Act

No. 6 of 2023

I assent

DR. LAZARUS MCCARTHY CHAKWERA
PRESIDENT
8th February, 2023

ARRANGEMENT OF SECTIONS

PART I–PRELIMINARY

SECTION

1. Short title and commencement
2. Interpretation
3. Application
4. Objectives
5. Application of the Financial Services Act
6. Inconsistencies with other laws

PART II–FUNCTIONS AND POWERS OF THE REGISTRAR

7. Functions and powers of the Registrar

PART III–NATIONAL PENSION SCHEME

8. National Pension Scheme

PART IV–NATIONAL PENSION FUND

9. National Pension Fund

PART V– MANDATORY OCCUPATIONAL PENSION SCHEME

10. Obligations of the employer
11. Minister's power to exempt
12. Minimum contribution rates
13. Employer to remit contributions promptly
14. Life insurance policy

SECTION

PART VI—VOLUNTARY PENSION SCHEMES

Division I—Membership to Voluntary Pension Scheme

15. Membership to voluntary pension scheme
16. Contributions to Voluntary Pension Scheme

Division II—Voluntary Personal Pension Scheme

17. Crediting contributions to a voluntary personal pension fund
18. Access to benefits from a voluntary personal pension fund

Division III—Provident Funds

19. Employer may set up a provident fund
20. Access to benefits from a provident fund

PART VII—LICENSING AND REGISTRATION REQUIREMENT OF PENSION ENTITIES

Division I—Licensing and Registration Requirements

21. Pension entities to be licensed or registered
22. Registration criteria for a pension fund, provident fund or personal pension fund
23. Licensing criteria for other pension entities
24. Licensing criteria for trustees of pension funds or provident funds
25. Registration of employers and issuance of certificate of compliance

Division II—Licensing and Registration Procedure

26. Licensing and registration procedures
27. Issuance and publication of a licence or registration certificate
28. Refusal of a licence or registration
29. Licensing or registration of pension business
30. Pension business to be conducted in approved premises
31. Notice of registration to Commissioner General
32. Effects of registration of a pension fund
33. Trustee to establish member accounts
34. Restriction on transfer etc. of licence
35. Variation, suspension and revocation of licences or registration on request
36. Variation, suspension and revocation of licences or registration

SECTION

PART VIII–REQUIREMENTS FOR PENSION ENTITIES

Division I–Corporate Governance

37. Board of directors or trustees
38. Appointment of executive officers and management
39. Removal of executive officers and managers
40. Internal audit function
41. Fit and proper requirements

Division II–Principal officers, Trustees, Directors, Advisory Committees and Service Providers of Pension Funds and Provident Funds

42. A pension fund or provident fund to have a principal office
43. Appointment of a principal officer
44. Trustees, and directors to consent to appointment
45. Trustees of pension fund or provident fund
46. Equal representation rule
47. Advisory committees
48. Rules for appointment of member representatives
49. Appointment and removal of service providers

Division III–Administrators, Pension Services Companies, Pension Brokers, Pension Advisors and Provider of Programmed Withdrawals

50. Requirements for other pension entities

PART IX–REQUIREMENTS FOR FUND RULES OF PENSION FUNDS AND PROVIDENT FUNDS

51. Pension fund and provident fund rules to be enforceable
52. Contributions to be paid to the pension fund or provident fund
53. Pension funds and provident funds to be trusts
54. Covenants for pension funds or provident funds
55. Consistency of covenants
56. Covenants bind directors of trustee
57. Damages for breach of covenants
58. Fund rules regarding indemnity, liability and advice
59. Directors of corporate trustee may be indemnified
60. Pension fund trustees not to be subject to direction
61. Pension benefits to be transferable
62. Portability of pension fund benefits
63. Trustee to accept payments in respect of a member
64. Transfer of benefits under provident fund and voluntary personal pension fund
65. Exercise of discretion in respect of pension funds

SECTION

66. Restriction on requirement for approval of trustee's decision by employer
67. Restrictions on amendments to fund rules

