

MEMORANDUM ON THE OBJECTS OF THE PENSION FUNDS AMENDMENT BILL, 2007

1. BACKGROUND TO THE BILL

- 1.1 The primary objective of the Amendment Bill is to enhance the protection of the pension interest of members, given that dedicated contributions towards their retirement often extend across their lifetimes, and therefore serves as the most significant source of saving for most individuals in formal employment. A number of amendments over time have had this objective at their nexus, for example, the establishment of the Pension Funds Adjudicator, the amendments passed by Parliament in 2001 regarding pension fund surpluses and the determination of minimum benefits.
- 1.2 Over time however, not only have certain references in the Pension Funds Act, 1956 ('the Act') gradually become misaligned with provisions in other legislation, but more seriously, certain provisions of the Act have been challenged by those seeking in many instances to circumvent the spirit of the original legislation passed by Parliament through creative legal interpretations.

2. OBJECTS OF THE BILL

The Objects of the Amendment Bill are to –

- 2.1 to protect the pension interest of members; and
- 2.2 align the Act to changing regulatory policy and practical considerations.

3. SUMMARY OF THE BILL

- 3.1 The Amendment Bill broadly addresses the following areas:
 - 3.1.1 clarifying the surplus utilised improperly in terms of section 15B of the Act and other provisions regarding the process of surplus apportionment. These amendments are necessary to provide clarity to boards of trustees when apportioning surplus, and to close loopholes that allow for creative interpretations not aligned with the

intention of the legislature in the promulgation of the Pension Fund Second Amendment Act;

- 3.1.2 bringing the regulation of retirement funds established through bargaining council arrangements under the regulatory auspices of the Registrar of Pension Funds. It is further proposed that bargaining council funds not yet registered under the Act must register on or before 1 January 2008. This amendment is necessary to ensure consistency in fund governance and dispute resolution across both bargaining council funds and other occupational funds;
- 3.1.3 increasing the powers of the Registrar of Pension Funds so as to increase regulatory effectiveness;
- 3.1.4 providing for specific duties of pension fund administrators;
- 3.1.5 clarifying the jurisdiction of the Pension Funds Adjudicator. Provision is also made for the appointment of a deputy and acting adjudicator, when necessary, and the alignment of the Act with the Prescription Act;
- 3.1.6 providing clarity on the treatment of divorce orders and maintenance claims in respect of pension benefits; and
- 3.1.7 updating provisions in the Act which are no longer aligned to recently promulgated legislation.

3.2 The following is a brief summary of the Amendment Bill:

Section 1(1): Definitions

“actuarial surplus” [amendment of existing definition] - To ensure that any surplus utilised improperly by an employer is taken into account when the actuarial surplus of a fund is determined.

“adjudicator” [amendment of existing definition] - To include a deputy adjudicator and an acting adjudicator in the definition. An amendment to section 30C provides for these appointments.

“administrative penalty” [new definition] - To facilitate the use of the term in the Act and the Regulations.

“administrator” [new definition] - To facilitate the use of the term in the Act and the Regulations.

“advisory committee” [new definition] - To provide a definition for the advisory committee created by section 3B, during a previous amendment to the Act.

“audit-exempt” [new definition] - To facilitate the use of the term in the Act and the Regulations.

“augment” [new definition] - To ensure that the term when used in the Act is interpreted to include reduction, as the term in its ordinary meaning does not include reduction.

“beneficiary” [new definition] - To facilitate the use of the term in the Act and the Regulations.

“benefit” [new definition] - To facilitate the use of the term in the Act and the Regulations.

“board member” [new definition] - To facilitate the use of the term in the Act and the Regulations.

“contingency reserve account” [amendment of existing definition] - To clarify that the registrar may disallow or require amendments to a contingency reserve account and to align the Act with the requirements for contingency reserve accounts as set out in PF117.

“contribution holiday” [amendment of existing definition] - To remove the word “employer” from the term “employer reserve account” used in the current definition as this exact term is not always used in the rules of funds.

“court” [amendment of existing definition] - To replace the reference to “Supreme Court” with “High Court”.

“defined contribution category of a fund” [amendment of existing definition] - To allow for benefits as a result of a transfer or amalgamation in terms of section 14 of the Act and other amounts that may be credited or debited to a

member's individual account to be included in the calculation of the value of the benefits payable on retirement.

"dependant" [amendment of existing definition] - To delete the reference to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion. A new definition of spouse is proposed.

"employer surplus account" [amendment of existing definition] - To include amounts allocated to the employer surplus account in terms of section 15E(1)(e) of the Act.

"fund" [amendment of existing definition] - To facilitate the use of the term in the Act and the Regulations.

"fund return" [new definition] - To facilitate the use of the term in the Act and the Regulations.

"member surplus account" [amendment of existing definition] - To reflect the definition of "fund return" and to recognise that a fund return may be smoothed by a fund.

"minimum individual reserve" [amendment of existing definition] - To provide for pensioners and deferred pensioners in the definition.

