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**GENERAL NOTICE**

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**NOTICE 248 OF 2001****NATIONAL TREASURY****PUBLICATION OF THE PENSION FUNDS SECOND AMENDMENT BILL, 2001**

The Minister of Finance intends tabling the Pension Funds Second Amendment Bill, 2001 in Parliament during February 2001. The Bill is published in the Government Gazette in accordance with Rule 241(c) of the Rules of the National Assembly.

Interested persons and institutions are invited to submit written representation on the bill to the Secretary to Parliament by no later than 31 March 2001.

All submissions must be addressed to:

**The Secretary to Parliament  
c/o Mr A Hermans  
Committee Section  
Parliament of the RSA  
P.O. Box 15  
8000**

**You can contact Mr Hermans at:**

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## PENSION FUNDS SECOND AMENDMENT BILL, 2001

To amend the Pensions Fund Act, 1956, to make new provision for the apportionment of actuarial surpluses and for minimum benefits, and for matters related thereto.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 24 of 1956, as amended by section 21 of Act 101 of 1976, section 9 of Act 94 of 1977, section 10 of Act 80 of 1978, section 38 of Act 99 of 1980, section 20 of Act 54 of 1989, section 29 of Act 97 of 1990, section 14 of Act 83 of 1992, section 21 of Act 104 of 1993, and sections 1 and 6 of Act 22 of 1996 5

1. Section 1 of the Pensions Fund Act, 1956 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion in subsection (1) immediately prior to the definition of “actuary” of the following definition: 10

“‘**actuarial surplus**’, in relation to a fund, means—

(a) in the case of a fund subject to actuarial valuation, the difference between—

(i) the value that the valuator has placed on the assets of the fund less the value of such contingency reserve accounts, established or to be established, as the board of the fund deems prudent on the advice of the valuator; and 15

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date; 20

(b) in the case of a fund which is exempt from actuarial valuation, the difference between—

(i) the fair value of the assets of the fund less the values of any investment reserve account set up to facilitate the smoothing of investment returns credited to member accounts and such contingency reserve accounts as the board of the fund deems prudent; and 25

(ii) the sum of the values of all the accounts held for individual members, whether contributory or paid-up, plus any outstanding benefits payable by the fund;”;

(b) by the insertion in the said subsection (1) after the definition of “board” of the following definition: 30

“‘**commencement date**’ means the date of commencement of this Amendment Act;

(c) by the insertion in the said subsection (1) after the definition of “complaint” of the following definitions: 35

“‘**contingency reserve account**’ in relation to a fund, means an account of the fund to which shall be credited or debited such amounts as the board of the fund concerned shall determine, on the advice of the valuator where the fund is not exempt from actuarial valuations, in order to provide for contingencies defined in the rules of the fund; 40

“‘**contribution holiday**’, in relation to a fund, means payment by the employer of less than—

(a) in the case of a defined benefit fund, the difference between the standard contribution rate as defined in generally accepted actuarial practice and the contribution payable by members; or 45

(b) in the case of a defined contribution fund, the employer contribution rate defined in the rules prior to application of any credit balance in the employer reserve account.

“‘**conversion**’, in relation to a fund, means the change of the basis of funding of the retirement benefit from defined benefit to defined contribution, or vice versa;”;

(d) by the insertion in the said subsection (1) after the definition of “court” of the following definitions:

- “**deferred pensioner**” means a member who has not yet retired but has left the service of the employer concerned prior to normal retirement age, as defined in the rules of the fund, leaving in the fund the member’s rights to such benefits as may be defined in the rules;
- “**defined benefit fund**” means a fund other than a defined contribution fund; 5
- “**defined contribution fund**” means a fund in respect of which any benefits payable on leaving service for a reason other than death or disability have a value equal to or less than the value of the contributions paid by and/or on behalf of the member accumulated with such investment returns as the board of the fund determines;”;
- (e) by the insertion in the said subsection (1) after the definition of “dependant” of the following definitions: 10
- “**employer**”, in relation to a fund, means an employer participating in the fund;
- “**employer surplus account**”, in relation to a fund, means an account of the fund to which shall be credited— 15
- (a) amounts allocated by the board of the fund in terms of section 15A for use by the employer;
- (b) such contributions as are specified in the rules to be credited to this account; and 20
- (c) investment return on the balance in the account from time to time at a rate determined by the board of the fund after taking account of the earnings of the fund,
- and to which shall be debited any surplus utilised by the employer;
- “**fair value**”, in relation to the assets of a fund, means the fair value of the assets of the fund determined in accordance with South African Statements of Generally Accepted Accounting Practice; 25
- (f) by the insertion in the said subsection (1) after the definition of “fund” of the following definitions:
- “**investment reserve account**”, in relation to a fund which is a defined contribution fund, means an account of the fund to which shall be credited the gross investment earnings of the fund, and to which shall be debited the investment returns credited to individual member accounts and such expenses as the board of the fund determines are best levied against the gross investment earnings, including any tax payable on the investment buildup of the fund; 30
- “**Labour Relations Act, 1995**” means the Labour Relations Act, 1995 (Act No 66 of 1995)”;
- (g) by the insertion in the said subsection (1) after the definition of “member” of the following definition: 40
- “**member surplus account**”, in relation to a fund, means an account of the fund to which shall be credited—
- (a) amounts allocated by the board of the fund in terms of section 15A to be used for the benefit of members;
- (b) investment return on the balance in the account from time to time at a rate determined by the board after taking account of the earnings of the fund, and to which account shall be debited— 45
- (i) the cost of any benefit improvements funded from this account; and
- (ii) any expenses which would otherwise reduce benefits payable to members;”;
- “**minimum contribution accumulation**” means the value of the member’s contributions accumulated with a rate of interest which is reasonable in relation to the investment return earned by the fund, nett of such expenses as the board of the fund determines should be offset against the investment return: Provided that the board of the fund may elect to smooth these interest rates over a period which should not exceed ten (10) years;” 50
- “**minimum individual reserve**” means
- (a) in relation to a member of a defined benefit fund, the present value of the benefit payable from the member’s normal retirement age in terms of the rules of the fund assuming that the member’s pensionable remuneration remains constant from the effective date of the calculation to normal retirement age and pensionable service is fixed at the amount accrued at the effective date of the calculation: Provided that the present value will 60



be determined using assumptions prescribed by the registrar by notice in the *Gazette*; and

- (b) in relation to a member of a defined contribution fund, the value of the member's individual account together with a share of the investment reserve account and any contingency reserve accounts, in the proportion that the member's individual account value as at the effective date of calculation bears to the total of all members' individual account values as at this date;" 5

