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(DECREE NO. 16)

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GOVERNMENT OF FIJI

MAHOGANY INDUSTRY DEVELOPMENT DECREE, 2010 (DECREE NO. 15 OF 2010)

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

TO PROVIDE FOR THE RESTRUCTURING OF THE MAHOGANY INDUSTRY IN FIJI FOR THE PURPOSE OF FACILITATING ITS FURTHER DEVELOPMENT HAVING REGARD TO THE INTERESTS OF INDIGENOUS LANDOWNERS AND THE PEOPLE OF FIJI GENERALLY, AND FOR RELATED MATTERS

PART 1—PRELIMINARY

Short title and commencement

- 1.—(1) This Decree may be cited as the Mahogany Industry Development Decree 2010.
- (2) This Decree comes into force on a date appointed by the Minister by notice in the *Gazette*.

Interpretation

- 2.—(1) In this Decree, unless the context otherwise requires—

“Council” means the Mahogany Industry Council mentioned in section 3;

“Fiji Hardwood Corporation Limited” means the company of that name incorporated under the Companies Act [Cap. 247];

“landowner”, in relation to mahogany plantation land, means—

- (a) in the case of mahogany plantation land that is native land, the mataqali or other division or subdivision of Fijians whose native land it is; or
- (b) in the case of mahogany plantation land that is State-owned land, the State;

“lease” includes any tenancy, licence, approval notice, provisional application for lease, provisional approval for lease, deed or agreement in respect of land or an interest in land;

“mahogany lease” means—

- (a) any lease in respect of mahogany plantation land; or
- (b) any lease specified in regulations made under this Decree to be a mahogany lease for the purposes of this Decree,

and, for the avoidance of doubt, leases in respect of mahogany plantation land include the following leases in effect at the commencement of this Decree—

- (i) leases in respect of native land between the Native Land Trust Board as lessor and Fiji Hardwood Corporation Limited as lessee (being lessee by virtue of an assignment from the Director of Lands as original lessee) conferring on the lessee the right to harvest mahogany timber grown on the land; and
- (ii) leases in respect of State-owned land between [the Director of Lands] as lessor and Fiji Hardwood Corporation Limited as lessee conferring on the lessee the right to harvest mahogany timber grown on the land.

“mahogany plantation land” means—

- (a) any native land or State-owned land used or to be used for growing mahogany trees; or
- (b) any land specified in regulations made under this Decree to be mahogany plantation land for the purposes of this Decree;

“Minister” means the Prime Minister;

“native land” has the same meaning as in the Native Land Trust Act [Cap. 134];

“Native Land Trust Board” means the Board of that name established under section 3 of the Native Land Trust Act;

“repealed Act” means the Fiji Mahogany Act 2003 (No. 13 of 2003) that is repealed by section 1 of Schedule 3;

“Trust” means the Fiji Mahogany Trust that is continued in existence under section 8(1).

(2) In this Decree, unless the context otherwise requires, reference to mahogany timber is a reference to mahogany timber in Fiji.

PART 2—MAHOGANY INDUSTRY COUNCIL

Mahogany Industry Council

3.—(1) There is to be a Council known as the Mahogany Industry Council consisting of—

- (a) the Prime Minister, as Chairperson;
- (b) the Attorney-General;
- (c) the Minister responsible for forests;
- (d) the chairperson of the Fiji Mahogany Trust;
- (e) one person, not holding any State office or emolument, appointed by the Chairperson.

(2) There is to be a secretary to the Council, appointed by the Chairperson.

Functions of the Council

4.—(1) The principal function of the Council is to supervise and direct the maintenance and development of the mahogany industry in Fiji.

(2) In particular, it is the function of the Council to supervise and direct Fiji Hardwood Corporation Limited and Fiji Mahogany Trust in the performance of their functions under this Decree.

Objectives

5.—(1) In performing its functions, the Council must have regard to—

- (a) the need for the mahogany industry to be operated on a basis that is sustainable in the long term, and in particular the need for a comprehensive reforestation programme;
- (b) the desirability of value being added within Fiji to mahogany timber and mahogany timber products;
- (c) the aim of achieving a fair return to landowners for the mahogany timber on their land;
- (d) the interests of the people of Fiji as a whole, including opportunities for increased employment and skills training.