PART X–PRUDENTIAL AND OTHER REQUIREMENTS FOR THE OPERATION OF PENSION FUNDS AND PROVIDENT FUNDS

68. Directives
69. A pension fund or provident fund to maintain books of accounts
70. A pension fund or a provident fund to maintain a financially sound position
71. Significant adverse effects to be notified
72. Credit to member account
73. Debits to member account
74. Trustee to ensure that a defined benefit pension fund or a hybrid pension fund is fully funded
75. Investment management agreements not to exclude liability for negligence
76. Provision of information in an investment management agreement
77. Fund assets to be invested at arm's length
78. Restriction on employer assets
79. Financial assistance to pension fund members
80. Pension funds not to acquire assets from members or associates
81. Borrowing prohibited
82. Investments outside Malawi
83. Complaint resolution mechanisms for pension funds or provident funds

PART XI–APPLICATION FOR MEMBERSHIP AND PROVISION OF INFORMATION TO FUND MEMBERS

84. Fund information and fund member information
85. Applications for membership for unrestricted pension fund
86. Trustees to give information to fund members

PART XII–PENSION AND OTHER BENEFITS

Division I–Payment of benefits

87. Conditions for payment of benefits
88. Early payment of benefits
89. Immediate vesting of contributions for pension funds
90. Programmed withdrawals, annuities and pension
91. Lump sum payment of benefits

SECTION

92. Restriction on payment of benefits
93. Access of pension benefits accumulated prior to 1st June, 2011
94. Death benefit nominations
95. Revocation of a nomination
96. Invalid nomination
97. Payment of death benefits
98. Payment of proceeds from life insurance policy

Division II–Protection of Benefits

99. Benefits not to be attached, etc.
100. Effect of bankruptcy
101. Benefits cannot be assigned or pledged
102. Pension assets protected from custodian's creditor

PART XIII–MERGERS, ACQUISITION AND TRANSFER

103. Mergers, acquisition and transfers
104. Notice of merger, acquisition or transfer
105. Effects of merger, acquisition or transfer of pension funds
106. Rights of creditors and members

PART XIV–WINDING-UP OF PENSION ENTITIES

Division I – Winding-up of pension funds and provident funds

107. Application of this Division
108. Termination of a pension fund or provident fund by trustees
109. Winding-up order by the Registrar
110. Winding-up report
111. Appointment of a trustee to wind-up a fund
112. Notice of entitlements
113. Determination of entitlement
114. Accrual of pension during notice of termination
115. Liability of employer on termination
116. Pension fund continues subject to this Act
117. Termination surplus

Division II–Winding-up of other pension entities

118. Application of this Division
119. Winding-up of other pension entities
120. Voluntary wind-up
121. Compulsory winding-up
122. Effects of appointment of liquidator
123. Powers of liquidator
124. Duties of liquidator
125. Taking possession of the pension entity

SECTION

126. Termination of certain contracts
127. Schedule of actions for winding-up and objections
128. Revocation of pre-liquidation transfers
129. Priority of claims
130. Final reporting

PART XV—APPEALS

131. Appeal to the Registrar
132. Appeals to the Financial Services Appeal Committee

PART XVI—OFFENCES, AND PENALTIES

133. Offences relating to contravention of this Act
134. Offences relating to liquidation
135. Administrative penalties

PART XVII—MISCELLANEOUS

136. Accrued severance liability
137. Pension levy
138. Non-application of the supervisory levy
139. Missing member
140. Treatment of unclaimed benefits
141. Member to hold one pension account
142. Payment to employers restricted
143. Victimization of trustees
144. Rule against remoteness of vesting
145. Jurisdiction of the Industrial Relations Court
146. Public statement of a contravention
147. Regulations
148. Non-application of the Estate Duty Act and any other law relating to deceased estates
149. Repeal and savings
150. Transitional

An Act to make provision for the regulation of matters of pension in Malawi; the establishment of both the National Pension Scheme and the National Pension Fund; for mandatory and voluntary pension schemes; for the enforcement of employer compliance; for matters relating to the supervision and regulation of pension funds and provident funds; and for matters incidental thereto.