"**'minimum pension increase'** means the lower of

- (a) the increase that can be afforded from the difference between the investment return earned by the fund on the assets backing pensioner liabilities and the cost of pension increases awarded previously, in both cases projecting over the period from date of retirement to the effective date of calculation of the increase: Provided that, if the assets backing the pensioner liabilities are not administered separately from the other assets of the fund, the investment return earned on all the assets shall be used instead of the investment return earned on the assets backing pensioner liabilities; and 10 15
- (b) the amount required to increase the pension to the pension payable in the month following retirement, nett of the commutation of any portion of the pension for cash, increased by the change in the consumer price index from the date of retirement to the effective date of calculation of the increase: 20

Provided that, where the pension has arisen because of the death of a member rather than the member's retirement, retirement shall be replaced by death in (a) and (b) above. 25

- (h) by the insertion in the said subsection (1) after the definition of "pension fund organization" of the following definition:

"**'pensioner'**, in relation to a fund, means a member of that fund, or a dependant of a former member of that fund, who is, in either case, in receipt of a pension paid from the fund; 30

- (i) by the insertion in the said subsection (1) after the definition of "prescribed" of the following definition:

"**'principal employer'**, in relation to a fund, means the employer defined as the principal employer in the rules of the fund;" 35

- (j) by the insertion in the said subsection (1) after the definition of "regulation" of the following definitions:

"**'repatriate'** means the payment of any assets of the fund, in cash or by transfer of assets, to a person other than a member entitled to a benefit from the fund; 40

**'reserve account'**, in relation to a fund, means a contingency reserve account, or investment reserve account, as the case may be;

**'retrenchment'**, in relation to a member, means dismissal from employment based on the operational requirements of the relevant employer;"

- (k) by the insertion in the said subsection (1) after the definition of "rules" of the following definitions: 45

"**'stakeholder'**, in respect of a fund, means current members, including pensioners and deferred pensioners, former members and the employers participating in the fund;

**'statutory actuarial valuation'**, in relation to a fund, means an investigation by a valuator contemplated in section 16; 50

**'surplus apportionment date'**, in relation to a fund, means the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date: Provided that, where the board of a fund elects to apportion actuarial surplus after the commencement date but prior to the effective date upon which the next statutory actuarial valuation would otherwise have taken place, the effective date of the next statutory actuarial valuation shall be advanced to the actual date of apportionment of the actuarial surplus by such board; 55

**Amendment of section 14 of Act 24 of 1956, as amended by section 15 of Act 81 of 1957, section 3 of Act 54 of 1991 and section 21 of Act 83 of 1992**

2. Section 14 of the principal Act is hereby amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

- “(c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition—
- (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund concerned, where such rights and reasonable benefit expectations shall relate to service prior to the date of transfer; and
  - (ii) to any additional benefits, in respect of service prior to the date of transfer, the payment of which has become established practice; and
  - (iii) to the payment of minimum benefits referred to in section 14A, and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;”.

**Insertion of section 14A in Act 24 of 1956**

3. The following section is hereby inserted after section 14 of the principal Act:

**“Minimum benefits**

**14A.** (1) Any registered fund shall provide the following minimum benefits to a member:

- (a) the benefit paid to a member who is retrenched shall not be less than the minimum individual reserve;
- (b) the benefit that is paid to a member if the fund is terminated in terms of sections 28 or 29 shall not be less than the minimum individual reserve: Provided that, where the fair value of the assets of the fund after recovery of any debt owed by the employer in terms of section 30(3) is lower than the total of the minimum individual reserves for all members who are being included in the distribution of the assets, after adjustment for any benefits paid previously, the minimum individual reserve may be proportionally reduced by the ratio which the fair value of the assets bears to the total of all the minimum individual reserves adjusted for any benefits paid previously;
- (c) if the fund is converted from a defined benefit to a defined contribution basis of funding, the amount that is to be credited to the member's individual account shall not be less than the minimum individual reserve;
- (d) if the member is transferred from one fund to another, the transfer value shall not be less than the minimum individual reserve;
- (e) starting with the pension increase payable from the effective date of the statutory actuarial valuation coincident with, or next following, the commencement date, and at least once every three years thereafter, the pension increase to be granted to pensioners shall not be less than the minimum pension increase; and
- (f) if a member leaves the fund prior to retirement with a benefit in terms of the rules which is based upon the accumulation of the member's own contributions with interest, the member shall not receive less, in respect of his own accumulated contributions, than the minimum contribution accumulation.

(2) (a) In respect of a fund which is registered on or after a date three (3) months after the commencement date, subsection (1) shall apply immediately on registration.

(b) In respect of a fund which is registered prior to a date three (3) months after the commencement date

- (i) Paragraphs (a), (c) and (d) of subsection (1) shall, apply from a date twelve (12) months after the surplus apportionment date.
- (ii) Paragraph (f) of subsection (1) shall apply from the scheme anniversary coincident with or next following the commencement date.
- (iii) Paragraphs (b) and (e) of subsection (1) shall apply from the commencement date.

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(3) If the employer exercises any right that the employer has in terms of the rules of the fund to terminate the fund prior to the commencement date or change the basis upon which future benefits accrue prior to the date from which paragraphs (a) (c) and (d) of subsection (1) will apply to the fund, the members may not seek redress against the employer in respect of any increase in value of the benefits that would occur as a result of the application of minimum individual reserves to the fund.

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#### Insertion of sections 15A to 15K in Act 24 of 1956

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4. The following sections are hereby inserted after section 15 of the principal Act:

#### “Rights to the use of actuarial surplus

**15A.** (1) All actuarial surplus in the fund, belongs to the fund.

(2) Once apportioned to either the member surplus account or the employer surplus account in terms of sections 15B and 15C, members and the employer acquire rights to use such actuarial surplus as provided for in this section.

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(3) After the commencement date, the only portion of the assets of the fund that may be utilised by, or for the benefit of, the employer is any credit balance in the employer surplus account: Provided that the employer may continue a contribution holiday, which the employer was already taking immediately prior to the commencement date upon the following conditions:

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(a) The value of any contribution holiday taken by the employer during any period between the commencement date and the surplus apportionment date, accumulated with the investment return earned by the fund, nett of expenses, must be added to the actuarial surplus to be apportioned at the surplus apportionment date, and must after the surplus apportionment, be debited to the employer surplus account.

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(b) If the employer surplus account has a debit balance after such debit, the debit balance will represent a debt owed by the employer to the fund and the employer must redeem such debt within a period deemed reasonable by the board of the fund, and the fund must then notify the registrar, in writing and in the prescribed manner, of the amount and terms of repayment of any such debt.

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(4) Any credit balance in the member surplus account must be used for the benefit of members as provided for in section 15D.

