



**NATIONAL PARLIAMENT OF SOLOMON ISLANDS
BILLS AND LEGISLATION COMMITTEE**

**Report on the
Foreign Investment
(Amendment and Validation)
Bill 2009**

NP-Paper No. 22/2009

Presented on 6 July 2009

National Parliament Office

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1 INTRODUCTION

The Bills and Legislation Committee has completed its review of the *Foreign Investment (Amendment and Validation) Bill 2009* (“**Bill**”) introduced in the House during the current (10th) meeting of Parliament by the Minister for Commerce, Industry, Employment and Immigration. The Bill was submitted to the Speaker through the Clerk to Parliament as required under the *Standing Orders*¹. The Speaker examined the Bill² and authorised it to be introduced in the current Parliament meeting.

The Bill was read the first time on Monday 29 June 2009 according to the government’s order of business. It is proposed that the Bill be read the second time on Monday 6 July 2009. On 24 June 2009 and 1 July 2009, the Bills and Legislation Committee considered the Bill and heard evidence from a range of stakeholders. Following its review, the Committee makes this report to Parliament, with recommendations, for the information of Members and for Parliament’s consideration.

Terms of Reference

Pursuant to its mandate under the *Standing Orders*, the terms of reference of the Committee in this instance is to examine the Bill and to report its observations and recommendations on the Bill to Parliament.

Functions of the Committee

The Bills and Legislation Committee (“**Committee**”) is established under *Standing Order 71*, an Order made pursuant to the *Constitution*³, and has, under that Order has the functions, together with the necessary powers to discharge such, to:

- (a) examine such matters as may be referred to it by Parliament or the Government;
- (b) review all draft legislation prepared for introduction into Parliament;
- (c) examine all subsidiary legislation made under any Act so as to ensure compliance with the Acts under which they are made;
- (d) monitor all motions adopted by Parliament which require legislative action;
- (e) review current or proposed legislative measures to the extent it deems necessary;

¹ *Standing Order 44* (1).

² As required by *Standing Order 45* (1).

³ Section 62, *Constitution of Solomon Islands 1978*.

- (f) examine such other matters in relation to legislation that, in the opinion of the Committee require examination; and
- (g) make a written report to each Meeting of Parliament containing the observations and recommendations arising from the Committee's deliberations.

Membership

The current members of the Bills and Legislation Committee (9th Parliament) are:

Hon. Severino Nuaiasi, MP (Chair)

Hon. Manasseh Sogavare, MP

Hon. Siriako Usa, MP

Hon. Isaac Inoke Tosika, MP

Hon. Augustine Taneko, MP

Hon. Nelson Ne'e, MP

Hon. Japhet Waipora, MP

2 POLICY BACKGROUND

Purpose of the Bill

The *Foreign Investment (Amendment and Validation) Bill 2009* includes the following government policy objectives:

The objects of the Bill are to validate all acts done before 19 October 2007 and to amend certain provisions, in particular to introduce an administrative penalty system and compounding of offences.⁴

Background

Prior to gaining independence, foreign investment activities in Solomon Islands relied only on British statutes and legislation. It was not until 1979 that the Legislative Assembly enacted the first local statute the: *Foreign Investment Act*⁵. In 1984 the 1979 Act was repealed and replaced with another *Foreign Investment Act*⁶. The reason for replacing the 1979 Act was that it was thought to have given rise to too many complications in terms of application, and difficulties of interpretation to both foreign investors and the foreign Investment Division as the implementing agency of the government. It dealt with concepts such as “central management” or “control” of an enterprise, whereas precision was required in law⁷.

In 1990 the 1984 Act was also repealed and replaced with the *Investment Act 1990*⁸. The new Act aimed to make clearer provisions for the promotion of local and foreign investment⁹.

Over the years the country offered significant potential investment opportunities in many productive sectors. From late 1998 onwards, foreign investment took a downward spiral due to political instability and the ensuing ‘ethnic tension’ which saw many investors pulling out of Solomon Islands. The investment climate however improved from 2004 and has shown significant improvements in terms of stability and growth due largely to important

⁴ See the Explanatory Memorandum attached to the Bill, page 10.