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title and commencement

1. This Act may be cited as the Pension Act, 2023 and shall come into operation on such date as the Minister may appoint by notice published in the *Gazette*.

Interpretation

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

"actuary" means a person having an actuarial qualification and a fellow of a relevant actuarial professional body or institute recognized as such by the Registrar;

"administrator" means a person who, as a business, provides data management, specialist technical and financial services to pension funds by arrangement with the trustee;

"advisory committee" in relation to a pension fund, means a board, committee or other body that–

(*a*) is established as such by, or under, the fund rules; and

(*b*) has the function of advising the trustee of the fund about issues relating to the fund;

"annuity" means an insurance product provided by a life insurer which constitutes the exchange of a capital sum for regular income benefit, which may or may not increase at a predetermined level or according to an appropriate index, payable for the remaining life of the recipient or within such period and on such terms as may be prescribed in the directives;

"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—

(*a*) spouse of the member;

(*b*) child of the member or a child of the spouse of the member;

(*c*) brother, sister, parent, aunt, uncle, nephew, niece, grandparent, or grandchild of the member; or

(*d*) the spouse of any of those mentioned in paragraph (*b*) and (*c*);

"Commissioner General" means the Commissioner General of the Malawi Revenue Authority appointed under section 17 (1) of the Malawi Revenue Authority Act; Cap. 39:07

"corporate trustee" means a trustee that is a body corporate;

"covenant" means a covenant provided under section 54;

"custodian" means a licensed bank or any other entity authorized by the Registrar to provide custodial services;

"death benefit" means benefits of a deceased member from pension fund and the deceased member's proceeds from a life insurance policy maintained under section 14;

"default fund" means the National Pension Fund or any unrestricted pension fund designated as such by the Registrar;

"defined benefit pension fund" means a pension fund, other than a defined contribution pension fund, where under the fund rules, a member's benefits on retirement are calculated based on a formula, wholly or in part, by reference to any or all of the following–

(*a*) the amount of the fund member's pensionable emoluments 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 pension fund" means a pension fund that is not a defined benefit pension 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 under 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 account upon the commencement of the member's membership of the pension fund, or upon the conversion of the category of the pension fund to which the member belongs from a defined benefit pension fund to a defined contribution pension fund, or upon the merger of the fund with any other pension fund, other than amounts taken into account in accordance with paragraph (*d*); and

(*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" means, in relation to a member, a close relation who was financially dependent on the member at the time of the member's death;

"directive" means a directive issued by the Registrar under this Act or the Financial Services Act; Cap. 44:05

"director" has the meaning ascribed to that term under the Financial Services Act; Cap. 44:05

"employee" has the same meaning as ascribed to that term under the Employment Act; Cap. 55:01

"employee contribution" means a contribution to a pension fund made by an 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" has the same meaning as ascribed to it under the Employment Act and 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; Cap. 55:01

"employer asset" means an asset, other than securities issued or guaranteed by the Government, and 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;

"employer asset percentage" means, for a pension fund, the percentage calculated as total fair market value of employer assets held by the fund, divided by total fair market value of all fund assets multiplied by one hundred;

"employer contribution" means a contribution to a pension fund made by an employer in respect of an employee, excluding the contribution of the employee, fees and other charges;

"employer representative" in relation to a group of trustees of a pension fund, means a member of the group, committee or body

corporate nominated by the employer(s) or an organization representing the interests of employers;

"equal representation rule" means the rule referred to in section 46;

"Financial Services Laws" has the same meaning as ascribed to
Cap.44:05 that term under the Financial Services Act;

"Financial Services Appeals Committee" means the committee
Cap.44:05 established under section 78 of the Financial Services Act;