- (2) In furtherance of these objectives, the Council must also have regard to the desirability of—
- (a) maintaining a high quality in the mahogany timber and timber products produced in Fiji;
 - (b) establishing a scheme for the certification of felled mahogany timber;
 - (c) the development of a recognised brand for Fiji mahogany timber and timber products.

Powers of the Council

- 6.—(1) In performing its functions, the Council has the power—
- (a) to fix the terms subject to which mahogany timber may be sold by Fiji Hardwood Corporation Limited;
 - (b) to direct Fiji Hardwood Corporation Limited to enter into an agreement with a specified person for the sale of mahogany timber;
 - (c) to determine how the proceeds of sale of mahogany timber are to be distributed or used, including the amounts that are to be—
 - (i) paid to landowners;
 - (ii) paid to the State, as reimbursement of costs incurred in connection with the mahogany industry or for use in the repayment of debts owed by Fiji Hardwood Corporation Limited that have been guaranteed by the State; or
 - (iii) set aside for reforestation or other purposes;
 - (d) to direct Fiji Hardwood Corporation Limited and Fiji Mahogany Trust to do anything that they may lawfully do—
 - (i) in the performance of their functions under this Decree;
 - (ii) pursuant to the terms of any mahogany lease to which they are a party;
 - (iii) with regard to any renewal of a mahogany lease to which they are a party; or
 - (iv) with regard to entering into any lease in respect of, or otherwise dealing with, any mahogany plantation land or native land intended to be used for growing mahogany;
 - (e) to direct the Native Land Trust Board in the exercise of any rights or obligations the Board may have—
 - (i) as lessor under a mahogany lease, including the termination or renewal of such lease;
 - (ii) under the Native Land Trust Act [Cap. 134] in respect of any mahogany lease;
 - (iii) under the Native Land Trust Act [Cap. 124] in respect of any mahogany plantation land or native land intended to be used for growing mahogany, including the issuance of any lease in respect of that land;
 - (f) to do any other thing that it considers necessary or appropriate for the proper performance of its functions under this Decree.

- (2) The Council may obtain the advice of experts in connection with the making of any decision.

Meetings of the Council

- 7.—(1) The Council meets at such times and places as the Chairperson may appoint.

- (2) At meetings of the Council—

- (a) three members constitute a quorum; and
- (b) the Chairperson or presiding person has a casting vote where there is an equality of votes.

- (3) The Chairperson or, in his absence, a deputy chairperson appointed by the Chairperson, presides at meetings of the Council.

PART 3—FIJI MAHOGANY TRUST

Continuation of the Fiji Mahogany Trust

8.—(1) The Fiji Mahogany Trust established by the Fiji Mahogany Act 2003 (No 13 of 2003) for the benefit of landowners is continued in existence.

(2) Schedule 1 has effect as regards the Trust.

Trust to distribute monies to landowners

9. It is the duty of the Trust to distribute to landowners, promptly and in the manner directed by the Council, monies received by the Trust from Fiji Hardwood Corporation Limited as proceeds of the sale of mahogany timber.

Trust to be subject to direction of Council

10. In exercising any rights or performing any duties under this Decree or under the Trust Rules the Trust is subject to the direction of the Council.

PART 4—FIJI HARDWOOD CORPORATION LIMITED

Functions of Fiji Hardwood Corporation Limited

11.—(1) It is the function of Fiji Hardwood Corporation Limited, acting on the direction of the Council—

- (a) to manage all operations in connection with the planting, growing, harvesting and sale of mahogany timber on mahogany plantation land; and
- (b) to provide services and expertise to the Council in connection with the management of mahogany plantation lands and the development of the mahogany industry.

(2) Without limiting the effect of subsection (1)(b), the matters on which the Fiji Hardwood Corporation Limited is to provide services and expertise include—

- (a) the reforestation of cleared mahogany plantation land; and
- (b) the establishing of a scheme for certification of felled mahogany timber.