#### Apportionment of existing surplus

**15B.** (1) The board of a fund must, within three months following the completion of the statutory actuarial valuation performed as at the surplus apportionment date, but not later than 15 months after the surplus apportionment date, submit a scheme for the proposed apportionment of any actuarial surplus (in this section referred to as the scheme) as at the surplus apportionment date to the registrar. Such scheme must comply with such conditions as the registrar may prescribe by regulation.

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(2) The scheme may involve the improvement of benefits to existing members and pensioners, increases to benefits or transfer values in respect of former members, the crediting of an amount to the member surplus account, and/or the crediting of an amount to the employer surplus account.

(3) The board of the fund must determine—

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- (a) who may participate in the apportionment of actuarial surplus, and shall include in such apportionment such former members as may be prescribed;
  - (b) what amount of actuarial surplus should be retained in contingency reserve accounts; 5
  - (c) an equitable distribution of the residual actuarial surplus between the various classes of stakeholder whom the board has determined shall participate in the apportionment, following which such portion as is due to the employer shall be credited to the employer surplus account;
  - (d) how, in the case of members and former members, the allocated portion of actuarial surplus will be applied for their benefit, including the crediting of any portion to the member surplus account 10
- after taking account of the financial history of the fund, in such manner as may be prescribed by notice in the *Gazette*.
- (4) At least 75 percent of the board of the fund duly constituted in terms of section 7A must approve the scheme. 15
- (5) Notwithstanding anything to the contrary in the rules of the fund, no person or persons other than the relevant board (or, in the event of a deadlock within the board, the special ad hoc tribunal referred to in section 15K), and the registrar may be required to approve the scheme. 20
- (6) Such apportionment shall be of no force or effect unless—
- (a) the scheme, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar;
  - (b) the registrar has been furnished with a certificate signed by the valuator stating whether or not the valuator finds the apportionment of the surplus between the stakeholders to be equitable and, if not, why not, together with such additional particulars or such a special report by the valuator, as he may deem necessary for the purposes of this subsection; 25
  - (c) the registrar has been furnished with such additional report, as he may require, from an independent actuary appointed by the registrar, on such matters associated with the apportionment of the actuarial surplus as the registrar shall determine and including such information as may be prescribed: Provided that the registrar must require such a report where the board of the fund has been unable to reach agreement within the prescribed period, or where there are complaints in respect of the apportionment of surplus which have not been resolved to the satisfaction of the complainants concerned: Provided further that the costs consequent on the appointment of such independent actuary shall be borne by the fund; 30
  - (d) the employer, and members have been informed of the scheme in a manner which is clear and understandable to the members and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the Rand amounts of any actuarial surplus which it is intended to credit to the member surplus account and to the employer surplus account, respectively, and the Rand costs of any benefit improvements for members and former members: Provided that 35
- (i) standards for the information to be included in this communication may be prescribed by regulation, including a requirement that the independent actuary and/or the valuator certifies that he or she is satisfied that the communication material is objective and contains sufficient information to enable the stakeholders to judge the reasonableness of the scheme, and 50
  - (ii) the communication should be explicit about how and where any complaint should be lodged; 55
- (e) the employer and members have had four (4) weeks after receipt of the communication in which to complain to the board of the fund;
  - (f) the board of the fund have considered such objections before submitting the scheme to the registrar; 60

- (g) the principal officer of the fund has furnished the registrar with details of all objections lodged with the board and the actions taken to address such objections;
- (h) the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of members and former members; and 5
- (i) the registrar has forwarded a certificate to the principal officer of the fund to the effect that all the requirements of this subsection have been fulfilled.

(7) If the board of a fund fails to submit a scheme as required by subsection (1) or the registrar doubts the equity of the scheme, possibly but not exclusively, as a result of outstanding complaints, the registrar shall refer the apportionment of the surplus to the special ad hoc tribunal referred to in section 15K, and such tribunal shall exercise the powers of the board in terms of this section: Provided that, if the apportionment of actuarial surplus is referred to the tribunal, any reference in section 15B to the board shall be construed as a reference to the tribunal. 10 15

#### **Apportionment of future surplus**

**15C.** (1) The rules of a fund may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account. 20

(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board of the fund in the proper exercise of their fiduciary duties towards the stakeholders of the fund: Provided that, notwithstanding anything to the contrary in the rules of the fund, neither the employer nor the members may exercise a right to veto such apportionment. 25

#### **Utilisation of surplus for the benefit of members**

**15D.** (1) Notwithstanding anything to the contrary in the rules of a fund, any credit balance in the member surplus account may only be used by the board to— 30

- (a) improve benefits for existing members;
- (b) improve the benefits previously paid to former members or the amounts previously transferred in respect of former members;
- (c) reduce current contributions due from members; and 35
- (d) meet, in full or in part, expenses which would otherwise reduce the proportion of the members' contributions that are invested for retirement.

#### **Utilisation of surplus for the benefit of the employer**

**15E.** (1) Notwithstanding anything to the contrary in the rules of a fund, the principal employer or, with the approval of the principal employer, any or all other participating employers, may use actuarial surplus allocated to the employer surplus account in terms of sections 15B and 15C, for any of the following purposes— 40

- (a) funding a contribution holiday; 45
- (b) the payment of pensions, or an increase to pensions in course of payment, to compensate members for the loss of any subsidy from the employer of their medical costs after retirement;
- (c) meeting, in full or in part, expenses which the employer is obliged to pay in terms of the rules of the fund; 50
- (d) improving the benefits payable to all, or a category of, members, as determined by the employer;
- (e) transferring part, or all, of the employer surplus account to the employer surplus account in another fund where the employer is a participating employer in terms of subsection (2) of this section; 55

- (f) on liquidation of the fund, repatriating to the employer in terms of section 15I; and
  - (g) in order to avoid retrenchment of a significant proportion of the workforce, repatriating to the employer in terms of section 15J.
- (2) The registrar may approve the transfer of a portion of the employer surplus account from the fund to the employer surplus account in another fund, provided the following conditions are satisfied, namely, that—
- (a) the employer who has control of the employer surplus account in terms of the rules of the fund has similar control of the employer surplus account in the transferee fund;
  - (b) the transferee fund is either the fund from which some of the assets in the employer surplus account were transferred, or another fund to which assets and liabilities of either this fund or another fund from which assets and liabilities were transferred to this fund have been transferred;
  - (c) the employer applies to the registrar for approval of the transfer, giving such details and supporting reports as the registrar may require; and
  - (d) the registrar is satisfied that such transfer is necessary in order to achieve an equitable distribution of the surplus between the funds.

