 of the FNPF Act which requires that *“the Board shall, having considered the recommendation of the General Manager”*, declare a rate of a rate of interest to be paid to members' credit, not less than 2 1/2 per cent per annum provided that:

“no rate of interest exceeding 2 1/2 per cent per annum shall be so declared, unless, in the opinion of the Board, the ability of the Fund to meet all payments required to be paid under this Act is not endangered by the declaration of such rate”.

The FNPF is currently planning to reduce pension rates for future pensioners and existing pensioners, alleging that current pension rates are unsustainable, and even alleging that these pension rates have been known to be unsustainable for more than a decade.

Yet, year after year, the FNPF Board has declared a rate of interest higher than 2 ½ percent (including this year (2011) as well as 5 ½%) to be credited to Members' funds. The FNPF Board is acting in contravention of the FNPF Act which very specifically asks the Trustees to not declare a rate of interest above 2 ½% if the Fund is not sustainable. In other words, the General Reserve should be built up, if it is thought that the pensions are not sustainable at existing annuity rates.

At times, the Board anomalously credited a percentage which was even higher than what the Fund was earning (as in 2002: see ILO Report on FNPF 2002).

The FNPF Board has been in breach of the FNPF Act by declaring rates of interest which are in excess of 2 ½ percent and at the same time claiming that the Fund is unsustainable. The continue to be in breach of the Act, since this last year they again declared a return higher than 2.5%.

While not doing what it is specifically required to do by the FNPF Act, the FNPF Board is attempting to do what is nowhere authorized in the FNPF Act, namely to reduce existing annuities contracted to existing pensioners or their beneficiaries.

It appears that the FNPF Board may be sued by the pensioners under the Act, whose pensions are being illegally reduced.

Question 4: How should the FNPF problems be addressed within the laws of Fiji and according to the FNPF Act.

As an economist with longstanding appreciation of the economic problems of Fiji under many governments, I can only state what should be obvious to anyone being able to read the signs of a wide variety of problems facing FNPF in the present and likely to arise in the future.

The actuarial experts brought in by FNPF itself have all stated that the sustainable rate of annuity depends on FNPF's return on investments, the growth of employment and incomes in the Fiji economy, the contributions to the FNPF, the rate of inflation and the future trend in life expectancies of men and women in Fiji (none have discussed the ethnicity factor at all, quite important to expert demographers).

I explain why the current members of the Fund would be ill-served if any such proposed FNPF review were to go ahead as currently intimated.

(a) Refusal of the FNPF Board and Management to supply all reports and data to the Fund Owners: contrary to Fund "Core Values"

Under the provisions of the Act, the FNPF and all its assets belongs to the current contributors and pensioners. The FNPF Board are only trustees, and together with the FNPF Management, are supposed to be accountable and transparent to the members (this is explicitly acknowledged by the FNPF Website). Yet, for several years now, both the FNPF Board (current and preceding ones) and Management (current and preceding ones) have adamantly refused to make available to the beneficiaries of the Fund, all the various Reports and relevant data on the sustainability of the FNPF.

Such refusal to provide information to the contributors and pensioners, and their proposal to reduce existing pensions, would contradict the following "Core Values" which FNPF advertises on its website:

Accountability: Being answerable and having the courage and honesty to take ownership of our actions.

Fairness: Treating everyone in an equitable and non-discriminatory manner

Integrity: Being honest and fair to all our stakeholders.

Excellence: Always maintaining highest standards.

The Board Members and FNPF management ought to be taken to task for their abject failure to abide by these “Core Values”, particularly since even their data on the website ends with 2007 figures. *The latest data on their “Key Indicators” webpage ends with 2007 data- already four years out of date.*

While I have perused the Reports undertaken by various consultants provided to me, I find that there are serious gaps in data, and specifically, none of them give the details of actuarial projections based on the life expectancies; therefore one has no idea if their assumptions and analyses are correct. Some of their assumptions about future life expectancies may even be wrong, as I indicate below.