(3) In exercising any rights or performing any duties under this Decree or as lessee under a mahogany lease, Fiji Hardwood Corporation Limited is subject to the direction of the Council.

(4) Without affecting the generality of subsection (3), Fiji Hardwood Corporation Limited must comply with the directions of the Council as regards—

- (a) entering into any agreement for the sale of mahogany timber; or
- (b) undertaking any transaction for or in connection with the harvesting of mahogany timber or the management of mahogany plantation lands.

(5) Fiji Hardwood Corporation Limited must report to the Council on the performance of its functions under this Decree when so requested by the Council.

PART 5—MISCELLANEOUS

Mahogany leases

12.—(1) By this subsection, the terms of every mahogany lease in effect at the commencement of this Decree are varied—

- (a) by removing any obligation on the part of the lessee for any payment to the lessor in respect of the harvesting or removal of mahogany timber grown on mahogany plantation land; and
- (b) by removing any provision for reassessment of the rent payable by the lessee under the lease.

(2) The Native Land Trust Board, in the exercise of its rights and obligations as lessor under any mahogany lease, is subject to the direction of the Council including in particular as regards—

- (a) any variation of the terms of the lease;
- (b) terminating the lease;
- (c) its rights under the lease in respect of default or failure on the part of the lessee in complying with the lessee's obligations under the lease.

(3) The Native Land Trust Board must not, without first obtaining the consent of the Council, enter into or consent to the issuing of any lease in respect of native land which is used or intended to be used for the growing of mahogany trees.

(4) The Native Land Trust Board must, not less than 12 months before the expiry of any mahogany lease of which it is the lessor, notify the Council in writing of the date of expiry of the lease.

Mahogany plantation land

13. Schedule 2 has effect as regards mahogany plantation land.

Regulations

14. The Minister may, with the approval of the Council, make regulations to give effect to the provisions of this Decree.

Offences

15.—(1) A person who, without the authorisation of Fiji Hardwood Corporation Limited acting on the direction of the Council—

- (a) fells any mahogany timber on mahogany plantation land or removes any mahogany timber from mahogany plantation land; or
- (b) solicits the owner of mahogany plantation land or a person having right of access to mahogany plantation land to consent to the felling of any mahogany timber on the land or the removal of any mahogany timber from the land,

commits an offence.

(2) A person who is convicted of an offence under subsection (1) is liable to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 5 years or both.

(3) Any person being the owner of mahogany plantation land or having right of access to mahogany plantation land who, without the authorisation of Fiji Hardwood Corporation Limited acting on the direction of the Council—

- (a) consents or purports to consent to the felling of any mahogany timber on the land or the removal of any mahogany timber from the land; or
- (b) solicits a person to fell any mahogany timber on the land or to remove any mahogany timber from the land,

commits an offence.

(4) A person who is convicted of an offence under subsection (3) is liable to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 5 years or both.

Operation of Native Land Trust Act [Cap. 134], etc

16.—(1) This decree has effect notwithstanding any provision of the Native Land Trust Act [Cap. 134] or any other law and, accordingly, to the extent that there is any inconsistency between this Decree and the Native Land Trust Act or other law, this Decree prevails.

(2) Without affecting the generality of subsection (1), and for the avoidance of doubt—

- (a) this Decree has effect notwithstanding sections 4 to 8 of the Native Land Trust Act;
- (b) where there is any inconsistency between a direction given to Native Land Trust Board by the Council under this Decree and a provision of the Native Land Trust Act, the direction given by the Council prevails.

Repeals and amendments

17. The repeals and amendments set out in Schedule 3 have effect.

Consequential and transitional matters

18. Schedule 4 has effect in relation to certain arrangements that were in place under the repealed Act, and to transitional matters.

SCHEDULES

SCHEDULE 1—FIJI MAHOGANY TRUST

[s.8(2)]

Interpretation

1. In this Schedule, unless the context otherwise requires—

“Board of Trustees” means the Board appointed under paragraph 3 of this Schedule;

“Trustee” means any person appointed as a member of the Board of Trustees under paragraph 3 of this Schedule;

“Trust Rules” means the Trust Rules made under paragraph 5 of this Schedule.