#### **Existing employer reserve accounts**

- 15F.** (1) On or after the commencement date, the board of a fund may apply to the registrar to transfer all or some of the credit balance in an existing employer reserve account to the employer surplus account.
- (2) The registrar may approve such transfer provided that the registrar is satisfied that the allocation of actuarial surplus to such account was negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C.
- (3) Any remaining portion of the credit balance in an existing employer reserve account shall be treated as actuarial surplus to be distributed in terms of section 15B.

#### **Right to share in surplus accounts on exit**

- 15G.** (1) Notwithstanding anything to the contrary in the rules of a fund, the board of a fund must consider the degree to which members, who are transferring to another fund or who are leaving the fund with payment of the benefit defined in the rules, should benefit from any credit balances in the member surplus account, investment reserve account and any contingency reserve accounts.
- (2) Unless the board of the fund considers that it would be inequitable to remaining members, or that there are sound administrative reasons why it should not be done, in which case the board should determine some reasonable alternative, members who transfer out of the fund should receive a share of any credit balances in the member surplus account, and investment reserve account in the ratio that the liability of the fund in respect of the past service of the members transferring bears to the liability of the fund towards all its members in respect of past service at the date of transfer.
- (3) Notwithstanding anything to the contrary in the rules of a fund, unless the relevant employer so directs, members and former members may not participate in the employer surplus account when they transfer out of a fund or when they become entitled to a benefit.

#### **Use of the contents of any surplus accounts to fund deficits**

- 15H.** (1) If a fund has credit balances in any of its reserve accounts or the member surplus account or the employer surplus account and the fund is found to have a deficit following an actuarial valuation, including a valuation carried out for the purpose of distributing assets on liquidation of the fund, such credit balances shall be reduced in the same proportion by

the amount of the deficit provided that no credit balance may be reduced by more than the amount to which the account was in credit.

(2) If the deficit exceeds the credit balances in the reserve accounts, the member surplus account and the employer surplus account, the credit balances must be applied in full to reduce the deficit and should be reduced to zero. 5

#### **Application of surplus accounts on liquidation of the fund**

**15I.** (1) On liquidation of a fund, any credit balances in any reserve accounts, the member surplus account and the employer surplus account, may be drawn upon to secure the rights and reasonable benefit expectations of the members participating in the distribution: Provided that the credit balances in any such accounts shall be reduced by the same proportion. 10

(2) On liquidation of a fund, any remaining credit balances in the member surplus account, any contingency reserve accounts and any surplus which has not been allocated to the member and employer surplus accounts, must be used for the benefit of the members and former members of the fund, in such manner as the liquidator, acting on the advice of the valuator, shall determine. 15

(3) On liquidation of a fund, any remaining balance in the employer surplus account shall be paid to the employer unless the employer has been liquidated, in which case it shall be distributed amongst the members at date of liquidation and such former members as are eligible in terms of the rules to participate in the distribution. 20

#### **Repatriation of actuarial surplus to prevent job losses**

**15J.** (1) A fund may apply to the registrar for permission to repatriate actuarial surplus to an employer where the employer would otherwise have to retrench a significant number of its employees, provided that the negotiations in terms of section 189 of the Labour Relations Act, 1995, as amended from time to time, have confirmed the need for such retrenchments if additional capital is not obtained. 25 30

(2) The application must be made to the registrar in the prescribed manner.

(3) The registrar may only grant an application if the registrar is satisfied that—

- (a) members have had full disclosure of the current financial position of the fund including the proposed distribution to the employer, in both cases in Rand, and the need of the employer for additional capital in order to maintain employment; 35
  - (b) members have had a reasonable opportunity to consider the proposal;
  - (c) at least two thirds of the members currently in employment have approved the proposal; 40
  - (d) the payment will not prejudice the rights and reasonable benefit expectations of the members; and
  - (e) the payment is necessary in order to avoid a significant reduction in the number of employees employed by the sponsoring employer, 45
- and the registrar must, on being so satisfied, issue a certificate to the applicant to the effect that repatriation of the requested amount may take place.

#### **Specialist tribunal**

**15K.** (1) Where a board of a fund is unable to reach agreement on the apportionment of an actuarial surplus in terms of section 15B, within the prescribed period, or the registrar is not satisfied that the scheme submitted by the board in terms of section 15B is reasonable and equitable, or the registrar considers that unresolved complaints require investigation which may lead to a review of such scheme, the registrar shall appoint a special *ad hoc* tribunal to perform the functions of the board set out in the said section 15B. 50 55

- (2) The tribunal shall consist of at least three members who must all be independent of any stakeholder in the fund, and of whom—
- (a) one must be a lawyer who satisfies the conditions set out in section 30C(2) of this Act, provided that such lawyer may be the Adjudicator; and 5
- (b) one shall be an actuary who has experience in retirement fund financing.
- (3) The tribunal shall perform the apportionment within such period as may be determined by the registrar.
- (4) Three members of the tribunal shall constitute a quorum. 10
- (5) The tribunal shall elect a chairperson from amongst its members; such chairperson shall have a deliberative vote but no casting vote.
- (6) At least two-thirds of the members of the tribunal must agree to any decision or step taken in the performance of the functions of the board of a fund as set out in section 15B. 15
- (7) The tribunal may follow any procedure which it considers appropriate in conducting an investigation, including procedures in an inquisitorial manner, and affording any stakeholder the right to a hearing.
- (8) Notwithstanding section 22 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), the tribunal may obtain copies of any document or correspondence contained in the files of the registrar relating to a fund in connection with which the tribunal is conducting an investigation. 20
- (9) (a) For the purposes of an investigation, the tribunal may
- (i) under the hand of the chairperson, summon any person who in the opinion of the tribunal may be able to give material information concerning the subject matter of the investigation or who is believed by the tribunal to have in his or her possession or custody or under his or her control any book, document, record or thing which has any bearing on the subject matter of the investigation, to appear before it at a time and place specified in the summons, to be questioned or to produce that book, document, record, or thing, and may retain for inspection any book, document, record or thing so produced; 25 30
- (ii) through the chairperson administer an oath to, or accept an affirmation from, any person who was summoned under subparagraph (i) and question him or her, and require him or her to produce any book, document, record or thing in his or her possession or custody or under his or her control. 35
- (b) A summons referred to in paragraph (a) shall be served in the same manner as a summons for the attendance of a witness at a civil trial in a magistrate's court. 40
- (c) In connection with the questioning of any person who has been summoned under this section or the production by such person of any book, document, record or thing, the law relating to privilege as applicable to a witness summoned to give evidence or to produce a book, document, record or thing in a civil trial before a court of law shall apply. 45
- (d) (i) Any person who has been summoned in terms of this subsection or who has given evidence before a tribunal shall be entitled to the same witness fees as if he or she had been summoned to attend or had given evidence at a civil trial in a magistrate's court held at the place where the investigation is held. 50
- (ii) Any fees which may become payable in terms of subparagraph (i) shall be paid by the fund.
- (10) No party shall be entitled to legal representation at proceedings before the tribunal.
- (11) The tribunal shall keep or cause to be kept, whether in writing or by mechanical or electronic means, a permanent record of the proceedings relating to the determination of a matter before it including the apportionment of actuarial surplus and any evidence given. 55
- (12) After the tribunal has completed an investigation, it shall send a statement containing its determination and the reasons therefor, signed by the members of the tribunal, to all parties concerned as well as to the registrar. 60



(13) Any costs arising from the work of the tribunal, including periodical allowances or compensation for personal expenses of the members of the tribunal, shall be recovered from the fund out of the surplus being apportioned, provided that the tribunal satisfies the registrar that such costs were reasonably incurred in the performance of the required functions.”. 5

(14) Any member of the public may obtain a readable copy of the record on payment of a fee determined by the registrar.