"non-member spouse" [new definition] - To facilitate the use of the term in the Act and the Regulations.

"prescribed" and "prescribed by regulation" [new definitions] - To clarify the meaning of these terms when used in the Act.

"rules" [amendment of existing definition] - To clarify what constitute the rules of a fund.

"spouse" [new definition] - To clarify who qualifies as a spouse of a member and to align the definition with recently promulgated legislation.

"surplus apportionment date" [amendment of existing definition] - To ensure that each fund has a surplus apportionment date irrespective of the fact that a fund may not have surplus to apportion to facilitate the submission of a "nil" return.

“valuation-exempt” [new definition] - To facilitate the use of the term in the Act and the Regulations.

Section 2: Application of Act

To make it clear that all bargaining council funds registered in terms of the Act are indeed subject to the Act and to oblige bargaining council funds not yet registered under the Act to register before or on 1 January 2008 in the interest of consistency in fund governance and dispute resolution across bargaining council funds and other occupational funds.

Section 5: Effect of registration of pension fund

To correct references to Acts repealed since the last amendment to the Act. The following references are corrected:

- Stock Exchanges Control Act, No 1 of 1985 replaced with Securities Services Act, No 36 of 2004;
- Insurance Act, No 27 of 1943 replaced with Long-term Insurance Act, No 52 of 1998;
- Banks Act, No 23 of 1965 replaced with Banks Act, No 94 of 1990.

Section 7D: Duties of board

To correct a reference to an Act repealed since the last amendment to the Act. The following reference is corrected:

- Financial Institutions (Investment of Funds) Act, No 39 of 1984 replaced with Financial Institutions (Protection of Funds) Act, No 28 of 2001.

Section 9: Appointment of auditor

To correct a reference to an Act repealed since the last amendment to the Act. The following reference is corrected:

- Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991) replaced with Auditing Profession Act, 2005 (Act No. 26 of 2005).

Section 13A: Payment of contributions and certain benefits to pension funds

To provide clarity on the period in respect of which interest is payable.

Section 13B: Restrictions on administration of pension funds

To provide for the duties of pension fund administrators and to authorise the registrar to take certain steps in the event of non-compliance by an administrator with these duties.

Section 14: Amalgamations and transfers

- To provide that a scheme for a proposed amalgamation or transfer of a business of a registered fund must be submitted to the registrar within 180 days of the effective date of the transaction to prevent difficulties resulting from the retrospective implementation of a scheme and to ensure the expeditious finalisation of section 14 transfers. The current section does not require a scheme to be submitted within a specified period.
- To exclude certain transactions from the requirement to submit a scheme under certain stated circumstances.
- To determine a fixed period within which assets must be transferred. The current section does not specify a period.
- To provide for the lapsing of a scheme lodged with the registrar where a fund failed to provide the registrar with information requested within a period of 180 days.
- To authorise the registrar to impose conditions on the amendment or withdrawal of a certificate previously issued by him or her in respect of compliance with section 14(1).

Section 14A: Minimum benefits

- **14A(1)**: to ensure that minimum benefits are also provided to pensioners and deferred pensioners.
- **14A(1)(b) & (c)**: to clarify the wording in the interest of simplicity and certainty.
- **14A(1)(d)**: to clarify the wording to ensure that boards are compelled to grant at least minimum pension increases.
- **14B(1)**: to align the wording used with the definition of “defined contribution category of a fund”.
- **14B(2)(a)(i)(aa)**: to ensure that the rate of accrual is equitable and appropriate, should a fund register a rule amendment to reduce the accrual rate prospectively.
- **14B(2)(a)(i)(bb)**: to clarify the wording in the interest of simplicity and certainty.
- **14B(2)(a)(i)(cc)**: to ensure that any lump sum benefit is included when the minimum individual reserve is determined.
- **14B(2)(a)(ii)**: to clarify the wording and to align the wording used with the definition of “fund return”.
- **14B(3)(c)**: to exclude certain pension funds (such as retirement annuities and pensions purchased from insurers) from the obligation to grant minimum pension increases as this is not practical.
- **14B(4)(a)**: to ensure that minimum pension increases do not compromise a fund’s financial soundness.
- **14B(4)(b)(i)**: to ensure that where a pensioner retired in a previous fund all the conditions of this section apply as if the pensioner had retired on the day that he became a pensioner in a current fund. To provide for the re-setting of the moneys available for fund pension increases in the future when there is insufficient actuarial surplus at the surplus apportionment date to permit full increases to be given.
- **14B(4)(c)**: to clarify the wording in the interest of simplicity and certainty.

- **14B(6):** to ensure that contingent pensions are included in the calculation of minimum individual reserve where the corresponding beneficiaries are still alive.

