

Malawi

Pension Act

Chapter 55:02

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Malawi

Pension Act

Chapter 55:02

Assented to on 1 April 2011

Commenced on 1 June 2011

[This is the version of this document at 31 December 2014.]

[Note: This version of the Act was revised and consolidated in the Forth Revised Edition of the Laws of Malawi (L.R.O. 1/2015), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]

An Act to make provision for mandatory pension, and for matters relating to the supervision and regulation of pension funds and umbrella funds, and for matters connected therewith and incidental thereto

Part I – Preliminary

1. Short title

This Act may be cited as the Pension Act.

2. Application of the Act

- (1) Unless expressly exempted by the Minister in writing, with the approval of the Cabinet, this Act shall apply to every employer and employee in Malawi.
- (2) The Government, in its capacity as employer, shall be exempt from compliance with the provisions of this Act, provided that such exemption shall only be for a period not exceeding twenty-four months from the date of commencement of this Act.

3. Interpretation

- (1) In this Act, unless the context otherwise requires—
 - “**administrator**” means a person who, as a business, provides data management, specialist technical services to pension funds or umbrella funds, by arrangement with the trustee or operator of the funds concerned;
 - “**advisory committee**”, in relation to a pension fund, means a board, committee or other body that—
 - (a) is established by or under the fund rules; and
 - (b) has the function of advising the trustee of the fund about issues relating to the fund that a member or an employer has raised;
 - “**annuity**” means the exchange of a capital sum for a regular income benefit, which may or may not increase at a predefined level or according to an appropriate index, payable for the remaining life of the recipient;
 - “**beneficiary**”, in relation to a pension fund, means an individual who is, in accordance with the fund rules, entitled to a benefit from that fund;

“**child**” in relation to a member, means a child of the member, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother;

“**close relation**” means spouse, brother, sister, parent, child, child of the spouse, aunt, uncle, grandparent, and the spouse of any of these;

“**corporate trustee**” means a trustee that is a body corporate;

“**defined benefit fund**” means a pension fund other than a defined contribution fund where under the fund rules a member’s benefits are calculated, wholly or in part, by reference to any or all of the following—

- (a) the amount of the fund member’s remuneration at the date on which benefits are payable or a specified earlier date;
- (b) the amount of the fund member’s remuneration averaged over a specified period before the date on which benefits are payable; or
- (c) an amount specified in the fund rules;

“**defined contribution fund**” means a pension fund that is not a defined benefit fund where under the fund rules a member’s benefits on retirement has a value equal to the value of—

- (a) the contributions paid by the member and by the employer in terms of the fund rules that determine the rates of both their contributions at a fixed rate;
- (b) less such expenses as the trustees determine should be deducted from the contributions paid;
- (c) plus any amount credited to the member’s account upon the commencement of the member’s membership of the fund or upon the conversion of the category of the fund to which the member belongs from a defined benefit fund to a defined contribution fund or upon the amalgamation of the fund with any other fund, other than amounts taken into account in terms of section (d);
- (d) plus any other amounts lawfully permitted, credited to or debited from the member’s individual account, if any,

as increased or decreased by fund investment return;

“**dependant**” in relation to a member, includes a spouse and a child of the member;

“**director**” shall bear the same meaning ascribed to that term in the Financial Services Act;

[Cap. 44:05]

“**employee**” means—

- (a) a person who offers his services under an oral or written contract of employment, whether express or implied; or
- (b) a person who performs work or services for another person, including the Government and other public institutions, for remuneration or reward on such terms and conditions, that he is, in relation to that person, in a position of economic dependence on and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor;

“**employee contribution**” means a contribution to a pension fund made by the employee, including a contribution deducted by the employer from the employee’s remuneration where the employer is under an obligation to remit the amount concerned to the trustee of the fund;

“**employer**” means—

- (a) any person, or undertaking, corporation, company, public authority or body of persons who or which employs an employee and include heirs, successors and assignees of the employer; and
- (b) in relation to a pension fund, means a person who employs a member and who is liable, under the fund rules, to make employer contributions to the fund in respect of the member;

“**employer asset**” includes—

- (a) an asset acquired from an employer or an associate of an employer;
- (b) rights under a lease of fund assets to an employer or an associate of an employer; and
- (c) a loan to, or rights acquired by the provision by the trustee of financial accommodation of any kind to an employer or an associate of an employer,

but does not include assets that are securities issued by or guaranteed by the Government;

“**employer asset percentage**”, for a pension fund, means the percentage calculated using the following formula—

$$\frac{\text{total fair market value of fund's employer assets}}{\text{total fair market value of all fund assets}} \times 100$$

where employer assets are those invested in the equity or debt, listed or unlisted, of the employer, or any other financial commitment of the employer to the fund;

“**employer contribution**” means a contribution to a pension fund made by an employer in respect of an employee, excluding employee contributions, fees and other charges;

“**employer representative**”, in relation to a group of trustees of a pension fund or the board of directors of a corporate trustee of a pension fund, means a member of the group, committee or board nominated by—

- (a) the employers; or
- (b) an organization representing the interests of employers;

“**equal representation rule**” means the rule referred to in [section 26](#) (1) or (2);

“**fully funded**” in relation to a pension fund, means that the financial obligations to the pension fund’s members, creditors and service providers are fully covered by the assets held in the fund’s name, as confirmed in the case of a defined benefit fund by the valuation conducted by an actuary as at the effective date of the funding assessment;

“**fund assets**” of a pension fund or an umbrella fund means property of any kind held by the trustee or operator of the fund in that capacity;

“**fund information**”, in relation to a pension fund, means information about—

- (a) the fund’s investment strategy;
- (b) the fund’s investment performance and financial position;
- (c) fees and charges payable by, or borne by, members or beneficiaries in relation to the fund;
- (d) the rights and entitlements of members or beneficiaries under the fund rules and otherwise in relation to the fund;
- (e) the obligation of members to pay contributions under the fund rules; and

- (f) the obligation of employers to pay contributions under the fund rules and to provide life insurance under the requirements of this Act,

or as specified by Registrar's Directive;

"guaranteed wages" means basic wages excluding overtime and bonuses;

"independent director", in relation to a corporate trustee of a pension fund, means a director of the corporate trustee who is not—

- (a) a member;
- (b) an employer;
- (c) an associate of an employer;
- (d) an employee of an employer or of an associate of an employer;
- (e) in any capacity, a representative of a trade union, or other organization representing the interests of one or more members; or
- (f) in any capacity, a representative of an organization representing the interests of one or more employers;

"independent trustee", in relation to a fund, means a trustee of the fund who is not—

- (a) a member;
- (b) an employer;
- (c) an associate of an employer;
- (d) an employee of an employer or of an associate of an employer;
- (e) in any capacity, a representative of a trade union, or other organization representing the interests of one or more members; or
- (f) in any capacity, a representative of an organization representing the interests of one or more employers;

"investment management agreement" means an agreement between the trustee of a pension fund or the operator of an umbrella fund and an investment manager, for the investment of fund assets that for the purposes of the agreement, are under the control of the investment manager;

"investment manager" means a person who, as a business, invests fund assets of pension funds or umbrella funds by arrangement with the trustees or operators of the funds concerned;

"legal personal representative" means—

- (a) in relation to a deceased person, the executor of the will or administrator of the estate of that person; and
- (b) in relation to a person under a legal disability, the trustee or manager of the estate of that person appointed under law;

"lifetime flat annuity" means an annuity payable for the remaining lifetime of the recipient without increases;

"loan" includes the provision of credit and any other form of financial accommodation, whether or not enforceable, or intended to be enforceable, by legal proceedings;

"member", in relation to a pension fund, means a person who is, in accordance with the fund rules, a member of the fund;

“**member account**”, or “member’s account” means an account established under [section 11](#);

“**member information**”, in relation to a member of a pension fund, means information about the nature and extent of the member’s entitlements under the fund rules and otherwise in relation to the fund;

“**member representative**”, in relation to a group of trustees of a pension fund, a policy committee of a pension fund or the board of directors of a corporate trustee of a pension fund, means a member of the group, committee or board nominated by the members;

“**most representative organization of employees**” means the most representative organization of employees enjoying the right of freedom of association;

“**most representative organization of employers**” means the most representative organization of employers enjoying the right of freedom of association;

“**national pension fund**” means the national pension fund contemplated under [section 6 \(2\)](#);

“**National Pension Scheme**” means the Contributory National Pension Scheme established under [section 6 \(1\)](#);

“**nomination**” means a nomination made by a member under [section 70](#); “operator”, in relation to an umbrella fund, means the trustee of the trust;

“**Pension Administrator**” means the National Pension Fund Administrator appointed under [section 7](#);

“**pension broker**” means a person who as a business, provides consulting or advisory services to pension schemes or funds, including claims assistance, where required;

“**pension fund**” means—

- (a) a pension scheme that is an indefinitely continuing trust whether as a restricted or unrestricted fund and includes a defined contribution fund or a defined benefit fund or a hybrid of the two; or
- (b) an association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members, upon the death of such members; or
- (c) a business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons;

“**pension scheme**” means a scheme the primary purpose of which is the provision of retirement benefits to a member of the scheme on his retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged, whether or not it also provides for benefits to be paid in other circumstances (for instance, on the death or disablement of a person), but does not include—

- (a) a contract of insurance; or
- (b) a contract of employment merely because it provides for payments to be made on termination of the contract;

“**pensionable emoluments**” means guaranteed wages and other earnings, but not including personal investment income, capital gains or provision from employers in the form of houses or motor vehicles;

“**principal officer**” means the principal officer of a pension fund or umbrella fund appointed under [section 32](#);

“**programmed withdrawal**” means the payment by the fund of regular income payments during the remaining life of the member from the date of retirement or the date at which an annuity is purchased;

“**Registrar**” means the Registrar of Financial Institutions appointed under the Financial Services Act, or a specialist registrar for pension funds, as may be defined in any modifications to the Financial Services Act;