(15) The registrar may, for purposes of the performance of his or her functions in terms of this or any other Act, rely on a copy of the record of the tribunal without the need of any further proof. 10

**Amendment of section 30 of Act 24 of 1956, as amended by section 17 of Act 103 of 1979 and section 25 of Act 104 of 1993**

5. Section 30 of the principal Act is hereby amended by the addition of the following subsection:

“(3) If a registered fund is terminated or dissolved in terms of sections 28 or 29 15  
after the date from which minimum individual reserves are payable on transfer or retrenchment, and the fair value of the assets of the fund, less any current liabilities, is less than the sum of the minimum individual reserves payable in respect of the members and former members who will participate in the distribution of the assets (with appropriate adjustment for benefits previously paid in the case of former 20  
members), the shortfall shall represent a debt payable by the employer to the fund.”

**Amendment of section 30H of act 24 of 1956, as inserted by section 3 of Act 22 of 1996**

6. Section 30H of the principal Act is hereby amended by the addition of the following subsection: 25

“(4) The Adjudicator shall not have jurisdiction over complaints which relate to the apportionment of surplus in terms of section 15B.”.

**Short title and commencement**

7. This Act is called the Pension Funds Second Amendment Act, 2001, and shall come into operation on a date determined by the President by proclamation in the *Gazette*. 30

## MEMORANDUM ON OBJECTS OF THE PENSION FUNDS SECOND AMENDMENT BILL, 2001

### 1. INTRODUCTION

The Pension Funds Second Amendment Bill ("the Bill") introduces minimum values to be paid in future from retirement funds in defined circumstances, such as transfer, conversion or retrenchment, and provides for minimum levels of pension increase and minimum levels of interest to be added to member contributions in respect of early leavers. This will prevent the generation in future of surplus as a result of the inequitable treatment of members leaving the fund or receiving pension increases. Future surplus then ceases to be contentious, and can be left to be distributed by the board of the fund, either in terms of the rules of the fund or, if the rules are silent, in terms of the normal exercise of their fiduciary duties towards all stakeholders.

The Bill then requires an equitable apportionment of existing surplus between members, former members and the sponsoring employer, setting out the process that is required to achieve the apportionment. Funds which have surplus will, in the process, redress inequitable past benefit payments. In order to prevent extended negotiation on such apportionment, the Bill provides for an ad hoc specialist tribunal to replace the board of the fund if the latter fails to reach agreement within a stipulated time. The specialist tribunal will then oversee the apportionment of surplus to the exclusion of the Pension Funds Adjudicator.

In this context, surplus means assets which are in excess of the requirements of a retirement fund to meet its obligations towards its members and their dependants. Such surplus may have arisen in the past or may arise in future.

The Bill then gives rights to members and the employer in respect of the surplus that has been apportioned to them and prescribes how surplus may be utilised thereafter. The Bill fills a gap in the existing law and brings clarity to the whole pension surplus debate. It addresses the social policy issues which the Supreme Court of Appeal has noted should best be dealt with by legislation.

Extensive consultation took place within NEDLAC. The Bill represents a compromise, as the Government team was unable to achieve consensus between Business and Labour, because their positions are far apart on several major issues.

### 2. GUIDING PRINCIPLES

Annexure A includes a brief summary of the history of South African retirement funds which has left a substantial amount of surplus (estimated by the Chief Actuary to the Financial Services Board at R80 billion as at the end of 1999) in residual defined benefit funds. Some of this surplus was generated because the actuary's assumptions proved conservative relative to actual experience; the most financially significant examples of this are real returns (that is the difference between the investment return and salary or pension increases) significantly higher than the actuary had anticipated. Some of this surplus was generated because many more members left the funds with no more than their accrued liability (that is the present value of the obligations of the fund to provide benefits in respect of past service), leaving behind them the provision in the fund against a fall in the stock market and any actuarial surplus.

Labour, in particular, felt that some of the existing surplus had been generated at the expense of members and represented assets which should be used for the benefit of members. Labour felt that professional advisors, including actuaries, had, at times, acted in concert with the employer to achieve an outcome which favoured the employer at the expense of members. This could be achieved because, even if there were member-elected trustees, such trustees were at a disadvantage because of historic educational disparities, a relative lack of financial sophistication and a lack of experience.

The following principles were considered important in drafting the Bill and were adhered to as far as possible:

- (a) The board of trustees, acting on the advice of the actuary, must be able to retain a buffer to protect the fund against a fall in the value of the assets and to protect the fund against future contingencies such as increasing death and disability premium rates because of the HIV/AIDS epidemic. These buffers will be held within contingency reserves. The surplus to be distributed must therefore represent the actuarial value of assets less such contingency reserves and the fund's liabilities.