Section 15B: Apportionment of existing surplus

- **15B(1)(a):** to clarify which funds must submit surplus schemes to the registrar, e.g. a fund that commenced in 2000 and registered in 2005 must also submit a scheme to the Registrar for approval.
- **15B(1)(b):** to provide that any advancement of a fund's statutory actuarial valuation date must be motivated to the registrar.
- **15B(5):** to include deferred pensioners within the ambit of this subsection.
- **15B(5)(d):** to authorise the registrar to set requirements relating to the method for and timing of the repayment of any surplus utilised improperly.
- **15B(5)(f):** To clarify that fund return is payable to stakeholders from the surplus apportionment date until the date of final settlement.
- **15B(6):** to reword the subsection to clarify what constitutes improper uses and to confirm that improper use investigations must go back to at least 1 January 1980. To provide for specific definitions applicable to this subsection only ("cost", "employer", "former member" and "selected").
- **15B(9)(d):** to clarify that reasonable measures taken to inform affected persons of a scheme is sufficient to comply with this subsection.
- **15B(9) & (10):** to confirm that the statutory actuarial valuation as at the surplus apportionment date and the surplus scheme must be considered jointly to determine whether or not funds have satisfied the provisions of section 15B.
- **15B(11):** to require a "nil" return to be submitted to the registrar where a fund does not have surplus to apportion and to set out the requirements for a "nil" return.

- **15B(12):** to enable a fund to apply the requirements of surplus apportionment on a participating employer level, where the participating employers have been administered as separate entities or sub-funds within a fund (in other words, under “umbrella” arrangements).
- **15B(13):** to authorise the registrar to prescribe additional requirements for a “nil” return.

Section 15C: Apportionment of future surplus

To clarify that future surplus can be allocated to either the member or employer surplus accounts or both.

Section 15E: Utilisation of surplus for benefit of employer

To allow for transfers from the employer surplus account to the member surplus account.

Section 15F: Existing employer reserve accounts

To align the wording used with the definition of “employer reserve account”.

Section 15K(1): Specialist tribunal

To align this section 15K(1) with section 15B(10).

New Section 18(5)

To authorise the registrar to, in the interest of members, require an audit, valuation, inspection or investigation in respect of a fund.

Section 25: Powers of inspection

To authorise the registrar to conduct compliance inspections and to instruct any person to conduct an inspection on his or her behalf.

Section 26: The Registrar may intervene in the management of a fund

To authorise the registrar to intervene in the management of a fund without first having to obtain a Court order.

Section 28: Voluntary dissolution of fund

To authorise the registrar to exempt a fund from any of the provisions of section 28, subject to conditions.

Section 30A: Submission and consideration of complaints

To authorise the adjudicator to condone any non-compliance with or to extend any of the timeframes provided for in this section.

Section 30C: Appointment of Adjudicator

To authorise the Minister, after consultation with the FSB, to appoint one or more Deputy Adjudicators and an acting Adjudicator, when necessary, to allow for the more efficient functioning of the office of the Pension Funds Adjudicator.

Section 30I: Time limit for lodging of complaints

To align the section with legal and legislative best practice on prescription.

Section 30P: Access to Court

To replace the reference to “Supreme Court” with “High Court”.

New Section 30Y: Adjudicator proceedings

To authorise the Minister to make regulations regarding the processes and procedures the Adjudicator must comply with in exercising his or her functions.

New Section 33A: Directives

To authorise the registrar to issue directives to pension funds under certain circumstances.

Section 36: Regulations

To delete the need to prescribe the form of documents referred to in the Act by regulation. It is more practical to enable the registrar to prescribe such.

Section 37: Administrative penalties

To authorise the registrar to impose administrative penalties in the event of non-compliance with the Act and to delete offences created by the Act.

Section 37C: Disposition of pension benefits upon death of member

To ensure that a dedicated pension (a spouse's and dependant's pension) is not subject to the discretion of the trustees in the allocation of death benefits and cannot be re-directed to other beneficiaries.

Section 37D: Funds may make certain deductions from pension benefits

- To allow for the deduction of an amount that is due to a non-member spouse or other person in accordance with a valid court order from a member's pension benefit.
- To correct references to Acts repealed since the last amendment to the Act. The following references are corrected:
 - Medical Schemes Act, No 72 of 1967 replaced with Medical Schemes Act, No 131 of 1998.
 - Insurance Act, No 27 of 1943 replaced with Long-term Insurance Act, No 52 of 1998.

New Clause 40A: Delegations and authorisations

To authorise the Minister to delegate the powers afforded to him or her under the Act.

New Section 40B: Retrospectivity

To clarify the date on which certain provisions of the Bill will take effect and to regulate the implications thereof.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

The proposed amendments were made available for public comment for a period of 30 days during the latter half of 2006. Comments were received from a variety of stakeholders, including specific funds, unions, and industry participants. The Bill was revised where considered necessary in the light of comments received.

5. FINANCIAL IMPLICATIONS TO THE STATE

- 5.1 The Bill will not have financial implications for government.
- 5.2 Limited costs will be incurred by those funds directed by the Registrar to review their apportionment schemes. It is envisaged that this will happen only in a small minority of cases.

6. CONSTITUTIONAL IMPLICATIONS

None.

7. PARLIAMENTARY PROCEDURE

- 7.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.