[Cap. 44:05]

“**Registrar’s directive**” means a directive issued under this Act or the Financial Services Act;

“**restricted fund**” means a pension fund the rules of which restrict membership of the fund to officers and employees of a specified employer and its related bodies corporate;

“**retire**”, in relation to a member, means attain the retirement age specified in the rules of the fund at which retirement is to take place, or meet any of the other conditions specified in the rules to take retirement;

“**retirement age**” means the age stipulated in the rules of a pension fund, which shall be between fifty years and seventy years, or as may be prescribed by the Minister for the purposes of this Act;

“**scheme**” means any plan, proposal, action, course of action, course of conduct, agreement, arrangement, understanding, promise or undertaking, whatever its legal form, whether express or implied and whether or not enforceable or intended to be enforceable;

“**scheme rules**”, in relation to a pension fund or an umbrella fund, means the rules contained in a trust instrument, other document or legislation, or combination of them governing the establishment or operation of the fund;

“**self-employed individual**” means any person who is running a business on his own as a sole trader, whether he has employed any other person or not;

“**service retirement**” means a minimum of twenty years of continuous service by an employee with one employer;

“**spouse**” means a person’s husband or wife in relation to a marriage recognized under section 22 (5) of the Constitution;

“**statutory covenant**” means a covenant set out in or prescribed under [section 36 \(1\)](#) or [section 37 \(1\)](#);

“**totally and permanently disabled**”, in relation to a member, means permanently incapable, through infirmity of mind or body, from engaging in his business, trade, profession, vocation, calling, occupation or employment or in any other business, trade, profession, vocation, calling, occupation or employment for which he may be trained or fitted;

“**trustee**”—

- (a) in relation to a pension fund with only one trustee, means the trustee of the fund appointed in accordance with the instrument creating the pension fund;
- (b) in relation to a restricted fund where there is a group of individual trustees, means all of the trustees appointed in accordance with the instrument creating the restricted fund, acting together;

“**umbrella fund**” means a collective investment scheme as defined in the Securities Act, whose rules provide that only trustees of pension funds or operators of umbrella funds may be members of the scheme;

[Cap. 46:06]

“**unrestricted fund**” means a pension fund whose rules do not restrict membership of the fund to officers and employees of a specified employer and its related bodies corporate.

- (2) Subject to subsection (1) and except where a contrary intention appears, words and expressions used in this Act shall bear the same respective meanings as they have in the Financial Services Act.

[Cap. 44:05]

- (3) Without limiting the ordinary meaning of “operate”, a person operates a pension scheme or an umbrella fund if the person—
- (a) establishes or administers the scheme or fund;
 - (b) induces or attempts to induce a person to be a member of the scheme or fund or to make payments by way of contribution to or investment in the scheme or fund; or
 - (c) accepts or makes payments in connexion with the scheme or fund otherwise than as a member or beneficiary of the scheme or fund.
- (4) A provision included in the fund rules of a pension fund to avoid a breach of a rule of law against remoteness of vesting shall not prevent the fund from being treated as an indefinitely continuing fund for the purposes of the definitions of “pension fund” in subsection (1).

4. Objectives of the Act

The objectives of this Act are to—

- (a) ensure that every employer to which this Act applies provides pension for every person employed by that employer;
- (b) ensure that every employee in Malawi receives retirement and supplementary benefits as and when due;
- (c) promote the safety, soundness and prudent management of pension funds that provide retirement and death benefits to members and beneficiaries; and
- (d) foster agglomeration of national savings in support of economic growth and development of the country.

5. Application of the Financial Services Act

This Act shall apply in addition to the Financial Services Act.

[Cap. 44:05]

Part II – Contributory National Pension Scheme

6. The Contributory National Pension Scheme

- (1) There is hereby established a contributory National Pension Scheme (in this Act otherwise referred to as the “National Pension Scheme”) for the purpose of ensuring that every employee in Malawi receives pension and supplementary benefits on retirement.
- (2) The National Pension Scheme shall comprise—
 - (a) a national pension fund to be established under this Act, by the Minister, by Order published in the *Gazette*; and

- (b) other pension funds licensed under this Act.
- (3) Every employer shall make provision for every person under his employment to be a member of the National Pension Scheme.

7. The National Pension Fund Administrator

- (1) There is hereby established a National Pension Administrator (in this Act otherwise referred to as the "Pension Administrator").
- (2) The Pension Administrator shall be a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name and with power to do or perform all such acts and things as a body corporate may by law do or perform.
- (3) The principal object of the Pension Administrator shall be to—
 - (a) act as an administrator for the National Pension Scheme; and
 - (b) set up and manage the national pension fund.
- (4) There shall be a Board of Trustees which shall be responsible for the administrative and management policy of the Pension Administrator.
- (5) The Board of Trustees shall consist of seven trustees appointed by the President on recommendation of the Minister, and shall include a representative from the most representative organization of employers, most representative organization of employees, and either the Secretary to the Treasury or the secretary responsible for labour, or the secretary responsible for economic planning.
- (6) A person shall not be appointed as trustee unless the Minister is satisfied that the person is a fit and proper person to hold the office of a trustee as defined by the Registrar, and qualified for the appointment by virtue of his qualification and experience in the following fields—
 - (a) financial markets and financial products;
 - (b) pension, insurance and social security;
 - (c) law;
 - (d) accounting; or
 - (e) economics and finance.
- (7) In addition to the powers, duties and functions of the trustees under the Trustees Incorporation Act, the Registrar may issue Registrar's directives on the powers, duties and functions of the trustees.
[Cap. 5:03]
- (8) The existence of the Pension Administrator shall not preclude the Registrar from licensing other pension funds whether as restricted or unrestricted or umbrella funds to participate in the management of funds under the National Pension Scheme:

Provided that the Pension Administrator shall at all times manage not more than twenty per cent of funds under the National Pension Scheme.
- (9) The Registrar may, from time to time, by order published in the *Gazette*, revise the proportion of funds under the National Pension Scheme to be under the management of the Pension Administrator as provided under subsection (8).

- (10) The Government shall at all times maintain capital of the Pension Administrator in compliance with the minimum capital and solvency directive issued by the Registrar.
- (11) The Pension Administrator shall at all times comply with all other regulatory requirements prescribed and issued under all applicable financial services laws.

8. Designation of Government or other agency for some duties of the Pension Administrator

- (1) Notwithstanding [section 7](#), the Minister may, upon consultation with the Minister responsible for labour and the Registrar, designate any Government agency or private organization to perform any part of the functions of the Pension Administrator.
- (2) Any Government agency or private organization appointed under subsection (1) as Pension Administrator shall exercise all the powers and duties of the Pension Administrator as outlined under [section 7](#), or in the Registrar's directives.

Part III – Mandatory provisions

9. Obligation of employer

- (1) Subject to [section 10](#), every employer shall make provision for every person under his employment to be a member of the National Pension Scheme.
- (2) The Minister responsible for labour and the Registrar, in consultation with the Minister, shall be responsible for ensuring compliance with this Part.
- (3) Any employer who, without reasonable excuse, fails to comply with this section, shall be liable to administrative penalties under the Financial Services Act.

[Cap. 44:05]

10. Minister's power to exempt

- (1) The Minister, in consultation with the Minister responsible for labour and the Registrar, may by notice published in the *Gazette*, prescribe a salary threshold above which an employee's earnings shall not constitute part of that employee's pensionable emoluments.
- (2) Notwithstanding the provisions of [section 6](#) (1), the Minister shall, in consultation with the Minister responsible for labour and the Registrar, by order published in the *Gazette*, prescribe a salary threshold below which an employer and employee shall be exempted from complying with the requirements of [section 9](#) and [section 15](#):

Provided that—

- (a) where an employer has more than five employees, that employer shall provide pension for those employees notwithstanding that the salary of those employees is below the salary threshold prescribed under this subsection; and
 - (b) employers who have existing pension schemes at the commencement of this Act shall ensure that every employee who was a member of such pension scheme continues to be a member of the pension scheme notwithstanding that the employee's salary is below the salary threshold prescribed under this subsection.
- (3) The Minister, in consultation with the Minister responsible for labour, and the Registrar, may, by order published in the *Gazette*, exempt any class or category of employers or employees from complying with the requirements of this Act.

- (4) Without limiting the provisions of [section 91](#), all matters relating to employers and employees exempt by subsections (2) and (3) shall be governed by the provisions of the Employment Act.
[Cap. 55:01]
- (5) Where the exemption under subsection (2) and subsection (3) no longer applies, an employer shall recognize as part of an employee's pension dues, the employee's entitlements accrued from the date of employment of the employee to the date when the employee becomes a member of the National Pension Scheme.

11. Trustees to establish separate accounts

The trustees of a pension fund shall establish and maintain a separate account in its books for each member, in accordance with the Registrar's directives.

12. Minimum contribution rates

- (1) Subject to subsection (2), and without limiting the powers of the Minister to make regulations on pension contribution, contributions relating to pensionable emoluments for an employee shall, under the National Pension Scheme, be made in the following manner—
 - (a) a minimum of ten per cent by the employer; and
 - (b) a minimum of five per cent by the employee:
Provided that the minimum contribution rate prescribed in paragraph (a) may be set at seven and a half per cent for the employer from the date of commencement of this Act until the latest 1st January before the expiry of two years from that date.
- (2) The rates of contribution prescribed in subsection (1) may, upon agreement between an employer and an employee, be revised upwards, from time to time, provided that the Registrar shall be notified of any such revision.
- (3) Notwithstanding the provisions of subsections (1) and (2), an employer may agree or elect to bear the full burden of the total contributions provided that in such case the employer's contribution shall not be less than the sum of the employer and employee contributions prescribed in subsection (1).
- (4) An employee or a self-employed individual may, in addition to the total contributions being made by him and his employer, make voluntary contributions to his account:
Provided that such contributions do not exceed the threshold set by the Minister under [section 10](#) (1).
- (5) Subject to such directives as may be issued from time to time by the Registrar, and notwithstanding the requirements of [section 9](#) and this section, an employee shall be entitled to make voluntary contributions to any unrestricted fund or to the restricted fund to which the employer of that employee is currently contributing.
- (6) In addition to the minimum contributions prescribed in subsections (1) and (3), an employer shall cover the cost of the pension fund in respect of those employees who elect to stay as members of the fund nominated by the employer.