- (b) A regime must be put in place for the future which will ensure that members who transfer out of the fund, who experience a conversion in the basis of funding, or who are retrenched are able to invest the proceeds in assets with a reasonable chance that the assets will grow to achieve a matching benefit on retirement to that which is foregone on transfer, conversion or retrenchment. Similarly, pensioners must get the increases which the trustees make provision for, and members who resign or die must get a fair rate of interest added to the accumulation of their own contributions. This set of conditions has given rise to a concept of minimum benefits, which are introduced for the first time.
- (c) The minimum benefit regime will, in some funds, effectively improve benefits payable to members. The cost of this improvement may be unaffordable to employers. Such funds, the members and the employer must have an opportunity to assess the financial impact of the new regime, determine if their benefit structure is affordable, negotiate any changes and give effect to them before the new regime comes into effect. Members should not be able to claim additional benefit value if a fund terminates during this window period.
- (d) An additional burden should not be placed on the employer without the employer's consent, except where an action has been taken in the past to unduly benefit decision-makers or the employer at the expense of the members in general.  
This has been interpreted to require that we must work only with existing surplus in regard to the correction of past inequities plus the value of certain benefit improvements, which may not have been properly considered by the trustees.
- (e) Existing surplus should be equitably apportioned between members, former members and the employer, with appropriate checks and balances to prevent abuse and to ensure that the unequal bargaining power between employer-appointed and member-elected members of the board is neutralised, including the appointment of a specialist tribunal which will perform the apportionment for the board if the latter deadlocks or if there are material complaints which remain unresolved. An independent actuary may be required in cases of deadlock or doubt as to the independence from the employer of the valuator to the fund.
- (f) Members and the employer must get rights to whatever actuarial surplus has been apportioned to them. These rights must specify not only how surplus will be used, but also rights on termination of the fund.
- (g) The employer should be able to use surplus allocated to it to fund a contribution holiday, subsidise expenses, selectively improve benefits, transfer it between funds, and repatriate it (ie. writing out a cheque to the employer) only on liquidation of the fund and when due process in terms of section 189 of the Labour Relations Act 1995 has shown that repatriation is needed to prevent significant job losses.

### 3. PROPOSED AMENDMENTS IN TERMS OF THE BILL

#### 3.1 Clause 1—Definitions

- (a) Various definitions need to be added to the Act to define terms used in the new sections. These are in line with generally accepted actuarial practice.
- (b) "Surplus apportionment date" is required for the following reason:  
Actuarial investigation will be required to achieve each apportionment. In order to avoid funds incurring additional costs through requiring an unscheduled valuation, and to spread the work out across a three year period (to prevent both congestion in the registrar's office and an inability on the part of the actuarial profession to accommodate requests by all funds to be valued immediately), the apportionment has been timed to coincide with the next statutory valuation.
- (c) A definition of "minimum individual reserve" is introduced. Under a defined benefit fund, this is the market value equivalent of the present value of the retirement benefit promised in relation to his or her accrued service. Under a defined contribution fund, this is the members' own contributions and the employer's contributions, nett of expenses, accumulated to date of exit with a reasonable rate of interest, plus a proportionate share of any investment

reserve. In either case, if invested until the member's retirement, the amount should grow sufficiently to replace the benefit promised by the fund.

(d) Regular review of the prescribed basis by the Registrar:

There is a valid concern amongst the parties who have negotiated the approach within NEDLAC that economic conditions could change without the minimum benefit basis being adjusted quickly enough.

Because the employer will now have an obligation to fund any deficit, this could cause the employer unnecessary hardship. The intention is that the Registrar will establish a technical committee, which will keep the basis under review.

Because economic conditions are expected to change over time, the assumptions are not specified in the law, but are prescribed by the Registrar. In order to assist him or her, the Registrar will appoint a technical committee, which will periodically review the basis. This review will take place once a year, or more often at the request of any of the parties represented in NEDLAC.

### 3.2 Clause 2—minimum benefits

Section 14, which governs all transfers, is amended to introduce the concept of a "minimum benefit" payable on transfer.

The opportunity has also been taken to amend clauses 14(1)(c)(i) and (ii) to address an anomaly in the law as it currently stands. Unlike Regulation 15, section 14 does not confine the operation of "rights and reasonable benefit expectations" to benefits which have arisen as a result of past service. This is believed by the FSB to represent an oversight in the drafting of the clause. It seems logical that the transferor fund should only be responsible for the transferring member getting satisfaction for rights and expectations in terms of past service. It is then desirable to bring clauses 14(1)(c)(i) and (ii) into line with a "past service only" approach, because there needs to be consistency between the "minimum benefit" and the transfer value that would otherwise be determined.

Clause 14(1)(c)(iii) introduces the minimum benefit on transfer. It would not be appropriate to remove (i) and (ii) on account of the introduction of the minimum benefit because many funds provide a benefit which is more generous than the minimum.

### 3.3 Clause 3

The proposed new section 14A introduces the concept of minimum benefits to be paid in future and which are aimed at removing abuses perceived in the past in connection with transfer and conversion values, retrenchment benefits, pension increases and the interest rates payable on a refund of contributions.

Clause 14A(1) requires the benefit payable on transfer, retrenchment or conversion to be at least the "minimum individual reserve". This is not payable on resignation or dismissal. The reason for this distinction is as follows:

- \* If members leave voluntarily they can reasonably be expected to have taken any loss of benefit value into account when deciding to leave. This is denied when members leave involuntarily. Such members should therefore receive a greater measure of protection.
- \* After consideration it was decided that dismissal should be treated similarly to resignation, rather than treating it in the same way as retrenchment. If the dismissal is unfair, the employee has the right to seek redress through the labour courts. Part of this redress would be the loss of benefit value.

Pension increases are specified to be the lower of the rate that the fund can afford to give on the basis of its investment returns earned less the cost of pension increases granted, and the change in the consumer price index from date of retirement.

Trustees must give a reasonable rate of interest when a member leaves with a benefit which depends on the accumulation of his or her own contributions. (This most commonly occurs on resignation or dismissal.)

Subsection 14A(2) provide that the minimum benefit provisions apply immediately for a new fund (that is one which has not already entered the registration pipeline). Existing funds would have been designed prior to the introduction of minimum benefits. Stakeholders will have negotiated contribution rates without having considered the minima. Their introduction could force some of these funds into deficits. Some



employers will be unable or unwilling to fund the additional costs. Accordingly, subsection 14A(2)(b) makes provision for a period of twelve months after the surplus apportionment date to enable the necessary negotiation to take place. Where the employer cannot afford the increased contribution rate required, the employer will either have to persuade members to agree to reduced benefits or will have to terminate participation in the fund. If a fund which would be in deficit on introduction of the minimum benefits is terminated or converted during this time period, members will not be entitled to claim the additional value that would accrue at the end of the time period.

The existence of this time period before full implementation of the minimum benefit approach must not be used to prejudice the interests of members. If, therefore, a fund is terminated prior to full implementation of the approach in the fund, members must be given termination values equivalent to the minimum benefits, or in proportion to the fair value of the assets divided by the total of the minimum benefits where the total of the minimum benefits exceeds the fair value of the assets.

If a fund can afford the minimum benefits immediately and the employer elects to terminate or convert, the minimum benefits will apply. Clause 14A(3) prevents members from claiming the additional value arising from the introduction of the minimum benefit even if the fund is converted, or terminated, prior to the introduction of the new approach.

### 3.4 Clause 4

Clause 4 proposes the insertion of sections 15A to 15K defining the apportionment of, and rights to the use of, actuarial surplus.

Under the law prior to this amendment, neither members nor the employer had rights to use actuarial surplus and former members lost any rights once they had been paid their benefits.