⁵ Foreign Investment Act 1979

⁶ Foreign Investment Act 1984

⁷ See the 1984 Foreign Investment Explanatory Memorandum attached with the Bill

⁸ Chapter 142, Laws of Solomon Islands, 1996 Revision

⁹ See repealed 1990 Foreign Investment Act, page 3.

developments, one of which is the presence of the Regional Assistance Mission to Solomon Island (RAMSI).

Following the end of the armed conflict (1998 – 2003) successive governments recognized the importance of foreign investment in the economic development and recovery of the country and thus instituted several reforms with a view to encouraging more investors from abroad. Consequently, fifteen years after its enactment the 1990 Act was also repealed, thus marking repeal of the foreign investment statute for the third time since independence. That Act was replaced with the current *Foreign Investment Act 2005*. The primary aim of the new Act was to enable and create a better and conducive environment to attract foreign investors; and to establish an administrative body (Foreign Investment Board) to regulate investment in the country and to administer the Act. It also provides for greater foreign investor participation in the country's economic development.

Since its inception, however, a number of flaws have been identified within the Principle Act and the Ministry, recognizing the need for improvement, began work on this bill. This bill seeks to simplify, and where necessary abolish, some of the regulatory and administrative requirements relating to foreign investment.

Further, whilst the government acknowledges that improving the investment climate has resulted in steady growth of foreign investment activities in the country, the government has also realised that the penalty provisions under the current legislation need further review. Moreover, a number of errors have also been noted in terms of the implementation of the 2005 Act. It is against this backdrop that the CNURA Government, through the responsible Ministry, now proposes further amendment to the principle Act, purposely:

- (a) To validate all acts taken under the principal Act before 19 October 2007;
- (b) To introduce additional clauses primarily related administrative penalty system, increasing penalties and convert them to penalty units under section (22), (32), (33) (35) and (36); and compounding violation.

3 REVIEW OF THE BILL

In its review of the *Foreign Investment (Amendment and Validation) Bill 2009*, the Committee considered secondary materials and also heard from certain key witnesses.

Secondary Material

In order to review the Bill in its proper context, the Committee received briefings from the Committee Secretariat on the history of foreign investment laws based on relevant laws enacted between 1979 and 2005. The Committee also received briefings on Foreign Investment laws in other common law jurisdictions, including Australia.

Public Hearing

The Committee held a public hearing on Wednesday 24 June 2009 and Wednesday 1 July 2009, with the view to hear from relevant officials of the Ministry and key stakeholders. The following witnesses appeared before the Committee at the hearings:

- Permanent Secretary, Ministry of Commerce, Industry, Employment and Immigration;
- Director, Foreign Investment Board;
- General Manager, Investment Cooperation of Solomon Islands (ICSI);
- Legal Draftsman; and
- Representatives of Central Bank of Solomon Islands (CBSI), Guadalcanal Plains Palm Oil Limited (GPPOL) and Gold Ridge Mining Limited (GRML).
- Representatives of Australia New Zealand Banking Corporation (ANZ), Bank South Pacific (BSP), Westpac Banking Corporation (Westpac).

A complete list of witnesses who appeared at the hearing is annexed as **Appendix 2**.

4 ISSUES ARISING

From its preliminary research and evidence gathered at the hearing, the Committee identified a number of issues arising from its review of the Foreign Investment (Amendment and Validation) Bill 2009. These are considered in this Chapter, together with responses from witnesses and, where necessary, recommendations of the Committee on a specific issue.

Consultation

One of the important functions of the Committee is designed to ensure that there is proper scrutiny of proposed legislation. In addition to the witnesses that appeared on Wednesday 26 June 2009, representatives of commercial banking corporations were invited but at the hearing, declined to provide any oral submissions on the basis of having little to comment on the proposed legislation. The Committee has on many occasions entreated the Government to consult widely with stakeholders before introducing legislation to parliament and placing it in the hands of this Committee. The Committee continues to hear that stakeholders are frustrated by the limited and last minute consultation that occurs. The Committee also feels that this limits and frustrates the effectiveness of the Committee.

The Committee notes that there was consultation prior to drafting the Bill amongst the relevant authorities involved but not necessarily more broadly.

The Committee is concerned that considerable consultations with stakeholders involved are necessary for meaningful feedback on the proposed provisions. While the Committee acknowledges that a bill cannot delve into the details of foreign investment regulation a common understanding amongst all stakeholders should have been reached before a bill is introduced in Parliament. Now that the Bill is before Parliament, the Committee suggests that the Ministry and the Director make certain that public awareness occurs so stakeholders are aware of how they will be affected by the rules under the Bill.