13. Taxation

- (1) All contributions made by both the employee and employer, up to the limits specified in [section 10](#) (1) and any income accruing to the credit of such contributions after being invested, shall be deductible from the relevant taxable income.

- (2) Any lump sum received at retirement, as specified in [section 68](#), shall be exempt from income tax.

14. Pension benefits to be transferable

An employee may transfer pension benefits accruing to his account to any unrestricted fund without giving any reason for the transfer, and upon such transfer the employer of that employee shall redirect the contribution that he is required to make under [section 9](#) to the fund selected by the employee:

Provided that—

- (a) the employee shall only be allowed to transfer pension benefits once in two years at most, or as may be determined by the Registrar in a Registrar's directive from time to time;
- (b) in respect of the fees levied by any fund other than the fund nominated by the employer, the employer shall pay only that amount of the fees equal to the fees that would otherwise be paid for that member, to the nominated fund, not any excess above this amount; and
- (c) the employer shall not be required to cover the costs of the transfer.

15. Life insurance policy

- (1) An employer shall, in addition to making pension contributions on behalf of its employees, maintain a life insurance policy in favour of each of its employees for a minimum life insurance policy cover of one times the annual pensionable emoluments of the employee.
- (2) The benefits of the life insurance policy specified in subsection (1) shall form part of the member's death benefits and shall be distributed in accordance with [section 70](#).
- (3) The Minister may, by notice published in the *Gazette*, amend the minimum life insurance policy cover prescribed in subsection (1).
- (4) The Minister may make regulations prescribing the manner in which the life insurance policy cover required in subsection (1) may be arranged.

Part IV – Registration and licensing

16. Pension schemes and umbrella funds to be registered and trustees licensed

- (1) A person shall not operate a pension scheme unless—
 - (a) the scheme is registered as a pension fund and has legal personality; and
 - (b) the trustee of the fund is licensed as a trustee of the fund.
- (2) A person shall not operate an umbrella fund unless—
 - (a) the fund is registered as an umbrella fund and has legal personality; and
 - (b) the operator of the fund is licensed as operator of the fund.
- (3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable upon conviction—
 - (a) in the case of a natural person, to a fine of K10,000,000 and to imprisonment for four years; and

- (b) in the case of a corporation, to administrative penalties as provided for in the Financial Services Act.

[Cap. 44:05]

17. Registration criteria for restricted funds

- (1) If an application is made in accordance with the Financial Services Act, for registration of a restricted fund as a pension fund, the Registrar shall so register the fund if—
 - (a) the fund rules provide that the fund shall be maintained solely to provide pensions or annuities for one or more of the following—
 - (i) members on their reaching retirement age;
 - (ii) members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment;
 - (iii) dependants of members on the members' deaths; or
 - (iv) for any of such purposes and the purpose of providing pensions or annuities for members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment because of ill-health;
 - (b) the fund rules provide for contributions to the fund to be made at specified times and rates;
 - (c) it appears to the Registrar that the fund complies with this Act and the other financial services laws;
 - (d) the trustee of the fund is licensed as required by this Act;
 - (e) the fund rules provide that each employer shall ensure that, for all employees of the employer who are eligible under the fund rules to be members, it is a condition of their employment that they be and remain a member of the fund or of some other registered pension fund;
 - (f) the fund assets shall be held by a custodian;
 - (g) subject to subsection (2), the fund rules provide that a trustee and, where the trustee is a corporate trustee, the directors of the trustee, are not to be paid any fee out of the fund assets for acting as trustee;
 - (h) if subsection (2) applies, the fee is, in the Registrar's opinion, reasonable in the circumstances;
 - (i) the principal officer has been approved by the Registrar in terms of the fit and proper person requirements as determined in the Registrar's directive; and
 - (j) the Registrar has no reason to believe that the fund and the trustee will not comply with this Act and other financial services laws, including the Registrar's directives, if the fund is registered.
- (2) The fund rules may permit an independent trustee who is an individual, or, in the case of a corporate trustee, an independent director of the corporate trustee, to be paid a fee out of the scheme assets for acting as trustee or director.

[Cap. 44:05]

18. Registration criteria for unrestricted funds

If an application is made in accordance with the Financial Services Act, for registration of an unrestricted fund as a pension fund, the Registrar shall not register the fund unless he is satisfied that—

- (a) the fund rules provide that the fund shall be maintained solely to provide pensions or annuities for one or more of the following—
 - (i) members on their reaching retirement age;
 - (ii) members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment;
 - (iii) dependants of members on the members' deaths; or
 - (iv) for any of such purposes and the purpose of providing pensions or annuities for members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment because of ill-health;
- (b) the fund rules provide for contributions to the fund to be made at specified times and rates;
- (c) the fund complies with this Act and the other financial services laws;
- (d) the trustee of the fund is licensed as required by this Act;
- (e) the fund assets shall be held by a custodian;
- (f) the principal officer has been approved by the Registrar in terms of the fit and proper person requirements as determined in the Registrar's directive;
- (g) any fee payable in accordance with the fund rules out of the fund assets to the trustee for acting as trustee is, in the Registrar's opinion, reasonable in the circumstances; and
- (h) the Registrar has no reason to believe that the fund and the trustee will not comply with this Act and other financial services laws, including the Registrar's directives, if the fund is registered.

[Cap. 44:05]

19. Registration criteria for umbrella funds

If an application is made in accordance with the Financial Services Act, for registration of a fund as an umbrella fund, the Registrar shall not register the fund unless—

- (a) the fund complies with this Act and the other financial services laws;
- (b) the operator of the fund is licensed as required by this Act;
- (c) the principal officer has been approved by the Registrar in terms of the fit and proper person requirements as determined in the Registrars directive; and
- (d) the Registrar has no reason to believe that the fund and the operator will not comply with this Act and other financial services laws, including the Registrar's directives, if the fund is registered.

[Cap. 44:05]

20. Notice of registration to Commissioner of Taxes

Upon registration of a pension fund or umbrella fund, the trustee or operator of that fund shall give notice to the Commissioner of Taxes of such registration, as required by a Registrar's directive.

21. Investment managers, custodians, administrators and pension brokers to be licensed

- (1) A person shall not act as—
 - (a) an investment manager for a pension fund;
 - (b) an investment manager for an umbrella fund;
 - (c) a custodian for a pension fund or an umbrella fund;
 - (d) an administrator for a pension fund; or
 - (e) a pension broker,
unless he is licensed as such under the requirements of the Financial Services Act.
- [Cap. 44:05]
- (2) Any person who contravenes subsection (1) commits an offence and shall be liable upon conviction—
 - (a) in the case of a natural person, to a fine of K10,000,000 and to four years imprisonment; and
 - (b) in the case of a corporation, to administrative penalties as provided in the Financial Services Act.

[Cap. 44:05]

22. Licensing and registration procedure

The provisions relating to licensing and registration of applications contained in the Financial Services Act, shall apply *mutatis mutandis* to this Act.

[Cap. 44:05]

23. Licensing on a “class” basis

- (1) A person may be licensed as a trustee in respect of pension funds of a class specified in the licence.
- (2) A person may be licensed as an operator of umbrella funds of a class specified in the licence.
- (3) An investment manager may be licensed in respect of pension funds of a class specified in the licence.

Part V – Retirements for trustees, investment managers, administrators, custodians, pension brokers and actuaries of pension funds and umbrella funds

Division – 1 Trustees of pension funds and operators of umbrella funds

24. Trustees, operators and directors to consent to appointment

A person shall not be appointed as a trustee of a pension fund, an operator of an umbrella fund or a director of a corporate trustee of a pension fund unless he has consented in writing to the appointment.

25. Composition of trustees

- (1) An umbrella fund and an unrestricted fund shall have a single trustee, which shall be a body corporate.
- (2) A restricted fund which has an individual as a trustee—
 - (a) shall have at least six individuals as trustees called “a group of individual trustees”.
- (3) If—
 - (a) a vacancy occurs in the membership of a group of individual trustees of a restricted fund;
 - (b) immediately before the vacancy occurred, the fund had at least six individuals as trustees;
 - (c) the vacancy is filled within ninety days after it occurred; and
 - (d) immediately after the vacancy is filled, the fund has at least six individuals as trustees, the fund shall be deemed to have had at least six individuals as trustees during the period of the vacancy.

26. Equal representation rule

- (1) If a restricted fund has a group of individual trustees, the group shall consist of equal numbers of employer representatives and member representatives.
- (2) If a restricted fund has a corporate trustee that is not the trustee of another fund or trust, the board of directors of the corporate trustee shall consist of equal numbers of employer representatives and member representatives.
- (3) For a fund where the equal representation rule applies, if—
 - (a) a vacancy occurs in the membership of a group of individual trustees or, if the trustee is a corporate trustee, on the board of directors of the corporate trustee;
 - (b) immediately before the vacancy occurred, the fund complied with the equal representation rule;
 - (c) the vacancy is filled within ninety days after it occurred; and
 - (d) immediately after the vacancy is filled, the fund complies with the equal representation rule, the fund shall be deemed to have complied with the equal representation rule during the period of the vacancy.

27. Additional independent trustees and additional independent directors

If the fund rules of a restricted fund provide that—

- (a) an independent additional trustee may be appointed as a trustee, or an independent additional director may be appointed as a director, at the request of the employer representatives, or the member representatives, who are the members of the group or board; and
- (b) the additional independent trustee or additional independent director may not exercise a vote in any proceedings of the group or board, the appointment of such an additional independent trustee or additional independent director does not contravene the equal representation rule.