**Section 15A** gives members, former members and the employer rights to surplus allocated in terms of sections 15B and 15C. These sections are designed to protect members and former members and prevent abuse.

The surplus apportionment date could be several years after the introduction of the new approach (see the definition section for the justification of this on practical grounds). If an employer was previously enjoying a contribution holiday, it might be unnecessarily harsh on the employer to demand that the contribution holiday ceases until after the surplus apportionment date. **Section 15A(3)** therefore permits the employer to continue the contribution holiday, provided the financial effect of the holiday after the introduction of the new approach is determined and added to the actuarial surplus as at the surplus apportionment date. If the employer then gets an apportionment of actuarial surplus that is lower than the value of the contribution holiday taken after the introduction of the new approach, the shortfall must be repaid to the fund over a period agreed with the board of management.

**Section 15B** requires that existing actuarial surplus at a certain date must be apportioned between members, former members and the employer in an equitable manner. The equitable distribution of existing surplus is prescribed by regulation, Regulation 33, in terms of section 15B(1). Section 15B distributes only the existing surplus. This means that the distribution is not retrospective.

**Section 15B** makes provision for a process to be followed to ensure that the trustees and the members give their informed consent:

- \* At least 75% of the trustees must approve it. This majority will ensure that at least half of the member-elected or employer-appointed trustees must approve the apportionment.
- \* The actuary must endorse the distribution as equitable.
- \* In order for stakeholders to give their informed consent, they must have had adequate information, adequate time to consider it, and any complaints must be properly considered.
- \* Members must be informed. The registrar has a right to prescribe what should be included in such an information pack, to ensure that members are told in a clear and objective manner.
- \* Members must have at least four weeks thereafter to consider the distribution, and to complain, if they so wish. Their complaints must be considered. Details of any outstanding complaints must be forwarded to the registrar with the application for distribution.



- \* The registrar has the right to require an independent actuary to review the distribution.
- \* Where the board of a fund is able to reach agreement using their own valuator, there is no need to force them to seek a second opinion from an independent actuary. Where, however, there is conflict (exhibited for example through unresolved complaints), an independent actuarial opinion becomes essential and will be required by the registrar.
- \* The registrar must be satisfied that the process has been followed correctly and that the distribution is reasonable and equitable. The registrar's responsibility will be to check that the process has been followed, complaints have been addressed, and to decide on the merits of any outstanding complaints that the board have been unable to resolve. Any party aggrieved by the action of the registrar will have the right to appeal to the Appeal Board established in terms of the Financial Services Board Act, 1990.

In **section 15B(1)** the board is given 15 months after the surplus apportionment date to submit a scheme for the once-off split of such actuarial surplus as exists at that time. This will allow the actuary time to do the work required. If the board misses the deadline for instance because they cannot reach agreement, a specialist tribunal will then take over all functions of the board in terms of this subsection.

**Section 15B(5)** requires the equitable distribution by the board of a fund, alone. No other parties may lodge a claim or force the board to distribute any share of the actuarial surplus to any party. The registrar is aware that the employer and, perhaps, a negotiating forum set up in terms of the Labour Relations Act, Act No 66 of 1995, may seek to put pressure on the board of management to approve a scheme of their devising. The composition of the board of management is designed to balance the interests of stakeholders including pensioners. It is therefore imperative that no-one else can impose their will on the board.

**Section 15B(7)** provides a deadlock breaking mechanism, if the trustees are unable to reach a decision within an acceptable time period, by referring the apportionment of existing surplus to a specialist tribunal. The tribunal will investigate the issues, any complaints from members that the trustees have been unable to resolve and will determine an apportionment. This tribunal will effectively replace the Pension Funds Adjudicator who will not have jurisdiction over surplus distribution. This is in line with practice in the United Kingdom. It has been discussed with the Pension Funds Adjudicator who supports the approach.

The use of the minimum benefit approach thereafter will ensure that members get a fair deal. **Section 15C** therefore enables any surplus that arises after the surplus apportionment date to be dealt with by the rules or by the trustees in the exercise of their fiduciary duties.

**Section 15D** defines the manner in which surplus may be used after apportionment. The uses for members and former members are straightforward. The uses by the employer are constrained: in particular, repatriation (that is, the writing out of a cheque in favour of the employer by the fund) is permitted in only two circumstances — the liquidation of the fund and where the employer and members have reached agreement after discussion in terms of section 189 of the Labour Relations Act that repatriation is necessary to save jobs.

**Section 15E** concerns the utilisation of surplus for the benefit of the employer. Paragraph (iv) of section 15E(2)(d) is necessary to prevent abuse by an employer who seeks to use liquidation as a route to achieve repatriation: the employer establishes a fund with very few members, transfers all the employer's share of surplus in other funds in which he participates to the newly established fund (far in excess of the requirements of such fund) and then liquidates the newly established fund.

Many employer reserve accounts exist in funds, particularly in defined contribution funds after the transfer of members from a defined benefit fund. The process followed in the establishment of these accounts might have satisfied the principles of section 15B and 15C, namely the distribution of surplus to the employer with the informed consent of the stakeholders. Often the process would not have satisfied these principles: frequently all residual actuarial surplus was transferred into such an account with no consideration of participation in the surplus distribution by members and former members. It is necessary therefore to investigate how the money got there before agreeing that the existing balance would automatically transfer to the employer surplus account.

The registrar is given the power in section 15F to approve the transfer of moneys from an employer reserve account to an employer surplus account provided the registrar is satisfied that the process used in the allocation of moneys to the account was consistent with the spirit of this amendment.

**Section 15G** extends rights to members on transfer. In particular they must get a proportionate share of any credit balance in the member surplus account and a share of the contingency reserves should be considered. Please note that members will get a share of the investment reserve automatically within the definition of the minimum benefit payable on transfer in a defined contribution fund. Members will get a market value equivalent to their accrued liability from a defined benefit fund. Members do not acquire any rights to the contents of the employer surplus account.

**Section 15H** enables the proportionate reduction of credit balances in reserve accounts if the fund goes into deficit.

**Section 15I** specifies what should happen to the reserve accounts and the member and employer surplus accounts on liquidation of the fund. Surplus must be used first to ensure that members' rights and reasonable benefit expectations are satisfied. Any remaining balance in the member surplus account, contingency reserve accounts and any unallocated surplus must be distributed amongst the members. The employer surplus account will be paid to the employer unless the employer itself has been liquidated, in which case it will be distributed to the members.

**Section 15J** sets out the conditions required before surplus can be repatriated to an ongoing fund in order to prevent significant job losses after consultation in terms of section 189 of the Labour Relations Act, 1995.