(b) Possible errors in actuarial assumptions

The Promontory Report’s recommendations were based on the Mercer actuarial study (by Richard Codron, Consulting Actuary, Authorised Representative #263844 of Mercer Investment Nominees Limited). The Mercer presentation at the symposia organized by FNPF stated that the mortality rates they used were derived from “the 2008 Fijian population life tables prepared by the World Health Organization”. This is not a problem, but Mercer they went further and stated that they used “*Mortality improvement based on experience of the Australian population over 25 years as reported in the current Australian Life Tables (2005-07).*”

Demographers will know that projections of improvements in Australian mortality cannot be used to predict future trends in Fiji’s mortality. Australia’s life expectancy is rising, their people are living longer, and drawing pensions for longer. If the Australian patterns of mortality improvement did apply to Fiji, then Fiji’s people would also be living longer, and the sustainability of FNPF pensions may indeed require relatively lower pension or annuity rates for Fiji. However, if Fiji’s mortality falls or stagnates, then Fiji’s pensioners will die earlier than predicted by Australian trends, and Fiji’s pension annuity rates would correspondingly need to be relatively higher.

All indications are that Fiji’s mortality will not fall like Australia’s and Fiji’s life expectancies will not rise like Australia’s. In Fiji, life expectancy for some ethnic and gender sub-groups actually fell between 1986 and 1996. Demographer Dr Martin Bakker, working with the Fiji Islands Bureau of Statistics, concluded that “adult mortality has actually increased somewhat during the period 1986-2001” and at best there may be a mortality stagnation, not improvement. Dr Bakker attributed this to possible deterioration in the health services for adults; increase in non-communicable (lifestyle) diseases amongst the adult population; differential net migration, with successful migrants more likely to be healthy persons than unhealthy (i.e. Australia, NZ, Canada and US have certain health requirements for their emigrants).

As an economist who also does population projections and is aware of some demographic factors that affect life expectancies, I conclude that there is every possibility that the three factors listed above, will be even stronger in the future because of the following:

- (i) the continued losses of qualified health personnel and the stagnation of the Fiji economy and health budget, will continue to worsen the Fiji health service system
- (ii) the life style diseases will worsen as Fiji people consume more and more processed Westernized foods and junk foods (as is the clear trend now as reported in my up-coming Report on Fiji's 2008-09 Household Income and Expenditure Survey for HBoS).
- (iii) the emigration of healthier persons (so selected by destination country health requirements) will continue now that even qualified indigenous Fijians are emigrating in large numbers as qualified Indo-Fijians and Others have been doing for two decades.

Therefore Mercer's use of the Australian improvements in mortality to project long-term pension outflows for Fiji is not appropriate. A similar error was made by the ILO actuarial projections. The projected life expectancies for 2010 I estimate to be possibly some 3 years higher than actual; and for 2030 may be higher by 6 to 7 years, if Fiji life expectancies continue to stagnate as they are doing at the moment. The Mercer differences are of a similar order.

What would be the impact on the actuarial projections if Fiji life expectancies do not rise: almost certainly the annuity rates to be recommended would have to be higher than those currently discussed. How much higher? We do not know. Because the FNPF management and Board, and none of the consultants (from Mercer or the Promontory) are releasing any actuarial Reports, or their detailed analysis, or any sensitivity analysis which might inform a few of us more numerate persons amongst us about the possibilities.

Yet it is the FNPF members funds that pay the management's salaries and the consultancy fees. Fund Members are not convinced that the experts who have been hired by FNPF are making the correct analysis and the correct recommendations. They would like to be convinced, and it is their right to be convinced.

To give one further example of confusing consultant conclusions, the ILO 2002 study concluded (Key results, p. v) that "*under the status quo conditions, the Fund would remain fully funded for the next 30 years.*" (though they also acknowledged that this would reduce if the Fund was not able to maintain the 7% return on their investments).

(c) Poor Investment decisions by FNPF Boards

A very important question for investigation is whether successive FNPF Boards have been giving loans to the Fiji Government at relatively low rates which the governments would not have received from the commercial banks, locally or internationally. Would a truly independent Board

and FNPF, free to invest internationally and locally, have been able to receive higher interest rates from the Fiji Government which could have resulted in higher returns to Members and higher sustainable annuities to pensioners?