28. Advisory committees

- (1) This section applies in respect of—
 - (a) an unrestricted fund; and
 - (b) a restricted fund which has a corporate trustee that is not the trustee of another fund or trust.
- (2) The trustee shall make arrangements, whether through the fund rules or otherwise, in accordance with the Registrar's directives, for the establishment and operation of one or more advisory committees for the fund.
- (3) While advisory committees shall not have power beyond the power to advise the trustee, in the event of a dispute by a member of the fund, failure of the trustee to provide evidence that it has failed to respond adequately to concerns raised by the advisory committee shall be regarded by the Registrar as a breach of the trustee's fiduciary responsibility to the members of the fund.

29. Rules for appointment of member representatives

- (1) This section applies to a pension fund to which the equal representation rule applies.
- (2) The trustee shall establish rules, whether by inclusion in the fund rules or otherwise—
 - (a) setting out a procedure for appointing the member representatives; and
 - (b) ensuring that the member representatives so appointed shall be removed only by the same procedure as that by which they were appointed, except in the event of—
 - (i) mental or physical infirmity;
 - (ii) retirement;
 - (iii) termination of employment with a fund employer; or
 - (iv) such other circumstances as are prescribed in Registrar's directives for the purposes of this section.
- (3) The trustee shall publish the rules established under subsection (2) in a way that will make members aware of the procedure for appointment and removal of member representatives.
- (4) Any person who contravenes subsections (2) and (3) commits an offence and shall be liable to an administrative penalty under the Financial Services Act.

[Cap. 44:05]

Division – 2 Investment managers, administrators, pension brokers, custodians and actuaries of pension funds and umbrella funds

30. Investment managers, pension brokers, custodians and administrators to be bodies corporate

The Registrar shall not license an individual as—

- (a) an investment manager or a custodian for pension funds or umbrella funds;
- (b) an administrator of pension funds; or

- (c) a pension broker.

31. Appointment of investment managers, pension brokers, custodians and administrators to be in writing

- (1) If the trustee of a pension fund—
 - (a) appoints a person other than a body corporate to be investment manager, administrator, pension broker or custodian for the fund; or
 - (b) appoints a person to be investment manager, administrator, pension broker, actuary or custodian for the fund otherwise than in writing, the trustee and the person appointed shall each be liable to administrative penalties under the Financial Services Act.
[Cap. 44:05]
- (2) If, in contravention to this Act, the operator of an umbrella fund—
 - (a) appoints a person other than a body corporate to be investment manager, pension broker or custodian for the fund; or
 - (b) appoints a person to be investment manager, pension broker or custodian for the fund otherwise than in writing, that operator and the person appointed shall each be liable to administrative penalties under the Financial Services Act.
[Cap. 44:05]
- (3) An appointment referred to in subsection (1) or (2) shall be void.

32. Appointment of principal officer

- (1) A pension fund or umbrella fund shall appoint a principal officer whose appointment shall be subject to the prior approval of the Registrar in terms of fit and proper person requirements as determined in the Registrar's directives.
- (2) No pension fund or umbrella fund shall remove or change its principal officer except with the prior written approval of the Registrar.

33. Individual not to act as investment manager, pension broker, custodian or administrator

- (1) An individual shall not act as an investment manager, pension broker or a custodian for pension funds or umbrella funds.
- (2) An individual shall not act as an administrator of pension funds.
- (3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable upon conviction to a fine of K10,000,000 and to four years imprisonment.

Part VI – Requirements for fund rules of pension funds and umbrella funds

34. Pension fund rules to be enforceable

The fund rules of a pension fund shall be legally enforceable as between the members and the trustee, and as between the trustee and each employer.

35. Pension funds to be held on trust

The fund rules of a pension fund shall provide that—

- (a) contributions to the fund, whether employer contributions or employee contributions, shall be paid to the trustee or as the trustee directs; and
- (b) the fund assets shall be held by the trustee in trust for members, in accordance with this Act.

36. Statutory covenants for pension funds

- (1) The fund rules of a pension fund shall provide that the trustee of the fund covenants in favour of the members—
 - (a) to act honestly in all matters concerning the fund;
 - (b) to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
 - (c) to obtain skilled advice to assist in instances in which the complexity of issues is such that an ordinary prudent person would not be expected to make sound decisions taking all facts into account, a service for which reasonable fees may be paid from the assets of the fund;
 - (d) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the members and beneficiaries of the fund;
 - (e) to formulate an investment strategy having regard to the whole of the circumstances of the fund including, but not limited to, the following—
 - (i) the risk involved in making, holding and realising, and the likely return from, the fund's investments having regard to its objectives and its expected cash flow requirements;
 - (ii) the composition of the fund's investments as a whole, including the extent to which the investments are diverse or involve risks from inadequate diversification;
 - (iii) the liquidity of the fund's investments having regard to its expected cash flow requirements; and
 - (iv) the ability of the fund to discharge its existing and prospective liabilities;
 - (f) to give effect to the investment strategy formulated under paragraph (e);
 - (g) to keep the money and other assets of the fund separate from any money and assets—
 - (i) that are held by the trustee personally; or
 - (ii) that is money or are assets of another person, including an employer or a related party of an employer;

- (h) not to do anything that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the functions and powers of the trustee;
 - (i) if there are reserves of the fund, to formulate and to give effect to a strategy for their prudential management, consistent with the fund's investment strategy and its capacity to discharge its liabilities as and when they fall due; and
 - (j) such additional covenants as may be prescribed in Registrar's directives for the purposes of this section.
- (2) The covenant referred to in subsection (1) (h) shall not prevent the trustee from engaging or authorizing persons to carry out specified actions on behalf of the trustee.

37. Statutory covenants for umbrella funds

- (1) The fund rules of an umbrella fund shall provide that the operator of the fund covenants in favour of the members—
- (a) to act honestly in all matters concerning the fund;
 - (b) to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
 - (c) to ensure that the operator's duties and powers are performed and exercised in the best interests of the members;
 - (d) not to do anything that would prevent the operator from, or hinder the operator in, properly performing or exercising the operator's functions and powers; and
 - (e) such additional covenants as may be prescribed in Registrar's directives for the purposes of this section.
- (2) The covenant referred to in subsection (1) (d) shall not prevent the operator from engaging or authorizing persons to carry out specified actions on behalf of the trustee.

38. Consistency of statutory covenants

- (1) A covenant prescribed for the purposes of [section 36](#) (1) (j) shall be capable of operating concurrently with all the covenants referred to in [section 36](#) (1) and the other provisions of this Act.
- (2) A covenant prescribed for the purposes of [section 37](#) (1) (e) shall be capable of operating concurrently with all the covenants referred to in [section 37](#) (1) and the other provisions of this Act.

39. Statutory covenants bind directors of trustee

If the trustee of a pension fund is a body corporate, the statutory covenants shall further have effect as covenants by each of the directors of the trustee to exercise the degree of care and diligence that a reasonable person in the position of director of the trustee would exercise in the trustee's circumstances, to ensure that the trustee performs the statutory covenants, and so operates as if the directors were parties to the fund rules.

40. Damages for breach of statutory covenants

- (1) A breach of a statutory covenant shall not be an offence and shall not result in the invalidity of a transaction, but a person who suffers loss or damage as a result of conduct of another person that is a breach of a statutory covenant may recover the amount of the loss or damage by action against that other person and against any person involved in the breach.
- (2) It shall be a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of a trustee of a pension fund if it is established that the investment was made in accordance with an investment strategy formulated under the covenant set out in [section 36](#) (1) (e).
- (3) It shall be a defence to an action for loss or damage suffered by a person as a result of the management of reserves by a trustee of a pension fund if it is established that the management of the reserves was in accordance with the covenant set out in [section 36](#) (1) (i).
- (4) Subsections (2) and (3) shall apply to an action for loss or damage, whether brought under subsection (1) or otherwise.

41. Fund rules regarding indemnities, liability and advice

- (1) A provision in the fund rules of a pension fund or an umbrella fund shall be void if—
 - (a) it purports to preclude a licensed trustee of the pension fund or the licensed operator of the umbrella fund from being indemnified out of the fund assets in respect of a liability incurred while acting as trustee or as operator; or
 - (b) subject to subsection (2), it limits the amount of such an indemnity.
- (2) A provision in the fund rules of a pension fund or an umbrella fund shall be void if it purports to—
 - (a) exempt a licensed trustee of the pension fund, or the licensed operator of the umbrella fund, from a liability arising as a result of the trustee or operator—
 - (i) failing to act honestly in a matter concerning the fund; or
 - (ii) intentionally or recklessly failing to exercise, in relation to a matter affecting the fund, the degree of care and diligence that the trustee or operator was required to exercise; or
 - (b) indemnify such a trustee or operator in respect of such a liability.
- (3) The fund rules of a pension fund or an umbrella fund shall not prevent a licensed trustee of the pension fund or the licensed operator of the umbrella fund from seeking advice from any person in respect of any matter relating to performance of his duties or the exercise of his powers as trustee or operator.
- (4) A provision in the fund rules shall be void if it purports to preclude the trustee or operator from being indemnified out of fund assets in respect of the cost of obtaining advice mentioned in subsection (3), or to limit the amount of such an indemnity.

42. Trustee directors may be indemnified

- (1) Subject to subsection (2), the fund rules of a pension fund or an umbrella fund may provide for a director of the licensed trustee, who is a corporate trustee, or of the licensed operator of the fund to be indemnified out of the fund assets in respect of a liability incurred while acting as such a director, and the director may be so indemnified out of the fund assets accordingly.