**Section 15K** enables a specialist tribunal to take over the decisions that the board of the fund would otherwise take, when the board is deadlocked or there are significant unresolved complaints. The specialist tribunal can also be used to resolve disputes over the amount which is added to existing surplus in respect of any past disproportionate benefit improvements for senior employees or other use of surplus in the past for the benefit of the employer (See Regulation 33).

### **3.5. Clause 5—Deficits to become a debt payable by the employer to the fund**

Once the minimum benefit approach applies to a fund, the employer will be obliged to fund any deficit (that is, where the actuarial value of the assets is less than the value the actuary places on the accrued liabilities). This will address a shortcoming of the existing legislation, which allows an employer to terminate a fund in deficit without any requirement to fund the shortfall.

### **3.6. Clause 6—Exclusion of the right of the Adjudicator to determine complaints in regard to the operation of section 15A(2)**

Section 30H(4) is added to remove overlap between the specialist tribunal/registrar and the Pension Funds Adjudicator with regard to surplus apportionment. The Pension Funds Adjudicator and the registrar are agreed that the Pension Funds Adjudicator may not determine complaints relating to the appropriation of existing surplus in terms of section 15A(2). The section makes adequate provision for a complaint procedure and a tribunal to resolve disputes.

## **4 CONSULTATIVE PROCESS**

A preliminary draft of the Bill was sent to various parties at the same time that the Bill was referred to NEDLAC in February 2000. Since February 2000 there has been extensive discussion within NEDLAC leading to the present Bill, which is very different to what was proposed in February 2000. The views expressed by parties outside of NEDLAC have also been made by parties within NEDLAC. We have, therefore, not repeated the consultation process initiated in February 2000 outside of NEDLAC.

The principal stakeholders in retirement funds, namely members through the Labour movement (with representatives from COSATU, NACTU and FEDUSA participating in the Labour team at NEDLAC) and employers through Business South Africa, have been consulted through NEDLAC.

The only other stakeholder group that might be affected is pensioners. We are aware of only two associations that represent their interests, namely the Association of Retired Persons and Pensioners and the Institute of Retirement Funds.

Every effort will be made to ensure that their views are made available to the Portfolio Committee on Finance prior to discussion of the Bill.

The principles have been discussed with, and approved by, the Pension Funds Adjudicator. Formal comment will be obtained from him for the Portfolio Committee.

## **5 FINANCIAL IMPLICATIONS FOR THE STATE**

The Bill has no direct financial implications for the State.

The Bill will require the Registrar of Pension Funds to set up specialist tribunals to hear disputes surrounding the apportionment of surplus. There are sufficient recently retired senior actuaries to staff such tribunals. The Pension Funds Adjudicator has expressed a desire to participate in some of the hearings of the tribunal, and will assist us to find suitable lawyers to complement the actuaries where he is unable, himself, to participate. The costs of the specialist tribunal will be recovered from the surplus that they apportion.

The Bill expressly removes complaints surrounding the apportionment of surplus from the jurisdiction of the Pension Funds Adjudicator, on the suggestion of the Adjudicator.

## **6 PARLIAMENTARY PROCEDURE**

In the opinion of the Financial Services Board and the National Treasury this Bill should be dealt with in terms of section 75 of the Constitution. None of the procedures laid down in sections 74 and 76 of the Constitution are applicable.

### **ANNEXURE A**

#### **THE QUANTUM AND DISTRIBUTION OF ACTUARIAL SURPLUS AMONGST SOUTH AFRICAN RETIREMENT FUNDS.**

South African retirement funds in the private sector contain significant amounts of surplus, concentrated within defined benefit funds which contain relatively few active members. (An active member is defined as one who is below retirement age and who is still contributing to the fund, or on whose behalf the employer is contributing to the fund.) The Chief Actuary to the Financial Services Board has estimated this surplus to be approximately R80 billion as at the end of 1999.

The reason for this is as follows:

Twenty years ago most retirement funds were defined benefit pension funds. That is, the retirement benefit was expressed as a pension of a certain percentage of earnings at or near retirement age for each year of pensionable service. The funds were governed by employer-appointed trustees and were perceived largely as an extension of the employer.

Retirement benefits were often good, but early leaver benefits were deliberately little more than a refund of the member's own contributions with a low rate of interest. This encouraged staff retention by penalising resignation.

In the 1980's and early 1990's most employees moved from these defined benefit pension funds to defined contribution funds. The defined contribution funds had retirement benefits equivalent in value to the accumulated member and employer contributions rolled up to retirement, nett of expenses, using the investment return earned by the fund. The resignation benefits were often substantially better than their defined benefit predecessors.

The reasons for this shift had little to do with the subject matter of this Bill, but suited both members and employers.

Members usually got

- \* better resignation and retrenchment benefits
- \* a funding structure which they would find easier to understand,
- \* the possibility of managing contributions more flexibly within a package approach to remuneration,
- \* a share in the management of the funds, and
- \* the reward of the high real returns earned (that is the difference between the rates of investment return and salary increases).

The employer enjoyed

- \* a transfer of the investment and expense risks from the employer to members and
- \* employee benefit costs were capped.

In the early transfers, members often moved with only their resignation benefits leaving behind the balance of the interest earned and the employer contributions. Later they moved with their accrued liability, representing the present value of benefits expected to be paid in future as a result of service prior to the date of transfer. Seldom were members given any benefit of the provision held within the fund to protect the fund against a fall in the stock market, or of any actuarial surplus.

This left behind not only excess assets but also any provision in the defined benefit fund for a fall in the stock market (which can loosely be described as the rationale for the difference between the fair value of the assets and the value placed on the assets by the actuary, which has normally been less than the fair value). Surplus was therefore released by such transfers, resulting in a concentration of surplus within the residual defined benefit funds.

At the same time, many industries experienced considerable contraction of their workforce, resulting for the first time in our economy in significant numbers of no-fault job losses. Retrenchment benefits had previously not been defined. Often members then received only the poor resignation benefits. Gradually practice changed until it became commonplace for the accrued liability to be paid. Still, members were seldom considered for any share of the provision against a fall in the stock market or of any actuarial surplus. Indeed, most members did not understand that they might have a claim in respect of more than their accrued liability. This aggravated the concentration of surplus in the residual defined benefit funds.

With the benefit of hindsight it was not fair to have given transferring or retrenched members no share of this provision against a fall in the stock market. Having decided this, it is necessary to legislate in order to give them any share, because,

- \* once a member is paid his benefit, the member loses any right to any further claim against the fund; former members have no rights in terms of the Act as it is currently written;
- \* secondly, most of the transfers had occurred more than three years ago, and, even though members may now feel that they did not get what was promised in whatever agreement was signed between the union and the employer, they would be unsuccessful in claiming anything through the courts because their claim would have become prescribed.

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