Another important question is, to what extent did the Board (which was not appointed according to the Act) make a difference to the kind of investments that the Board made over the last few years? To what extent is the current liquidity crisis due to the large investments made recently at Natadola, Momi, GPH, FSC, Tappoo City etc which are not returning the loans on time, as they should? Can independent reports from accounting firms be made available to the beneficiaries and members on how these were decided and managed and whether there was sufficient due diligence as required by the Act.

Would a politically independent FNPF Board have made the large loans to FSC which I believe has technically been insolvent for a couple of years? To what extent are FNPF losses on the loans to FSC undermining profitability because of the collapse of the sugar industry due to non-availability of the EU loan because of Fiji's failure to have elections in 2009 as promised?

To what extent is the pressure for the reduction in annuity partly due to the Fiji Government's decisions through the RBF to bring back FNPF investments from abroad. FNPF has clearly lost income, while losing the foreign exchange capital value. The 2002 ILO Report specifically recommended (p.vi) "*given the limitations of the domestic capital market in Fiji, the FNPF should seek wider possibilities for investment*". Instead of allowing it to invest more overseas, FNPF was forced to bring back whatever little they had invested abroad.

(d) Some suggested 'solutions' are not so simple: *the complexities of the Buffer Fund*

One may consider the complexities of the Buffer Fund issue of the "2 cents in the dollar" contribution which has been suggested should be brought back in order to ensure FNPF ability to pay for current and future pensions. While it appears a simple solution, it is not straightforward from the legal and ethical point of view, as it raises another problematic issue of discrimination against those who could not take advantage of the Buffer Fund if they chose a certain option at retirement.

When the Fund was first being set up (following a Report by British Expert J.E. Ashford and work by the first manager H.S. Robinson), the Hon Member for Social Services had outlined the logic of what they were doing in the Legislative Council debates in 1968:

"A National Provident Fund is, in essence, a compulsory savings scheme for workers. Periodic contributions are deducted from the wages of individual members with a matching contribution for the employers. The funds accumulate for each member until he reaches a stipulated age or some other contingency arises. The amount credited to him, including interest, is paid out to the member". (added emphasis)

Clearly, the deductions for the FNPF were always held to be the property of the worker, to be returned at the end of his working life. There is therefore an extremely convincing view that the 2

cents deduction towards the Buffer Fund was unfair, and also infringed the property rights of those pension contributors who eventually took the lump sum option, and therefore “lost” that 2 cents contribution for ever.

The question then is who decided to establish the Buffer Fund in the first place? Was it based on the recommendations of the FNPF management and/or Board? Was Parliament responsible for the eventual legislation? There are clearly many legal and other issues that would need to be addressed in any comprehensive review of the FNPF Act, properly and thoroughly carried out so as to quell and doubts in the future.

(e) Other negative consequences for FNPF resulting from political decisions

To what extent is the current FNPF crisis due to lack of investment, lack of economic growth, lack of growth in employment and incomes, and FNPF contributions due to the continuing political uncertainties? These factors have been stated by all Reports on FNPF over the past two decades since 1987.

To what extent is the high rate of inflation which is eroding all pensions and funds in the Pension Fund caused by the massive deficit financing by the Government (using easy funds obtained from the FNPF), and lack of economic growth?

These are all questions which would need to be examined in detail with full facts and figures, and all available reports, made available to an expert Commission of inquiry, and to Fund Members.

Any fundamental decisions should and can only be made by the collective responsibility of the people, through their elected leaders in Parliament as before.

There is a need for collective approval of any amendments to the law on compulsory savings of members and beneficiaries through an elected Parliament

Any changes to the Fiji National Provident Fund provision have historically been implemented through an elected parliament, with full responsibility falling on the people's own elected representatives and debated, whether or not any amendments were finally made. Whether or not they were the right decision or wrong decision it is a collective decision taken by society through its elected representatives. This is the only way in which such changes should be made to a legislation that will affect the lifetime savings and pensions of hundreds of thousands of waged and salaried persons in Fiji.

Given that even elected parliaments are not necessarily comprised of financial, economic and social experts, it would be essential that there should first of all be an Expert Commission of Inquiry which would examine all the financial, economic, actuarial expert analyses and reports, consider the past history (including key decisions, successes, failures, errors in judgment by FNPF Management and Boards etc) in the context of the broad social and political environment, and give reasoned and balanced advice on the future path for the Fiji National Provident Fund.