- (2) A provision of the fund rules of a pension fund or an umbrella fund shall be void if it would have the effect of indemnifying a director of the licensed trustee, being a corporate trustee, or of the licensed operator, of the fund against a liability that arises because the director—
 - (a) fails to act honestly in a matter concerning the fund; or
 - (b) intentionally or recklessly fails to exercise, in relation to a matter affecting the fund, the degree of care and diligence that the director is required to exercise.

43. Pension fund trustees not to be subject to direction

- (1) The fund rules of a pension fund shall not permit a trustee to be subject, in the exercise of any of the trustee's powers in relation to the fund, to direction by any other person.
- (2) Subsection (1) shall not apply to—
 - (a) a direction given by a court;
 - (b) a direction given by the Registrar under the Financial Services Act;
[Cap. 44:05]
 - (c) a nomination;
 - (d) in the case of a restricted fund, a direction given by an employer, or an associate of an employer, in circumstances prescribed in the Registrar's directives for the purposes of this section; or
 - (e) a direction given by the Appeals Committee, as defined in the Financial Services Act.
[Cap. 44:05]
- (3) A provision of fund rules of a pension fund shall be void to the extent of its inconsistency with subsection (1).

44. Pension funds benefits to be portable

- (1) The fund rules of a pension fund that is a restricted fund shall provide that—
 - (a) if a member, continuing in employment with an employer, applies to switch to a registered unrestricted fund, the trustee shall pay the amount of the member's benefits in the fund to the trustee of the specified pension fund;
 - (b) if a member—
 - (i) ceases employment with an employer; and
 - (ii) does not take up employment with another employer within the period specified in Registrar's directives for the purposes of this section, the trustee shall, on application by the member, pay the amount of the member's benefits in the fund to the trustee of another registered pension fund; and
 - (c) if a person becomes a member, the trustee shall accept payments in respect of the member from the trustee of another registered pension fund and shall credit to those amounts to the member's account in the fund.

- (2) Without limiting the Registrar's power under the Financial Services Act, to issue Registrar's directives, Registrar's directives may make provision with respect to the calculation and payment of members' benefits for the purposes of this section.

[Cap. 44:05]

45. Exercise of discretion in respect of pension funds

- (1) Subject to this Act and the Registrar's directives, the fund rules of a pension fund shall not permit a discretion under such rules that is exercisable by a person other than a trustee to be exercised unless—
 - (a) those rules require the consent of the trustee to the exercise of that discretion; or
 - (b) the discretion is exercised in circumstances prescribed in, and in accordance with, Registrar's directives for the purposes of this subsection.
- (2) A provision of fund rules of a pension fund shall be void to the extent of its inconsistency with subsection (1).

46. Restriction on requirement for approval of trustee's decisions by employer

Fund rules of a pension fund shall not require that a decision of the trustee under those rules be made only with the consent or approval, however described, of an employer, unless the decision—

- (a) increases the benefits or rates of benefits, payable under those rules;
- (b) would have the effect of increasing the costs to the employer, of the administration of the fund;
- (c) is made to comply with a written law or a direction of the Registrar or the Appeals Committee; or
- (d) is of a kind prescribed by Registrar's directives for the purposes of this section.

47. Restriction on amendments to fund rules

- (1) The fund rules of a pension fund shall not permit those rules to be amended unless—
 - (a) the trustee consents to the amendment;
 - (b) the amendment only confers on the trustee the power to consent to amendments of those rules; or
 - (c) the amendment is for the purposes prescribed in Registrar's directives for the purposes of this subsection.
- (2) The fund rules of a pension fund shall not permit the rules to be amended to make a person other than a licensed trustee eligible to be appointed as trustee.
- (3) The fund rules of an umbrella fund shall not permit the rules to be amended to make a person other than a licensed operator eligible to be appointed as operator.
- (4) A provision of fund rules of a pension fund or an umbrella fund shall be void to the extent of any inconsistency with subsections (1), (2) or (3).
- (5) If the fund rules of a pension fund or an umbrella fund are amended, the trustee or operator of the fund shall give a copy of the amendment, as prescribed by Registrar's directives for the purposes of this subsection, to the Registrar.
- (6) An amendment to the fund rules of a pension fund shall not have effect until—

- (a) the day the Registrar approves the amendment; or
 - (b) on a day specified in the amendment but after the approval of the Registrar.
- (7) The Registrar shall not approve amendment to the fund rules of a pension fund if—
- (a) in the case of a restricted fund and subject to subsection (8), the fund rules as amended would provide that a trustee and, if the trustee is a corporate trustee, the directors of the trustee, are entitled to be paid a fee out of the fund assets for acting as trustee;
 - (b) in the case of an unrestricted fund, the fund rules as amended would provide that the trustee may be paid a fee payable out of the fund assets for acting as trustee that is not, in the Registrar's opinion, reasonable in the circumstances.
- (8) Fund rules of a restricted fund may be amended to permit an independent trustee who is an individual or, in the case of a corporate trustee, an independent director of the corporate trustee, to be paid a fee out of the fund assets for acting as trustee or director.
- (9) The Registrar shall approve or refuse approval of an amendment to the fund rules in writing, within thirty days of receipt by the Registrar of a copy of the amendment under subsection (5):
Provided however that the Registrar may, by notice in writing to the trustee or operator, extend the period within which an application shall be considered.
- (10) The Registrar may extend more than once the period for dealing with the application.
- (11) The trustee or operator of a pension fund or umbrella fund shall give notice of any amendment to the fund rules, as prescribed by the Minister, to the Registrar within thirty days after the amendment comes into effect.
- (12) Any person who contravenes subsection (11) shall be liable to an administrative penalty under the Financial Services Act.

[Cap. 44:05]

Part VII – Prudential and other requirements for the operation of pension funds and umbrella funds

48. Matters that Registrar's directives may cover

Without limiting the Registrar's power under the Financial Services Act, to issue Registrar's directives, Registrar's directives may make provision with respect to—

- (a) contributions to pension funds, including who may make contributions and the circumstances in which a pension fund may accept contributions;
- (b) payment of benefits from pension funds, including—
 - (i) the way in which amounts of benefits are to be calculated;
 - (ii) the form in which benefits may be paid; and
 - (iii) requirements relating to payment of benefits, based on conditions other than retirement age, under which retirement by a member may be permissible under the fund rules;
- (c) commutation of pensions and annuities from pension funds;
- (d) transferring entitlements to benefits from pension funds to other pension funds;
- (e) the levels of assets that may be held by pension funds;

- (f) the application of fund assets no longer required to meet payments of benefits to beneficiaries in pension funds, including because the beneficiaries have ceased to be entitled to receive those benefits;
- (g) the investment of fund assets of pension funds and umbrella funds and the management of those investments and limits to the proportion of assets that may be held by pension funds and umbrella funds in specified classes of investments;
- (h) the number of individual trustees and the composition of boards or committees of trustees of pension funds;
- (i) fit and proper person requirements for trustees, investment managers, custodians and administrators and principal officers;
- (j) disclosure of information by trustees of a pension fund to other trustees of the fund;
- (k) disclosure of information by an investment manager to the trustee or operator of a fund whose assets are managed by the investment manager or to the trustee or operator of a prospective client of the investment manager;
- (l) disclosure of information, including the format of this information if necessary, to trustees by investment managers, custodians, pension brokers, administrators, actuaries and auditors concerning the fees and charges levied for the services rendered;
- (m) specifications of the forms in which fees and charges may be expressed, facilitating clear comparison;
- (n) maximum fees and charges to be applied by pension fund administrators, custodians, investment managers and brokers, and independent trustees;
- (o) specifications of the types and forms of fees to be applied by pension fund administrators, custodians, investment managers and brokers, and independent trustees; and
- (p) requirements relating to the role and mandate of a principal officer.

[Cap. 44:05]

49. Investment management agreement not to exclude liability for negligence

A provision in an agreement between a trustee of a pension fund of the operator of an umbrella fund and an investment manager that purports to exempt the investment manager from liability for negligence, or to limit that liability, shall be void.

50. Provision of information in an investment management agreement

- (1) An investment management agreement shall include adequate provision to enable the trustee or operator to require the investment manager—
 - (a) to provide appropriate information as to the making of, and return on, the investments made with those assets; and
 - (b) to provide whatever information is necessary to enable the trustee or operator to assess the capability of the investment manager to select and manage the investments, whenever it is necessary or desirable to do so.
- (2) If an investment management agreement entered into before the commencement of this Part does not include provision required by subsection (1), the trustee or operator shall, as soon as practicable—
 - (a) ensure that the agreement is amended so that it contains such provision; or

- (b) if the investment manager refuses to agree to such an amendment, terminate the agreement.
- (3) The trustee or operator—
 - (a) may terminate an investment management agreement under subsection (2) (b) despite anything in the agreement; and
 - (b) shall not be under any liability to the investment manager because of such a termination.

51. Pension fund assets to be invested at arm's length

- (1) A trustee of a pension fund shall not invest fund assets unless—
 - (a) the trustee and the other party to the transaction are dealing with each other at arm's length in respect of that transaction; or
 - (b) the terms of the transaction are no more favourable to the other party than those that it is reasonable to expect would apply if the trustee were dealing with the other party at arm's length in similar circumstances.
- (2) Subsection (1) applies to the investment manager of a pension fund in the same way as it applies to the trustee of the fund.
- (3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable to an administrative penalty prescribed under the Financial Services Act.
[Cap. 44:05]
- (4) A contravention of subsection (1) or (2) shall not affect the validity of a transaction.
- (5) A reference in this section to a trustee and another party to a transaction dealing with each other at arm's length is a reference to the trustee and the other party dealing with each other on the basis that—
 - (a) each is pursuing its own commercial interests in relation to the transaction; and
 - (b) neither is preferring the other's interests in relation to the transactions to its own interests.