"fully funded" in relation to a pension fund, means the financial obligations to the pension fund's members, creditors and service providers are fully covered by the assets of the fund, as confirmed in the case of a defined benefit pension fund or a hybrid pension fund by the valuation conducted by an actuary as at the effective date of the funding assessment;

"fund assets" of a pension fund or a provident fund means property of any kind held by the trustee in that capacity;

"fund information" in relation to a pension fund or provident 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*) in the case of a pension fund, 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 a directive;

"fund rules" in relation to a pension fund or provident 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;

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

"hybrid pension fund" means a pension fund that combines features of a defined benefit pension fund and a defined contribution pension fund;

"independent trustee" in relation to a fund, means a 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*) a representative of a trade union, or other organization representing the interests of one or more members; or

(*f*) 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 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 by arrangement with the trustee and is licensed as such under the Financial Services Act; Cap. 44:05

"legal personal representative" means–

(*a*) in relation to a deceased beneficiary, the executor of the will or administrator of the estate of that person; or

(*b*) in relation to a beneficiary under a legal disability, the trustee or manager of the estate of that person appointed under law;

"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" means an account established under section 33;

"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 or a committee of a pension fund, means a member of the group, committee or body corporate elected by the members in accordance with procedures set out in the fund rules;

"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 established under section 9;

"National Pension Scheme" means the National Pension Scheme established under section 8;

"nomination" means a nomination made by a member under section 94;

"pension advisor" means a person, other than a pension broker, who, as a business, provides professional and technical advisory services to pension funds, provident funds or members of pension funds or provident funds;

"pension broker" means a person who, as a business, provides consulting or advisory services to employers or employees, including claims assistance, where required;

"pension business" means the conduct of business as an administrator, a pension fund, a provident fund, a pension services company, a pension broker, pension advisor, a provider of programmed withdrawals or a trustee;

"pension entity" means a pension fund, a provident fund, an administrator, a pension services company, a pension broker, pension advisor, a provider of programmed withdrawals, a trustee or any person declared as such by the Registrar;

"pension fund" means—

(*a*) a pension scheme that is an indefinitely continuing trust;

(*b*) an association of persons established with the object of providing annuities, programmed withdrawals or lump sum payments for members or former members of such association upon their retirement, or for the dependents of such members or former members, upon the death of such members; and

(*c*) a business carried on under a scheme or arrangement established with the object of providing annuities, programmed withdrawals 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 retire or for dependants of such persons upon the death of those persons;

"pension levy" means a levy imposed by regulations made for the purposes of section 137;

"pension scheme" means a scheme the primary purpose of which is the provision of retirement benefits to a member of the scheme on the member's 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; and

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

"pension services company" means a body corporate that is authorized to conduct business as a corporate trustee, pension administrator, provider of programmed withdrawals and other pension business related services as may be authorized by the Registrar;

"pensionable emoluments" means any guaranteed wages and other earnings, but does not include personal investment income or capital gains or provision from an employer in the form of a house or a motor vehicle;

"provident fund" means a pension fund which is established with the object of providing lump sum payments to members upon meeting the conditions in section 87 or as defined in the rules of the provident fund;

"principal officer" means a representative of a pension fund, appointed in accordance with section 43;

"programmed withdrawal" means the payment of regular income other than an annuity, by a licensed provider of programmed withdrawal to a member from the date of retirement of the member, or from the date appointed by the member, following his or her retirement for such a period and terms as may be determined by a directive;

"provider of programmed withdrawal" means a person licensed to provide a programmed withdrawal to a member or a beneficiary of a pension fund or provident fund;

"Registrar" has the same meaning ascribed to that term in the Financial Services Act; Cap. 44:05

"restricted pension fund" means a pension fund, the fund 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 to cease to be engaged in a business, trade, profession, vocation, calling, occupation or employment, as the case may be, upon meeting the conditions in section 87;

"retirement age" means the age stipulated in the conditions of service of employment and, where there are no conditions of service of employment, in the fund rules, which shall be between fifty years and seventy years, or such age as may be prescribed by the Minister responsible for labour;