Objects and powers of Trust

2.—(1) The Trust exists for the benefit of landowners of mahogany plantation land, and has such objects as are set out in the Trust Rules.

(2) The Trust—

(a) may sue and be sued in its own name;

(b) on such terms as the Board thinks fit, may acquire, purchase, take, hold and enjoy real and personal property, other than land or an interest in land owned by members of the Trust, and may transfer, convey, assign, surrender and yield up, charge, mortgage or otherwise dispose of or deal with or in real or personal property vested in the Trust;

(c) on such terms as the Board thinks fit, may enter into contracts, borrow or lend money; and

(d) may do in connection with its objects all other things that a legal person can do.

(3) The Trust is administered in the manner set out in the Trust Rules.

Board of Trustees

3. There is to be a Board of Trustees of the Trust whose members are appointed by the Minister responsible for indigenous affairs.

Exclusion of Trustee Act [Cap. 65] and perpetuity rule

4. The provisions of the Trustee Act and the rules against perpetuity contained in any written or other law do not apply to the Trust or other trusts created under this Decree.

Trust Rules

5.—(1) The Board of Trustees may, after consultation with the landowners and with the approval of the Minister responsible for indigenous affairs, make the Trust Rules.

(2) Trust Rules made under this paragraph must be published in the *Gazette*.

(3) In this paragraph, a reference to making Trust Rules includes a reference to making Trust Rules that repeal or amend Trust Rules previously made.

Audit of Trust's accounts

6. The accounts of the Trust are to be audited annually.

Transitional

7. Any Trustee holding office immediately before the commencement of this Decree continues to hold office for the balance of his or her term or until an appointment is made under paragraph 3 of this Schedule for that position, whichever is the earlier.

SCHEDULE 2—GENERAL PROVISIONS RELATING TO MAHOGANY PLANTATION LAND

[s.13]

Prohibited activities

1. Unless authorised by the Council, no person shall on any mahogany plantation land—

(a) fell or extract timber other than mahogany timber;

(b) take other forest produce;

- (c) take peat, rock, sand, shells or soil other than minerals as defined in the Mining Act [Cap. 146];
- (d) clear any part of the land;
- (e) cut, burn, uproot, damage or destroy vegetation;
- (f) erect any buildings or livestock enclosures;
- (g) allow any domestic animal to be on the land;
- (h) plant any crops or trees;
- (i) construct or obstruct any roads, paths or waterways;
- (j) set any trap, snare or net or use or be in possession of any gun, poison or explosive substance;
or
- (k) hunt or fish.

Saving of customary rights

2.—(1) Nothing in this Schedule prohibits or restricts the exercise by the landowners of any rights established by native custom to hunt, fish, or collect fruits and vegetables growing wild for domestic use.

(2) Subparagraph (1) does not authorise any person to set fire to grass or undergrowth.

Abandoned or seized property

3.—(1) Any timber which appears to have been abandoned on mahogany plantation land and any items seized under paragraph 8 of this Schedule shall be taken possession of by Fiji Hardwood Corporation Limited pending a direction from the Council.

(2) The Council may authorise the immediate sale or disposal in any other way of any of the objects referred to in subparagraph (1) which are perishable.

(3) If any of the objects referred to in sub-paragraph (1) is claimed by more than one person, the Council may direct Fiji Hardwood Corporation Limited to refer the claimants to the competent court.

(4) No person shall be entitled to recover possession of any timber under the provisions of this paragraph until the amount of any expenses incurred in collecting, moving, storing and disposing of the timber has been paid.

Lighting of fires prohibited

4.—(1) Unless authorised by the Council, no person shall light or cause to be lit a fire on any mahogany plantation land, except in a place established for the purpose of lighting fires.

(2) Fiji Hardwood Corporation Limited acting on the direction of the Council may issue fire licences for any area where the lighting of fires is prohibited under subparagraph (1).

(3) Any person who lights a fire in contravention of subparagraph (1) shall be liable for any damage caused by the fire, notwithstanding any efforts he or she may have made to prevent such damage.

(4) Where a fire escapes from an area owned or occupied by any person, that person shall be liable for any damage caused by that fire unless he proves that neither he or she nor anyone in his or her employ lit the fire and that he took all possible measures to prevent such damage.