52. Restriction on employer assets

- (1) A trustee of a pension fund shall not acquire an employer asset as an asset of the fund if—
 - (a) the fund's employer asset percentage is five per cent or more; or
 - (b) because of the acquisition of the asset, the fund's employer asset percentage would be more than five per cent.
- (2) If at any time, including the time of commencement of this Part, the employer asset percentage of a pension fund is more than five per cent—
 - (a) the trustee shall notify the Registrar as soon as practicable;
 - (b) the trustee shall, within one month after the notification, formulate a plan to dispose of employer assets of the fund so that the fund's employer asset percentage will be no more than five per cent, and submit such plan to the Registrar.
 - (c) except that, in cases of employers listed on the Malawi Stock Exchange whose market capitalization is more than ten per cent of the corresponding total market capitalization, the Registrar may permit exceptions to this specified limit, having taken into account the

risks to which the members of the fund are exposed, the exception extending over a period specified by the Registrar, no longer than two years, and which on expiry is subject to the notification contemplated in subsection (2) (a) of this section and reconsideration of the merits of extension.

- (3) If the Registrar approves the plan, then, subject to any directions under subsection (6), the trustee shall implement the plan and report to the Registrar on the implementation of the plan every three months until the fund's employer asset percentage is five percent or less.
- (4) The Registrar shall be deemed to have approved a plan submitted to him under subsection (2) (b) at the expiry of thirty days after the plan was submitted to him unless, within the thirty days, the Registrar gives written notice to the trustee—
 - (a) that approval is refused; or
 - (b) extending the period for dealing with the plan:
Provided that no such automatic provision applies to the exception contemplated under subsection (2) (c), and approval for such an exception may not be considered to have been received unless provided in writing by the Registrar and provided further that the Registrar may extend more than once the period for dealing with the plan.
- (5) A person shall not take part in a scheme with the intention that the trustee of a pension fund acquire, either directly or indirectly through one or more interposed companies, partnerships or trusts, an employer asset contrary to this section.
- (6) The Registrar may give a written direction to a trustee of a pension fund at any time in relation to disposal of employer assets.
- (7) Any person who contravenes subsections (1), (2), (3) or (5) commits an offence and shall be liable to an administrative penalty prescribed under the Financial Services Act.

[Cap. 44:05]

53. Financial assistance to pension fund members

- (1) A trustee or an investment manager of a pension fund shall not lend money of the fund, or use fund assets to give any other financial assistance, to a member or a close relation of a member.
- (2) The trustee or an investment manager of an umbrella fund shall not lend money of the fund, or use fund assets to give any other financial assistance, to a member of the fund or an associate of a member of the fund.
- (3) Without limiting the generality of subsection (1) or (2), lending money or giving financial assistance to a person includes lending money or giving financial assistance to a company where the person owns more than fifty per cent of the voting shares in the company.
- (4) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable to an administrative penalty prescribed under the Financial Services Act.

[Cap. 44:05]

- (5) Subsections (1) and (2) shall not apply to a loan made before the commencement of this Act that was not in breach of the fund rules of the fund concerned.
- (6) For the avoidance of doubt, subsections (1) and (2) apply to an extension of the terms of a loan made before the commencement of this section.

54. Trustee or investment manager not to acquire assets from members or associates

- (1) The trustee or an investment manager of a pension fund shall not knowingly acquire an asset from a member or an associate of a member except as authorized by Registrar's directives.
- (2) A person shall not take part in a scheme with the intention that the trustee or an investment manager of a pension fund acquire, either directly or indirectly through one or more interposed companies, partnerships or trusts, an asset from a member or an associate of a member, except as authorized by Registrar's directives.
- (3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable to an administrative penalty prescribed under the Financial Services Act.

[Cap. 44:05]

- (4) For purposes of this section, "acquire an asset" does not include accepting money by way of contribution.

55. Trustee not to borrow pension funds

- (1) The trustee of a pension fund shall not borrow money or maintain an existing borrowing of money except as authorized by Registrar's directives.
- (2) Any person who contravenes subsection (1) commits an offence and shall be liable to an administrative penalty prescribed under the Financial Services Act.

[Cap. 44:05]

56. Investment outside Malawi

Fund assets of a pension fund or an umbrella fund shall not be invested outside Malawi except in accordance with the Exchange Control Act.

[Cap. 45:01]

57. Complaint resolution mechanism for pension funds

- (1) The trustee of a pension fund shall take reasonable steps to ensure that, at all times, arrangements are in force under which—
 - (a) persons referred to in subsection (2) have the right to make an inquiry or a complaint as specified in that subsection; and
 - (b) such inquiries and complaints are properly considered and dealt with within sixty days.
- (2) For the purposes of subsection (1) (a)—
 - (a) a beneficiary or former beneficiary of the fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to him;
 - (b) the legal personal representative of a former beneficiary of the fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to the former beneficiary; and
 - (c) without limiting paragraph (a) or (b), any person may make an inquiry into, or complaint about, a decision of a trustee of such a fund that relates to the payment of a death benefit if he has or claims to have an interest in the death benefit.

Part VIII – Giving information to fund members and beneficiaries

58. Fund information and member information

- (1) The trustee of a pension fund shall ensure that—
 - (a) a person who becomes a member is given fund information before, or, if that is not practicable, as soon as practicable after, he becomes a member; and
 - (b) each member is given fund information, and member information relating to the member, at times prescribed by Registrar’s directives for the purposes of this section.
- (2) Information given under subsection (1) shall be meaningful, accurate and complete and demonstrably written in a manner that enhances member understanding.

59. Information for prospective members, applications for membership in respect of unrestricted funds

- (1) Without limiting the Registrar’s power under the Financial Services Act, to issue Registrar’s directives, the Registrar’s directives may make provision with respect to offering membership in, and admitting persons as members of, unrestricted funds, including provision with respect to—
 - (a) applications for membership;
 - (b) documents to be provided to applicants for membership and their employers; and
 - (c) the circumstances in which the trustee may admit a person to membership of a fund.
- (2) An unrestricted fund may not turn down an application for membership on the basis that contributions are too small.

[Cap. 44:05]

60. Trustee of pension funds to give information to members

- (1) The trustee of a pension fund shall comply with any reasonable request by a member—
 - (a) for information about the fund; or
 - (b) for information about his entitlements in the fund.
- (2) The trustee of a pension fund shall not be obliged to comply with a request under subsection (1) if he complied with such a request within six months before the request was made.

Part IX – Contributions and investment returns

61. Employer to remit contributions promptly

- (1) If, under this Act or the fund rules of a pension fund, an employer is under an obligation to make employer contributions in respect of a member, the employer shall pay to the trustee, or as the trustee directs, the amount of those contributions no later than fourteen days after the end of the month in which the liability to make the contributions arose.

- (2) An employer who contravenes subsection (1), shall be liable to administrative penalty prescribed under the Financial Services Act.

[Cap. 44:05]

- (3) If—
- (a) an employer of an employee is authorized, whether by the employee, by law or otherwise, to deduct an amount from the remuneration payable by the employer to the employee and to pay the amount of the deduction to a trustee of a pension fund by way of employee contribution; and
- (b) the employer makes such a deduction, the employer shall pay to the trustee (or as the trustee directs) the amount of the deduction no later than fourteen days after the end of the month in which deduction was or should have been made.
- (4) An employer who contravenes subsection (3) shall be liable to administrative penalty prescribed under the Financial Services Act.
- [Cap. 44:05]
- (5) An employer who contravenes subsection (1) or subsection (3) shall be liable to pay the trustee of the pension fund interest, at the rate prescribed by the Minister by order published in the *Gazette*, in respect of each month or part of a month during which any such amount, including interest, is outstanding, until the full amount, including interest, is paid.
- (6) The Registrar shall, through a Registrar's directive, determine the treatment of the money paid as interest under subsection (5).

62. Credit to member accounts for defined contribution funds

- (1) The trustee of a defined contribution fund shall credit the following amounts to a member's account—
- (a) the amounts of the employer contributions and employee contributions paid to the trustee in respect of the member; and
- (b) investment returns, in accordance with the fund rules and Registrar's directives.
- (2) The trustee of a defined contribution fund who receives a contribution in respect of a member in a month shall allocate the contribution to the member's account within fourteen days from the date of receipt of the contribution from the employer.

63. Debits to member accounts

The trustee of a defined contribution fund shall debit a member's account, in accordance with the fund rules and Registrar's directives, with the following amounts—

- (a) amounts of benefits paid from the fund in respect of the member;
- (b) fees and charges;
- (c) amounts owed by the member to the trustee in respect of the fund; and
- (d) the proportion of the fund's investment losses allocated to the account in accordance with Registrar's directives.

Part X – Pensions and other benefits

Division – 1 Payment of benefits

64. Conditions for payment of benefits in respect of pension funds

- (1) Subject to this Act, benefits in respect of a member of a pension fund shall be payable out of the fund only if, on application, the trustee is satisfied that—
 - (a) the member has reached retirement age;
 - (b) the member has retired on the basis of years of service or any other conditions under the fund rules as approved by the Registrar;
 - (c) the member is retired on the advice of a qualified medical practitioner registered with the Medical Council of Malawi, or a legally constituted medical board certifying that the employee is totally and permanently disabled from carrying out the functions of his office;
 - (d) the member is about to leave or has left Malawi permanently;
 - (e) the member has died;
 - (f) the member has permanently left the service of the employer, in which case, except as set out in this section, the benefits may only be paid out for transfer to another pension fund;
 - (g) the Registrar has given permission under [section 65](#); and
- (2) An application for the purposes of this section shall be made—
 - (a) by or with the authority of the member;
 - (b) in the case of a member who has died or is under a legal disability, by or with the authority of the member's legal personal representative; or
 - (c) otherwise, in accordance with Registrar's directives.