"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;

"significant owner" means a person or corporation with–

(*a*) more than ten percent of the ordinary share capital of the pension entity; or

(*b*) more than ten percent of the voting rights of the pension entity;

"spouse" means a person's husband or wife in relation to a marriage recognized under section 22 (5) of the Constitution;

"termination" in relation to a pension fund or provident fund, means the cessation of the accrual of benefits or under the fund by members of the fund;

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

"trustee" means,–

(*a*) in relation to a pension fund or provident fund with only one trustee, the trustee of the fund appointed in accordance with the instrument creating the pension fund or provident fund; and

(*b*) in relation to a pension fund or provident fund where there is a group of individual trustees, all of the trustees appointed in accordance with the instrument creating the fund, acting together;

"unrestricted pension 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;

"voluntary personal pension fund" means a pension fund which is established for the purpose of providing savings and retirement benefits to members after contributing for a set period of time and whose fund rules do not restrict the making of contributions to specific times and amounts; and

"winding-up" means, in relation to a pension fund or provident fund, the distribution of the assets of the pension fund or provident fund after termination of the fund.

(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

Application

3.—(1) Unless specifically exempted by the Minister, with the approval of the Cabinet, this Act shall apply to every pension entity, employer, employee and member in Malawi.

(2) This Act shall apply to, and bind, Government, as an employer.

Objectives

4. 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 death benefits as, and when, due;

(*c*) promote voluntary savings for retirement;

(*d*) promote the safety, soundness and prudent management of pension funds or provident funds; and

(*e*) foster agglomeration of national savings in support of economic growth and development of the country.

Application of the Financial Services Act Cpp. 44:05

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

Inconsistencies with other laws

6. Subject to the Constitution, where there is an inconsistency between a provision of this Act and a provision of another written law, with regard to matters of pension, the provision of this Act shall prevail to the extent of the inconsistency.

PART II—FUNCTIONS AND POWERS OF THE REGISTRAR

Functions and powers of the Registrar

7.—(1) In addition to functions of the Registrar provided for under the Financial Services Act, the Registrar shall—

(*a*) administer and enforce the provisions of this Act;

(*b*) regulate, supervise and ensure the highest standard of conduct of business by all pension entities;

(*c*) register all employers operating in Malawi;

(*d*) promote the safety, financial soundness and prudent management of pension funds or provident funds;

(*e*) promote the development of the pension sector;

(*f*) advise Government on pension policy in Malawi; and

(*g*) perform such other functions as are ancillary to the fulfillment of the objectives of this Act.

(2) The Registrar shall have all powers as are necessary for the proper performance of his or her functions under this Act, and in particular, shall have the power to–

(*a*) request any information, record or document, from a pension entity or an employer, in relation to enforcement of compliance with this Act;

(*b*) carry out, at any time, on-site inspection and off-site surveillance of a pension entity to ensure compliance with this Act;

(*c*) carry out, at any time, employer compliance inspections in relation to the requirements of this Act and inspect any record, document, or information for purposes of verifying compliance with this Act;

(*d*) enforce employer compliance with the provisions of this Act;

(*e*) issue a certificate of compliance to employer;

(*f*) investigate any matter in relation to implementation of this Act;

(*g*) terminate, suspend, revoke or vary a licence or registration of a pension entity for reasons prescribed under this Act;

(*h*) appoint a liquidator in relation to a pension entity;

(*i*) apply to court for the freezing of assets of any person connected with an offence under this Act;

(*j*) prescribe any directive or guideline;

(*k*) issue directions in form of letters, orders, circulars or notices;

(*l*) carry out public awareness and education activities;

(*m*) receive, investigate and adjudicate complaints on pension;

(*n*) impose administrative penalties;

(*o*) enhance the market structure of pension industry; and

(*p*) take all such measures as are necessary to fulfill any functions of the Registrar provided under this Act.