(5) Any person who is in the vicinity of and is aware of a fire on mahogany plantation land which is occasioning damage or is likely to spread shall assist to the best of his or her possibilities in extinguishing the fire, and for this purpose the person may enter upon any land where the fire is or to which there is reason to believe the fire may spread and may do such things as are reasonably necessary to control or extinguish the fire.

Offences

5.—(1) Any person who—

- (a) contravenes any provision of this Schedule;
- (b) causes any damage while doing any activity that he has been permitted to do under this Schedule,

commits an offence and is liable to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 5 years or both.

(2) Where any person is convicted of an offence against this Decree, the court may, in addition to any other penalty, order that all forest produce and other things in respect of which such offence has been committed, and all tools, boats, conveyances and livestock used in the commission of such offence, be forfeited to the State.

(3) Any livestock found on any land is deemed to be there—

- (a) under the authority of the owner of the livestock, unless the owner proves the contrary; and
- (b) under the authority of the person, if any, actually in charge of such livestock.

Power of inspection and arrest

6. Any person (including any police officer) authorised in this behalf by the Council may –

- (a) where any person is engaged in an activity for which a licence or other authorisation is required under this Decree, require the production of such licence or other authorisation by such person;
- (b) stop and inspect any log carrier or other vehicle which is carrying any forest produce or which he or she reasonably suspects has been obtained in contravention of this Decree.

Power of arrest

7. Any police officer authorised in this behalf by the Council may without a warrant arrest any person who he or she reasonably suspects has committed an offence against this Decree, if such person refuses to give his or her name and address or gives a name and address which the officer has reason to believe is false.

Power of seizure

8. Any police officer authorised in this behalf by the Council may without a warrant seize and detain –

- (a) any forest produce or any peat, rock, sand, shells and soil other than minerals as defined in the Mining Act [Cap. 146], in respect of which there is reason to believe that an offence has been committed against this Decree, together with any objects or livestock used in the commission of such offence;
- (b) any livestock found trespassing or found without any person in charge of them in any forest reserve or nature reserve.

Non-liability for loss or damage

9. No person acting under this Schedule shall be responsible for any loss or damage which may occur in respect of any thing detained unless he or she causes that damage maliciously or fraudulently or by gross negligence.

SCHEDULE 3—REPEALS AND AMENDMENTS

[s.17]

Repeal of Fiji Mahogany Act 2003

1. The Fiji Mahogany Act 2003 (No. 15 of 2003) is repealed.

Disapplication of Forest Decree

2.—(1) The Forest Decree, 1992 (No. 31 of 1992) is amended by adding the following new section—

“2A. This Decree does not apply to land that is mahogany plantation land for the purposes of the Mahogany Industry Development Decree 2009.”

(2) Any mahogany plantation land that immediately before the commencement of this Decree was a forest reserve or a nature reserve, or part of such a reserve, for the purposes of the Forest Decree, 1992 ceases upon that commencement to be a forest or nature reserve or part of such reserve.

(3) Any licence issued under the Forest Decree, 1992 in respect of land that is mahogany plantation land for the purposes of this Decree and in effect immediately before the commencement of this Decree is upon that commencement deemed to have been revoked.

SCHEDULE 4—CONSEQUENTIAL AND TRANSITIONAL MATTERS

[s.18]

Trust to divest itself of shareholding in Fiji Hardwood Corporation Limited

1. Upon the commencement of this Decree, the Trust must execute a transfer of the shares in Fiji Hardwood Corporation Limited held in its name to the other existing shareholders of the Corporation in equal proportions.

Retrospective validation of certain mahogany leases

2.—(1) This paragraph applies to any grant of lease made or purported to be made before the commencement of this Decree between the Native Land Trust Board as lessor and the Director of Lands as lessee in respect of land that was or has since become mahogany plantation land.