65. Early payment of benefits

- (1) Subject to this Act, the Registrar may, on application by a member to the trustee, where the member has permanently left the service of the employer, whether because he has resigned or because the employer has terminated his employment, for any reason otherwise than in circumstances described in [section 64](#) (a) to (e), permit the trustee of the fund to pay benefits to the member out of the fund if the Registrar is satisfied that—
 - (a) the member has not secured another employment for a period of more than six months; and
 - (b) benefits paid to the member are limited to that part of the contributions paid by the member, not the employer, and any investment income on these contributions.
- (2) Permission under this section may be subject to specified conditions.
- (3) The Registrar may issue a Registrar's directive in respect of the implementation of subsections (1) and (2).

66. Immediate vesting of contributions for pension funds

For the purpose of calculating and paying benefits in respect of members of pension funds, all contributions received by the trustee of the fund shall be taken into account without any period having to elapse or any other condition to be satisfied, including a condition that the employee has remained in service with the employer for a specified period.

67. Pension fund benefits to be paid as annuities

- (1) Except as provided by this Act or in the Registrar's directives—
 - (a) benefits payable in respect of a member of a pension fund shall be paid as an annuity by a licensed insurer:

Provided that the member may elect to receive payments in the form of a programmed withdrawal, within limits specified by the Registrar, which may be changed from time to time.
 - (b) an annuity payable to a member of a pension fund, or on their death after retirement, to a surviving widow or widower, shall be an annuity for life.
- (2) Payments of an annuity or pension to a member of a pension fund on the basis that the member has retired shall not begin unless the trustee is satisfied that the member has reached retirement age, or has met the conditions for retirement as may be prescribed under [section 64](#) (1) (b), or is totally and permanently disabled as described in [section 64](#) (1) (c).

68. Commutation of annuities into lump sums

- (1) If the fund rules permit, a pension or annuity payable in respect of a member of a pension fund may, in accordance with the fund rules but subject to this section and the Registrar's directives, be commuted into a lump sum.
- (2) The maximum that may be commuted shall be calculated as follows—
 - (a) calculate the amount of the lump sum that would be payable if all the pensions and annuities payable in respect of the fund member were commuted in accordance with the fund rules and the Registrar's directives;
 - (b) if the amount calculated under paragraph (a) does not exceed the amount prescribed for the purpose of this paragraph in the Registrar's directives, all the pensions and annuities payable in respect of the fund member may be commuted;
 - (c) otherwise, up to forty per cent of the amount calculated under paragraph (a) may be commuted; and
 - (d) if the pensions or annuities are payable on the basis that the member has left, or is about to leave, Malawi permanently all the pensions and annuities payable in respect of the member may be commuted.

69. Payment of benefits upon member leaving Malawi permanently

Benefits payable from a pension fund in respect of a member on the basis that the member has left, or is about to leave Malawi permanently shall be payable as follows—

- (a) forty per cent of the amount payable shall be payable on granting of the application; and

- (b) the balance of the amount payable shall be payable at the end of twelve months after the payment made under paragraph (a), but only if the trustee is then satisfied that the member has left Malawi permanently.

70. Death benefit nominations

- (1) A member of a pension fund may give the trustee a written nomination directing the trustee to pay the fund member's benefits on his death to all or any of the following—
 - (a) the member's widow or widower, as the case may be;
 - (b) the member's child; or
 - (c) the member's close relation.
- (2) A nomination shall set out the amount or proportion of the benefits to be paid to each of the persons specified.
- (3) A member may amend a nomination by written notice to the trustee in line with the fund rules.
- (4) A member may revoke a nomination by written notice to the trustee.
- (5) A nomination shall be revoked by the divorce or later marriage of the member.
- (6) A nomination and a revocation of a nomination shall be signed by the member, but if the member is unable to sign his name, his thumb impression may be affixed in the presence of—
 - (a) a trustee of the fund;
 - (b) if the trustee is a corporate trustee a director or officer of the trustee; or
 - (c) a person prescribed by Registrar's directives for the purposes of this section.
- (7) If the thumbprint of the member is so affixed, the nomination or revocation shall be deemed to be signed by the member.
- (8) The trustee shall not accept a nomination or a revocation of a nomination if it appears to the trustee that the nomination or revocation was not made voluntarily.

71. Payment of death benefits

- (1) If a member's nomination to the trustee of a pension fund is current at the death of the member, then, subject to this section, benefits payable out of the fund on the member's death shall be paid as directed in the nomination.
- (2) The trustee shall not pay the death benefits in accordance with the nomination if it appears to the trustee that the nomination was not made voluntarily.
- (3) If, in relation to all or a part of the benefits payable on the death of a member of a pension fund—
 - (a) the member does not have a nomination current on his death; or
 - (b) the nomination is invalid; or
 - (c) under subsection 70 (8), the trustee has not accepted a nomination from the member, then, subject to this Act and notwithstanding any other law to the contrary, those benefits, or that part of those benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee of the fund, being a person or persons who, the trustee is satisfied, was or were financially dependent on the member at the time of his death.

- (4) If a person to whom benefits are to be paid under this section, other than a surviving spouse of the member, is under the age of eighteen years, the amount of the benefit shall be held by the trustee in a separate trust for the person, to be paid to him when he turns eighteen years and the following shall apply in that case—
- (a) the amount shall not be part of the fund assets of the pension fund, but may be invested and applied together with those fund assets;
 - (b) the trustee may at any time pay to the parent or guardian of the person any amount from the capital or income of the trust as the trustee thinks appropriate for the maintenance, education or welfare of the person;
 - (c) the trustee shall not be bound to see to the application of amounts paid under paragraph (b).

72. Death of an employee

- (1) Where an employee dies, his entitlements under the life insurance policy maintained under [section 15](#) shall be paid to the deceased member's account.
- (2) The trustee shall apply the amount paid under subsection (1) of this section in accordance with the requirements of [section 71](#).

Division – 2 Protection of benefits

73. Benefits not to be attached

- (1) Except as provided by this Act—
 - (a) amounts paid as contribution to a pension fund in respect of a member;
 - (b) a member's entitlement to benefits in a pension fund; and
 - (c) amounts paid out of a pension fund by way of benefits in respect of a member, shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever.
- (2) Except as provided by this Act, a member's entitlement to benefits in a pension fund is not part of his estate.

74. Effect of bankruptcy

- (1) The bankruptcy of an employee, and an act of bankruptcy by an employee, shall not affect—
 - (a) any liability of his employer to pay employer contributions to a pension fund; or
 - (b) any entitlement of the employee to benefits from a pension fund.
- (2) Subsection (1) shall apply notwithstanding any other law, and despite any provision in the employee's contract of employment or in any other arrangement or understanding, express or implied, formal or informal, written or not and whether or not enforceable.

75. Benefits not to be assigned or pledged

- (1) A member's entitlement to benefits in a pension fund shall not be capable of being assigned or transferred, or pledged or charged or otherwise being subject to a security interest, however described.
- (2) The trustee of a pension fund shall not recognize, or in any way encourage or sanction, a purported assignment or transfer of, or the granting of a pledge, charge or other security interest, however described, in respect of a member's entitlement to benefits.

Part XI – Miscellaneous provisions**76. Missing employees**

Notwithstanding anything to the contrary contained in any other law, where an employee is missing and is not found within a period of twenty-four months from the date he was reported missing, and a board of inquiry set up by the Registrar concludes that it is reasonable to presume that he has died, the provisions of sections [71](#) and [72](#) shall apply.

77. Significant adverse effects to be notified

- (1) If a trustee of a pension fund or an umbrella fund becomes aware that an event has occurred that has a significant adverse effect on the financial position of the fund, the trustee shall, within five days, give written notice to the Registrar setting out particulars of the event.
- (2) If the pension fund referred to in subsection (1) above has a group of individual trustees and, within the five days, one of them gives the notice as required by subsection (1), the notice shall be deemed to have been given by all of them.
- (3) For the purposes of subsection (1), an event has a significant adverse effect on the financial position of a fund if, as a result of the event, at any time within the next twelve months the trustee will not, or may not, be able to make payments to beneficiaries as and when the obligation to make the payments arises.

78. Payment to employers restricted

- (1) Except as provided by this section, the trustee of an employer pension fund shall not pay an amount, or permit an amount to be paid, out of the fund to an employer.
- (2) Subsection (1) shall not apply where its application would result in the arbitrary deprivation of a person's property.

79. Victimization of trustees

- (1) A person shall not victimize a trustee of, or an officer or employee of a corporate trustee of a restricted fund.
- (2) Any person who contravenes subsection (1) commits an offence and shall be liable, upon conviction, to a fine of K10,000,000 and to four years imprisonment.
- (3) If a person victimizes a trustee of, or an officer or employee of a corporate trustee of, a restricted fund the person victimized may recover the amount of any loss or damage he suffers as a result of the victimization by action against the defendant.

- (4) For purposes of this section “victimize” means subject, or threaten to subject, the trustee, officer or employee to a detriment on the ground that the trustee, officer or employee—
- (a) has exercised, is exercising or is proposing to exercise a power he has as trustee, or as an officer or employee of the trustee, or has exercised, is exercising or is proposing to exercise such a power in a particular way; or
 - (b) has performed, is performing or is proposing to perform a duty or function he has as trustee, or as an officer or employee of the trustee, or has performed, is performing or is proposing to perform such a duty or function in a particular way.
- (5) For the purposes of this section—
- (a) an employer subjects a trustee, or an officer or employee of a trustee, who is an employee of the employer to a detriment if he—
 - (i) dismisses the employee;
 - (ii) injures the employee in his employment; or
 - (iii) alters the position of the employee to the employee’s prejudice;
 - (b) an employer shall not be deemed to subject an employee to a detriment merely because the employer—
 - (i) permanently ceases to be an employer of the fund;
 - (ii) temporarily ceases to contribute to the fund in respect of a class of members in which the employee is included; or
 - (iii) reduces the level of employer contributions to the fund in respect of a class of members in which the employee is included.
- (6) In proceedings under subsection (3)—
- (a) it is not necessary for the plaintiff to prove the defendant’s reason for the alleged action; and
 - (b) it is a defence if it is established that the action was not motivated, whether in whole or in part, by the alleged reason.