PART III—NATIONAL PENSION SCHEME

National Pension Scheme

8.—(1) There is hereby established a National Pension Scheme (in this Act otherwise referred to as the "National Pension Scheme").

(2) The National Pension Scheme shall consist of–

(*a*) a mandatory occupational pension scheme; and

(*b*) a voluntary pension scheme.

(3) The mandatory occupational pension scheme referred to in subsection (2) (*a*) shall be made up of a National Pension Fund established under section 9 and other pension funds registered under this Act.

(4) The voluntary pension scheme referred to in subsection (2) (*b*) shall be made up of voluntary personal pension fund and provident fund.

PART IV—THE NATIONAL PENSION FUND

National Pension Fund

9.—(1) There shall be the National Pension Fund, (in this Act otherwise referred to as "National Pension Fund").

(2) The National Pension Fund 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 National Pension Fund shall–

(*a*) be registered by the Registrar as an unrestricted pension fund; and

(*b*) be composed of the following five individual trustees appointed by the Minister–

(i) one representative nominated by the most representative organization of employees;

(ii) one representative nominated by the most representative organization of employers;

(iii) one representative nominated by the secretary responsible for the welfare of the elderly; and

(iv) two other persons with university education or equivalent professional qualifications from an accredited institution of higher learning, and with not less than ten years of experience in the financial services industry.

(4) The National Pension Fund shall—

(*a*) receive contributions or transfers from members of the fund;

(*b*) administer the Fund;

(*c*) invest Fund assets;

(*d*) be a default fund for purposes of portability of pension benefits under section 62;

(*e*) pay pension and other benefits to beneficiaries; and

(*f*) perform such other functions as may be conferred on it by directives or regulations made under this Act.

PART V—MANDATORY OCCUPATIONAL PENSION SCHEME

Obligations of the employer

10.—(1) Subject to section 11, every employer shall—

(*a*) make provision for every person under his or her employment to be a member of a pension fund under the mandatory occupational pension scheme; and

(*b*) ensure that it is a condition of every employee's employment that he or she is a member of a pension fund.

(2) Where necessary, the Registrar may—

(*a*) issue a direction to any employer in Malawi to submit information which is relevant to the Registrar's responsibility and function to ensure compliance with this Part; and

(*b*) consult with the Minister, the Minister responsible for labour or any other relevant authority on how to better carry out its duties under this Part.

(3) Where the Registrar is satisfied on reasonable grounds that a person has contravened the provisions of this Part, the Registrar may take enforcement action against the person by doing one or more of the following—

(*a*) giving the person a written warning;

(*b*) the person to do a specified act, or to refrain from doing a specified act, for purposes of–

(i) remedying the effects of the contravention;

(ii) compensating persons who have suffered loss because of the contravention; or

(iii) that the person does not commit further contraventions of the requirements of this Part; and

(*c*) requiring the person to pay a monetary penalty of up to K100,000,000 or an amount equivalent to the financial gain generated or the loss suffered as a result of the contravention, whichever is greater.

(4) The Registrar or the most representative organization of employees may institute an action in court on behalf of any member or employee who has suffered loss as a consequence of a contravention of this Act by an employer.

(5) Where an action has been instituted in accordance with subsection (4), the provisions on compensation for loss from breach of this Act shall apply.

(6) The most representative organization of employees shall, before instituting an action under subsection (4), take all steps as are applicable to the reporting and resolution of disputes under the Labour Relations Act. Cap. 54:01

(7) person who fails to comply with an enforcement action taken by the Registrar, in accordance with subsection (3)—

(*a*) commits an offence and shall, on conviction, be liable—

(i) in the case of an individual, to a fine of K100,000,000 or an amount equivalent to the financial gain generated or the loss suffered due to the non-compliance, whichever is greater, and to imprisonment for ten years; and

(ii) in the case of a legal person, to a fine of K150,000,000 or an amount equivalent to the financial gain generated or the loss suffered due to the non-compliance, whichever is greater; or

(*b*) may have their or its registered place of business physically closed by the Registrar until such time as the person shall comply with the enforcement action.