Financial Implications

The Committee was interested in the financial implications of implementing the Bill but did not have the opportunity to dwell on this issue. Although the question had been prepared, emphasis was placed on the implications of the Bill to foreign investors, the government and the foreign investment environment and market in the Solomon Islands however it would be useful if the Minister addressed this issue during the Committee stage of the Bill.

Retrospective Validation

The Committee sought clarification on the reason as to why the Foreign Investment Act was assented on 16 December 2005 but did not commence until 19 October 2007 by virtue of Clause 9 of the Bill.

The Legal Draftsman advised that the commencement notice as covered by section 59 (3) of the Constitution, which states that *'no law shall come into operation until it has been published in the Gazette'*¹⁰. When the first notice of commencement was published, it contained errors including the use of the word 'Bill' as opposed to the word 'Act' and also omission of the word 'June' in the date '26 June 2006'. The correct notice was finally made on 19 October 2007.

The Bill attempts to vacate 19 October 2007 as the commencement date, make 26 June 2006 again the commencement date and validate any decisions and actions done or deemed to have been taken under the Act by the Division and the Director and any proceedings in court that might be raised before the date of 19th October 2007.

The Committee has expressed its concern on a number of occasions in relation the frequency of 'validation' bills which are brought to Parliament for a range of reasons. The Committee is of the view that once Parliament passes legislation it is up to the respective Ministries to work with the Attorney Generals chambers and the Prime Minister Office to ensure that the necessary administrative law is promptly and duly completed to avoid the Parliament taking up its time to tidy the law retrospectively. The Committee is strongly of the view that the administration of gazettal and other administrative law matters should fall within the Attorney Generals office rather than being divided with some functions being undertaken by the Prime Ministers Office.

¹⁰ Constitution of the Solomon Islands

Determining Violation

The Committee posed a question on the issue of categorizing contravention differentiating, violation from offence by virtue of Clause 4 under section 29B of the Bill.

The Ministry advised that the Director was the issuing authority and holds the discretion to decide what can be treated as “violation” under the Principle Act, as distinct from a criminal offence. The powers afforded to the Director to determine an alleged offence are too onerous and should be the responsibility of a board or an independent tribunal.

The Committee maintains that any decision made under the Principle Act or Bill must be made properly within the bounds of the law and not be the subject of individual discretion reliant upon ‘good faith’. It must be unbiased and fair and not be susceptible to political influence or corporate corruption.

This view was echoed by witnesses represented, particularly in reference to the introduction of a penalty system. Witnesses strongly suggested that the determination on the penalties be properly administered by an independent tribunal where foreign investor can have the opportunity to present its position as regards an offence or the penalty imposed.

Compounding Violation

In respect of the compounding of violations, the Committee acknowledged the initiative undertaken by the Ministry to reduce the time within which a complaint against an offence can be determined and penalised.

However, the Committee reiterates the risk of this responsibility resting with an individual (in this case, the Minister) as opposed to a board. Such board should approve compounding but with the confirmed signature of the Minister. Additionally, it was suggested that compounded penalties should also be negotiated through the suggested board or tribunal. This will not only ensure better protection to the Government but also to both large and small foreign investors.

The Committee further noted however that with the compounding of offences comes the need to properly record of offences and violations. Such a record must be kept with the Director which would allow the Board to monitor violations committed and the penalties

imposed on a foreign investor, allowing either the Board or the courts to be better informed in future offending.

Rationale on Penalty Increase

The Committee heard evidence that supported the introduction of a penalty system and the increase of penalties in the Principle Act and considered the rationale of the increase in the penalty that Clause 3, 5, 6 and 8 of the Bill and was particularly interested in the view of the foreign investors on the effect of such increases to the confidence in the Solomon Islands investment environment.

The position taken by GPPOL and GRML particularly in supporting the penalty system was well noted by the Committee. GPPOL and GRML submitted that foreign investors are expected to comply with the laws and regulations and penalties per se are not intended to deter investors but to provide clear guidelines within which an investor can be sure of fair and equal application.

It was submitted that investors invest on the basis of foreseeable opportunities within a country, and any potential investor that is put off by such penalties is most likely a non-genuine investor. On the contrary, foreign investors in the Solomon Islands are more concerned about the security of their investments, their assets and properties and on that basis the Government must have the right capabilities to protect its investors and in so doing promote the investment environment in the country.