80. Rule against remoteness of vesting

The rule of law against remoteness of vesting shall not apply in relation to a pension fund established after the commencement of this Act.

81. Protection for discharging obligations

A person shall not be liable in a civil action or civil proceeding in relation to an act done to discharge an obligation imposed by this Act, the regulations or Registrar’s directives in relation to pension funds or umbrella funds.

82. Contravention of this Act, regulations or directives

- (1) Any person who contravenes this Act, the regulations or directives made hereunder, for which no penalty has been prescribed, shall be liable to administrative penalty under the Financial Services Act.

- (2) A person on whom an administrative penalty has been imposed and who fails or refuses to comply with the administrative penalty commits an offence and shall be liable upon conviction to—
- (a) in case of a natural person, to a fine of K10,000,000 or to four years imprisonment; and
 - (b) in case of a body corporate, then provisions of the Financial Services Act, shall apply.
- [Cap. 44:05]

83. Jurisdiction of the Industrial Relations Court

In addition to the provisions of the Financial Services Act, the Industrial Relations Court established under the Labour Relations Act, shall have jurisdiction to hear and determine all labour related disputes arising out of this Act.

[Cap. 44:05]

[Cap. 54:01]

84. Regulations

- (1) The Minister may, upon the recommendation of the Registrar, make regulations for the better carrying out of this Act and for its better administration.
- (2) Without derogating from the generality of the foregoing the Minister may make Regulations—
 - (a) with respect to the management, control and administration of the National Pension Scheme;
 - (b) prescribing the manner of payment of pension benefits; and
 - (c) requirements relating to transition to pension by employees and employers in pursuance of [section 10](#);
 - (d) subject to Part XII, with respect to transitional provisions to enable existing pension schemes to comply with this Act.
- (3) The Minister may make different provisions for different categories of funds and different kinds of pension schemes in regulations made under subsection (1).
- (4) Notwithstanding section 21 (e) of the General Interpretation Act, any person who contravenes any regulations made under this Act shall be liable to such penalties as contained in the Financial Services Act.

[Cap. 44:05]

85. Non-application of the Estates Duty Act and any other law relating to deceased estates

The Estates Duty Act and any other law relating to deceased estates, shall not apply to a member's entitlement to benefits in a pension fund.

Part XII – Transitional arrangements

86. Transitional

- (1) Where an employer, prior to the commencement of this Act or a period of one year before commencement, was contributing to a pension fund at rates higher than the minimum

contribution rates prescribed in this Act, or maintaining a life insurance policy in favour of his employees at a value higher than the minimum prescribed under this Act, that employer shall not revise the rates downwards.

- (2) Any downward adjustment in an employer's contribution rate or in the value of life insurance policy in contravention of subsection (1) shall be void.
- (3) Notwithstanding the provisions of this Act, any employee who at the commencement of this Act is entitled to pension benefits under any pension scheme existing before the commencement of this Act but has three or less years until retirement date, shall be exempted from the requirements of this Act.
- (4) Nothing in this Act shall preclude the right of any employee referred to in subsection (2) to be paid his pension as and when due.

87. Existing schemes

- (1) Notwithstanding any other provisions in this Act, any pension scheme existing before the commencement of this Act may continue to exist provided that—
 - (a) the pension scheme meets the licensing requirements under this Act;
 - (b) the pension scheme shall be fully funded and in case of—
 - (i) any defined contribution scheme, contributions in favour of each employee together with the income and asset growth attributable to these contributions but less the corresponding expenses attributable to these contributions shall be computed and credited to a member's account opened for the employee;
 - (ii) any defined benefit scheme, whether or not it is converted in the process to a defined contribution scheme, the value of the assets of the fund shall be allocated to the members in proportion to their respective actuarial liabilities, on the same calculation basis as used for the actuarial valuation that is used to confirm that the scheme is fully funded;
 - (c) the pension funds and assets shall be fully segregated from the funds and assets of the employer;
 - (d) the pension funds and assets shall be held by a custodian;
 - (e) every employee in the existing scheme shall be free to exercise the option of coming under a scheme of his choice and his employer shall compute and credit to his account his contributions and distributable income earned as at the date the employee exercises such an option subject to the directives issued by the Registrar;
 - (f) any amount computed under paragraph (b) of this subsection shall be transferred to the member account of the employee maintained with a pension fund administrator of his choice;
 - (g) all investments in assets other than specified as permissible investment for pension funds may be maintained and from the commencement of this Act all investments of newly received income shall be made in accordance with directives issued by the Registrar;
 - (h) the employer shall undertake to the Registrar that the pension fund shall be fully funded at all times and that any shortfall shall be made up within three years;
 - (i) the employer demonstrates to the Registrar that it possesses fit and proper managerial capacity for the management of pension funds and assets; and

- (j) all rights by members of such a scheme to gain access to the benefits in the scheme in accordance with the rules of the scheme shall be retained in respect of benefits accumulated up to the date of entry into force of this Act even after the scheme has been approved as meeting the requirements to be registered as a fund under the provisions of this Act.
- (2) Any employer operating any defined benefit scheme shall undertake, at the end of the first financial year immediately following the date of entry into force of this Act and every two years thereafter, an actuarial valuation to determine the adequacy of his pension fund assets and shall submit this actuarial valuation to the Registrar for scrutiny, together with a plan of action for restoring the scheme to full funding consistent with the requirements of subsection (1) (h).
- (3) All pension schemes existing before the commencement of this Act shall submit to the Registrar within three months of the commencement of the Act, a statement of affairs effective at the last anniversary of the scheme prior to the commencement of the Act which shall include assets, liabilities, a list of members and, in the case of a defined benefits scheme, the total pensionable salary of all members and the assumptions used in the assessment of scheme liabilities.
- (4) The Registrar has the right, where the scheme fails to meet these requirements, to require the scheme to register as a pension fund and submit to the requirements of this Act within a period of time specified by the Registrar or be subject to the penalties set out in this Act for failure to register a pension fund.
- (5) In the case of a non-compliant defined benefit scheme, the Registrar shall give to the employer notice of six months of the requirement to close the scheme to new members and commencement contributions to a fund. The financial viability of the closed defined benefit scheme shall be subject to the requirements of this section. Members of the scheme may be offered transfer of their interests to the fund established under the requirements of this Act, as long as the terms of transfer are certified by an actuary as fairly reflecting their interests in the closed scheme.
- (6) Notwithstanding the provision of this Part, the Registrar may issue a directive for the better implementation of this Part.

88. Restricted pension fund

- (1) Any employer managing a pension scheme under the requirements of [section 74](#) of this Act shall apply to the Registrar to be licensed as a restricted pension fund administrator to manage such pension fund either directly or through a wholly owned subsidiary of such employer dedicated exclusively for the management of such pension fund, provided that all its pension funds and assets are transferred to a custodian of its choice.
- (2) An applicant under subsection (1) may be licensed by the Registrar as a restricted pension fund administrator if it meets the minimum requirements for a pension funds administrator.
- (3) Any employer with pension funds and assets of less than such amount as may be determined by the Registrar in a directive from time to time, and that expresses a desire to maintain its existing scheme shall have such pension scheme administered by a pension fund administrator licensed under this Act.

89. Payment of contribution arrears

- (1) Any employer operating a pension scheme prior to the date of commencement of this Act shall remit all contribution arrears, if any, to the trustees of the fund within six months from that date.
- (2) Any employer who contravenes subsection (1) shall be liable to an administrative penalty prescribed under the Financial Services Act.

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90. Registrar's oversight

Every employer licensed as restricted pension fund administrator to manage its pension funds and assets under [section 88](#) of this Act shall be subject to supervision and regulation by the Registrar and shall be deemed to be pension fund administrator and all provisions in this Act relating to the conduct and operations of a pension fund administrator shall apply to it.

91. Accrued severance liability

- (1) Every employer shall recognize as part of an employee's pension dues, each employee's severance due entitlement accrued from the date of employment of that employee to the date of commencement of this Act.
- (2) For employers not providing pension or gratuity prior to the date of commencement of this Act, the severance entitlement referred to in subsection (1) shall be calculated in accordance with the provisions of the Employment Act.
- (3) For employers providing pension or gratuity prior to the date of commencement of this Act, the severance entitlement referred to in subsection (1) shall be calculated as having a value equal to the value of—
 - (a) the severance entitlement calculated in accordance with the provisions of the Employment Act;
 - (b) less the sum of the accumulated employer pension contributions made or gratuity paid prior to the date of commencement of this Act and any growth on such contribution:
Provided that—
 - (i) the severance entitlement referred to in subsection (1) shall be greater than the sum of the accumulated employer pension contributions made or gratuity paid to the employee prior to the date of commencement of this Act and any growth on such contribution; or
 - (ii) if the severance entitlement is equal to or less than the sum of the accumulated employer pension contributions made or gratuity paid to the employee prior to the date of commencement of this Act and any growth on such contributions the severance entitlement shall not be recognized as pension.
- (4) The severance entitlement as calculated under subsection (2) and subsection (3) shall, subject to subsection (5), be transferred into a pension fund of the employee's choice within a period not exceeding eight years after the commencement of this Act:
Provided that such severance due entitlement shall be escalated for each year within the eight years that it is not transferred to a pension fund, at the rate of the average annual Consumer Price Index as published by the National Statistical Office from time to time.
- (5) Notwithstanding subsection (4), the severance due entitlement shall, upon termination of an employment contract between the employer and employee become immediately transferable to a pension fund of the employee's choice.
- (6) The Minister may, by order published in the *Gazette*, direct employers to provide, in a prescribed form, a schedule outlining how the employers shall comply with subsection (4).
- (7) Any person who contravenes the provisions of this section commits an offence and shall be liable to an administrative penalty under the Financial Services Act.

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- (8) In this section, “gratuity” means contractual gratuity as stipulated in an employment contract.