If the Commission finds that the actuarial studies, properly revised to Fundmembers satisfaction, do indicate the need for reviews of the pension fund, then that would no doubt go ahead, but only with social approval and social consensus.

An elected parliament is due in 2014, according to the promise and commitment of the Government of the Day. A Commission of Inquiry will inevitably take several months to establish. The Inquiry would itself take a year or so to clarify all the issues and obtain consensus from affected parties, by which time an elected parliament will be imminent or already in operation.

Given that the FNPF Review as planned will imply extremely comprehensive changes to the Fund and its operations, and will have a major impact on Fiji's financial and economic system, as well significant impact on the welfare of those retiring in the future, it is only appropriate that such changes be brought in by an elected parliament.

Part 4 of the Transition Decree is on "Protections".

You might have thought that Part 4 of the Transitional Decree titled "Protections" was about protecting you, the pensioners and your property. Sorry.

Do you really believe Subsection 11 (2) of the Transition Decree which claims "the relevant provisions are not to be taken to provide for a deprivation of property of anyone".

Note: Article 17 of the Universal Declaration of Human Rights (UDHR) says "Everyone has the right to own property" and "no one shall be arbitrarily deprived of his property".

By all relevant criteria, the current pensioners' FNPF annuities are real financial property, guaranteed by a lawful contract signed with FNPF, and guaranteed by elected Fiji parliaments

Yet for virtually everyone currently receiving more than \$300 per month, their entitlements are going to be drastically reduced – by between 30% and 54% of their lawful property. i.e. The total loss to existing pensioners, in present value terms, will amount to more than \$150 to \$200 millions in aggregate (I roughly estimate).

Given that Australia and NZ do not recognize the Military Regime or its unlawful decrees, FNPF pensioners who are being adversely harmed might think about suing FNPF in Australia or NZ where FNPF has investments.

Part 4 "Protections": Denying Human Rights of Access to Justice

Clause 11 of the Regime's Transition Decree states the following (1) "The relevant provisions are not to be taken to be inconsistent with a human right or a similar right of any person". i.e. the Military Decree assures you that your human rights are not being harmed.

Article 8 of the Universal Declaration of Human Rights (UDHR) states "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

Article 10 of the UDHR “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...”.

But Subsection (3) of Part 4 of the Regime’s Transition Decree states:

“No court, tribunal, or other adjudicating body has jurisdiction or power to accept, hear, determine or in any other way entertain any challenge by any person, or to grant any remedy or relief to any person in respect of” (a and b) the validity of the Decree and (c) “any loss or damage suffered by any person...” as a result of the provisions in the Decree.

While Subsection (4) states if there is any relevant claim before any court, “the presiding judicial officer, without hearing or in any way determining the proceeding of the application, shall immediately transfer the application to the Chief Registrar of the High Court for the termination of the proceeding or the application...” and “a certificate to that effect shall be issued by the Chief Registrar of the High Court”.

(5) states if any relevant proceeding has already been started but not determined, that proceeding is also terminated.

(6) in case some brave judge thinks otherwise, the Transition Decree sternly warns that any court that is currently hearing such a proceeding, “must, on application by the Attorney-General ... issue a certificate to the effect that the proceedings ... have been wholly terminated..”.

And under (7) Such terminating certificates cannot be challenged in court.

Bottom line: the judiciary will not be allowed to hear your case, even though it involves a lawful legal contract entered into between FNPF and pensioners (backed by elected Fiji Parliaments), even if the case involves your basic human right to personal property and your basic human right to go to court with your just grievances.

The very fact that this Military Decree stops all legal challenges is clear evidence that the Regime knows that the FNPF does not have a leg to stand on, in a fair and lawful court.

Tough luck for the BurnessShameem case.

You may well ask: where is the separation of the State and judiciary? Where is the independence of the judiciary?

But note the Catch 22 situation for the Regime: if it allows this case to go ahead, then legal challenges can and will be mounted to all the Military Decrees. **Where will that leave this Military Government?**