Penalty Administration

GPPOL, GRML and ICSI each strongly emphasised that improving foreign investment in Solomon Islands lays beyond the ambits of the Principle Act and the Bill.

It was submitted that other legislation, including the Immigration Act, Labour Act or Lands & Titles Act, that coincide with the Principle Act also need to be reviewed and modernised. All this legislation is interwoven into the development of this country and contributes towards the confidence that investors need to deal with our Government.

ICSI submitted that this Act is a crucial step forward for the Solomon Islands, but nonetheless represents a 'piecemeal approach' to improving foreign investment in the Solomon Islands as it only improves mere administration and registration of foreign investment. The country must have a holistic approach in reviewing legislation to attract foreign investment.

GRML also stated that there are still a number of impediments that restrict the efficient progress in the registration and implementation of a foreign investment activity, particularly due to inaction or delays in other government departments. Advice and information on the step-by-step process for foreign investors need to be provided particularly in terms of dealing with other related and relevant departments. Such resources allow investors to accelerate their investment.

Other investment impediments relate to infrastructure, telecommunications, access to resources etc. The Foreign investment policy must always be updated to reflect the will of government, but also to reflect the global market and its demands for foreign investment.

In respect of the penalties that may be derived as a result of the Bill, the Committee is of the view that such payments be utilised by the Ministry in areas that would benefit foreign investment in the Solomon Islands rather than to have it go into the Consolidated Funds and expended on unrelated areas. The Financial Instructions should be amended accordingly.

Protection of Foreign Investment

One of the points continuously raised by GRML and GPPOL was the need for the protection of foreign investors in the Solomon Islands. The Committee is concerned that violations dealt with by the Director (as opposed to an impartial Court) may undermine the justice

system as well as the right of an investor to impartial and proper determination of their case.

The Committee feels that there needs to be proper mechanism in place to protect the interest of foreign investors against unfair and biased decisions and actions that may adversely threaten their investments and business operations in the Solomon Islands. There must be mechanisms in place to not only administer and review sanctions under the Principal Act, but also other related authorities and government departments relevant to their business operations. Experience has provided instances when a foreign investment business collapsed as a result of a number of violations committed by other authorities, and against which a foreign investor is not afforded adequate opportunity to put forward its position.

Where an offence under the Principle Act is committed by the negligence or wilful conduct of an agent or employee, the investor must be afforded the opportunity to argue or defend its position, particularly when the penalty is likely to adversely affect the operational status of a foreign investor. The Committee believes that it is better to arbitrate over a matter before a certificate is revoked, causing potentially irrevocable damage to the investor. The Committee notes however that this mechanism should apply to serious offences only where the imminent effect of which is significant loss of business or cancellation of an investment certificate.

5 RECOMMENDATIONS

The Committee has reviewed the Bill and recommends that the government monitor matters raised in this report, in terms of assessing its implementation and effectiveness in achieving its important objectives, and report to Parliament 12 months after the commencement of the Act, and in particular recommends:

1. That Bills providing retrospective effect should, if possible, not be required to come before Parliament and to assist in this the administration of administrative law matters should fall within the Attorney-Generals Office rather than being divided with some functions being undertaken by the Prime Ministers Office.
2. That the Director maintain a proper record of all violations and decisions made thereon for the purposes of monitoring performances of each foreign investor in the Solomon Islands;
3. That investigation and assessment of purported violations, determination of penalties and compounding of violations not be undertaken by an individual (Director or Minister) but by a board or a tribunal that will ensure impartial and transparent review and determination of offences and penalties;
4. That there be a whole of Government approach to foreign investment regulation within Solomon Islands to build efficiency and reliability into investing in the country;
5. That penalties paid under the Act be utilised by the Ministry for development of areas that would benefit foreign investment in the Solomon Islands.