(2) By the operation of this subparagraph—

- (a) any grant or purported grant of lease to which this paragraph applies is deemed to have been validly made and, accordingly, the Director of Lands is deemed for all purposes to have acquired, as from the date of the purported grant of lease, an interest in the land as lessee in accordance with the terms of the grant document; and
- (b) the subsequent assignment or purported assignment by the Director of Lands of his interest as lessee under the lease to Fiji Hardwood Corporation Limited is deemed to have been validly made and, accordingly, the Corporation is deemed for all purposes to have acquired, as from the date of the purported assignment, the interest of the Director of Lands in the land as lessee in accordance with the terms of the assignment document.

(3) For the avoidance of doubt, subparagraph (2)(a) has effect notwithstanding—

- (a) that the term of the purported grant exceeded the maximum term permissible under regulation 20 of the Native Land Trust (Leases and Licences) Regulations as it then applied;
- (b) any other respect in which the purported grant was not in compliance with the Native Land Trust Act [Cap. 134] as it then applied; or
- (c) any judgement or order of a court declaring—
 - (i) the purported grant to be not permitted by law; or
 - (ii) the Director of Lands not to have acquired a valid interest in the land.

(4) For the avoidance of doubt, subparagraph (2)(b) has effect notwithstanding—

- (a) any absence of consent to the purported assignment on the part of the Native Land Trust Board under section 12 of the Native Land Trust Act as it then applied;
- (b) any other respect in which the purported assignment was not in compliance with the Native Land Trust Act as it then applied; or
- (c) any judgement or order of a court declaring the purported assignment not to have transferred any rights in the land, or being of no effect.

(5) Any judgement or order of a court, including a judgement or order given or made before the commencement of this Decree, is to have effect subject to subparagraph (2) and is, to the extent of any inconsistency with that subparagraph, not enforceable.

Immunity in respect of past use of mahogany plantation land

3. Further to paragraph 2 of this Schedule, no action lies against Fiji Hardwood Corporation Limited or any of its officers, the Native Land Trust Board or any of its officers, the Director of Lands or any other government officer or any Minister in respect of the use, before the commencement of this Decree, of any land that is mahogany plantation land for the purposes of this Decree for the planting, growing or harvesting of mahogany trees conducted in accordance with the terms of a purported lease or assignment to which that paragraph applies.

Certain licences deemed not to have been issued

4.—(1) This paragraph applies to any licence granted under the Forest Decree, 1992 (No 31 of 1992) before the commencement of this Decree in respect of mahogany plantation land to a person whose eligibility to be granted such licence was dependent upon a grant or purported grant of lease to which paragraph 2 of this Schedule applies not being a valid grant of lease.

(2) Any licence to which this paragraph applies is deemed not to have been granted and, accordingly, no claim lies in respect of any loss suffered by the purported licensee or any other person by virtue of—

- (a) any refusal or failure prior to the granting of the licence to grant the licence; or
- (b) the subsequent revocation or purported revocation of the licence.

Termination of certain court proceedings

- 5.—(1) This paragraph applies to any proceedings in a court in which proceedings—
- (a) any claim is made to the effect that or on the assumption that a grant or assignment, or purported grant or assignment, of lease to which paragraph 2(2) of this Schedule applies was not validly made;
 - (b) any claim is made in respect of the use of mahogany plantation land of the kind mentioned in paragraph 3 of this Schedule;
 - (c) any claim is made for loss of the kind mentioned in paragraph 4(2) of this Schedule;
 - (d) any claim is made against Fiji Hardwood Corporation Limited in respect of an agreement for the sale or supply of mahogany timber, regardless of whether the claim relates to any matter to which paragraphs 2 to 4 of this Schedule apply, or any relief or remedy is sought in respect of any such claim.

(2) Any proceeding to which this paragraph applies that was commenced but not determined immediately before the commencement of this Decree is upon the commencement of this Decree wholly terminated, and a certificate to that effect must be issued by the Chief Registrar to the parties.

(3) If any proceeding to which this paragraph applies is commenced after the commencement of this Decree, the judicial officer before whom the proceeding is brought must, without hearing or determining the matter, transfer the proceeding to the Chief Registrar who must terminate the proceeding by issuing a certificate to that effect to the parties.

GIVEN under my hand this 10th day of March 2010.

EPELI NAILATIKAU
President of the Republic of Fiji