Hon. Severino Nuaiasi

Chairman

Bills and Legislation Committee

Monday, 6 July 2009

APPENDIX 1: MINUTES



BILLS AND LEGISLATION COMMITTEE

NATIONAL PARLIAMENT OF SOLOMON ISLANDS

Minutes of Proceedings

Hearing No. 1

Wednesday 24 June 2009
Conference Room 2, Parliament House, 2:30pm

1. Members Present

Hon. Hon. Severino Nuaiasi, MP (Chair)
Hon. Manasseh Sogavare, MP
Hon. Augustine Taneko, MP
Hon. Japhet Waipora, MP
Hon. Nelson Ne'e, MP

Secretariat:

Mr. Noel Matea, Committee Secretariat

In – Attendance

Ms. Joanna Kenilorea

2. Opening Prayers

Hon. Nelson Ne'e said the opening prayer.

3. Hearing into the Foreign Investment (Amendment & Validation) Bill 2009

The following witnesses appear before the Committee

- Mr. Barnabas Anga, Permanent Secretary, Ministry of Commerce, Industry and Employment
- Mr. Derek Aehari, Director, Foreign Investment Board
- Mr. Rupeni Nawaqakuta, Legal Draftsman, Attorney General Chambers

The Chairman made a brief opening statement and called on the Permanent Secretary – MCIE, Director – FIB and Legal Draftsman - AGC to make an opening statement to the Committee as they so wished.

The Witnesses made their opening statements to their position on the Bill and following which the Committee questioned the witnesses on their presentation and their positions in respect of specific issues arising from the Bill.

After the witnesses concluded their submission, they withdrew and the following witnesses appear before the Committee:

- Mr. John Maneniara, General Manager, ICSI
- Mr. Reynick Aquillah, Chief Manager – International Department, CBSI
- Mr. Keith Nielsen, Government Liaison Manager, GRML
- Mr. George Kuper, Community Relations Manager, GRML
- Mr. Harry Brooke, General Manager, GPPOL

The Chairman made a brief opening statement and then called on the GM – ICSI, Chief Manager ID – CBSI, Government Liaison Manager – GRML and GM – GPPOL to make an opening statement to the Committee as they so wished.

The Witnesses made their opening statements to their position on the Bill and the Committee questioned the witnesses. Following submissions and questioning, the hearing was concluded.

4. Close

The Chair thanked the witnesses for their attendance.

Hon. Japheth Waipora said the closing prayer.

Meeting ended 5:00 pm.



BILLS AND LEGISLATION COMMITTEE

NATIONAL PARLIAMENT OF SOLOMON ISLANDS

Minutes of Proceedings

Hearing No. 2

Wednesday 1 July 2009
Conference Room 2, Parliament House, 3:15pm

5. Members Present

Hon. Hon. Severino Nuaiasi, MP (Chair)
Hon. Manasseh Sogavare, MP
Hon. Augustine Taneko, MP
Hon. Japhet Waipora, MP

Apology

Hon. Nelson Ne'e, MP
Hon. Isaac Inoke Tosika
Hon. Siriako Usa

Secretariat:

Mr. Stanley Hanu, Committee Secretariat

Witnesses

Mr. Mark Corcoran, Country Head, Bank South Pacific
Mr. Ben Anderson, Head of Risk, ANZ Banking Cooperation
Mr. Rolland Manetiva, Manager Operational-Risk and Compliance, Westpac Banking Cooperation

6. Hearing into the Foreign Investment (Amendment & Validation) Bill 2009

Witnesses from Banking Co-operations appear before the Committee, and provided evidence.

7. Close

The Chair thanked the witnesses for their brief attendance.

Meeting ended 3:20 pm.

APPENDIX 2: WITNESSES

Witnesses who appeared before the Bills and Legislation Committee on 24 June 2009 were:

1. **Mr. Barnabas Anga**, Permanent Secretary, Ministry of Commerce, Industry and Employment.
2. **Mr. Derek Aehari**, Director, Foreign Investment Board.
3. **Mr. Rupeni Nawaqakuta**, Legal Draftsman, Attorney-General's Chamber.
4. **Ms. Joanna Kenilorea**, Officers, Attorney-General's Chamber.
5. **Mr. John Maneniara**, General Manager, Investment Co-operation of Solomon Islands
6. **Mr. Reynick Aquillah**, Chief Manager – International Department, Central Bank of Solomon Islands.
7. **Mr. Keith Nielsen**, Government Liaison Officer, Gold Ridge Mining Limited.
8. **Mr. George Kuper**, Community Relations Manager, Gold Ridge Mining Limited.
9. **Mr. Harry Brooke**, General Manager, Guadalcanal Plains Palm Oil Limited