(8) Where the enforcement action taken pursuant to subsection (3) is a monetary penalty and the person on whom the monetary penalty has been imposed does not pay the monetary penalty for a period of twenty-one days from the date of first demand, the amount thereof shall be recovered as a civil debt.

Minister's power to exempt

11.—(1) The Minister, in consultation with the Minister responsible for labour and with 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 Part.

(2) Without limiting the provisions of section 131, all matters relating to employers and employees exempt by subsection (1) shall be governed by the provisions of the Employment Act. Cap. 55:01

Minimum contribution rates

12.—(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 mandatory occupational 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.

(2) The minimum contribution rate prescribed in subsection (1) (*a*) may be set at seven and a half per cent for the employer, from 1st June, 2011 until 1st January 2013.

(3) 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.

(4) Notwithstanding the provisions of subsections (1), (2) and (3), an employer may agree or elect to bear the full burden of the total contribution or part of the employee contribution, provided that in such case the total contribution shall not be less than the sum of the employer and employee contributions prescribed in subsection (1).

(5).Where an employer has elected to bear in part or in full, the employee contribution referred to under subsection (4), such contribution shall be considered as the employee's contribution.

(6) An employee may make additional contributions to the pension fund which his or her employer is currently contributing in accordance with this Part.

(7) Notwithstanding the minimum contributions prescribed in subsection (1), funding for a defined benefit pension fund shall be in accordance with the directives.

(8) An employer, who prior to the commencement of this Act was contributing to a pension fund at rates higher than the minimum contribution rates prescribed in this Act, shall not revise the rates downwards.

Employer to remit contributions promptly

13.—(1) An employer, who under this Act or the fund rules of a pension fund, is under an obligation to make employer contributions in respect of a member, 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) Where an employer 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 so deducted to a trustee of a pension fund by way of employee contribution and—

(*a*) 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; and

(*b*) the employer does not make such a deduction, the employer shall be liable to pay the trustee or as the trustee directs, the total amount which would ordinarily represent employee and employer deductions as if the employee had been deducted and the payment shall be made no later than fourteen days after the end of the month in which the deduction should have been made.

(3) An employer who contravenes subsection (1) or subsection (2) shall be liable to an enforcement action stipulated under section 10 (3).

(4) An employer who contravenes subsection (1) or subsection (2) shall, in addition to the enforcement action taken in accordance with section 10 (3), 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 penalty interest, is outstanding, until the full amount, including penalty interest, is paid.

(5) The penalty interest payable under this section shall be treated as part of a member's contribution.

Life insurance policy

14.—(1) An employer shall, in addition to making pension contributions on behalf of its employee, maintain a life insurance policy obtained from a licensed life insurance company in favour of its employee for a minimum life insurance policy cover equivalent to 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 94.

(3) A member of a pension fund who is not employed, may use part of investment income accruing to preserved benefits to pay for life insurance premiums in accordance with directives.

PART VI—VOLUNTARY PENSION SCHEMES

Division I—Membership to Voluntary Pension Scheme

Member ship to voluntary pension scheme

15.—(1) A person who wishes to voluntarily save for retirement may become a member of a pension fund under a voluntary pension scheme.

(2) A member of a mandatory occupational pension scheme may also join a voluntary pension scheme.

Contributions to voluntary pension scheme

16.—(1) A person who joins a voluntary pension scheme shall make contributions in the manner prescribed in the rules of that pension scheme.

(2) An employer may make additional contributions to a voluntary pension scheme for an employee.

(3) Where an employer facilitates remittance of contributions to a voluntary pension scheme, the employer shall remit the amount of those contributions no later than fourteen days of deduction.

(4) An employer who fails to remit contributions within fourteen days of deduction shall be liable to an administrative penalty.

Division II—Voluntary Personal Pension Funds

Crediting contributions to a voluntary personal pension fund

17. A trustee of a voluntary personal pension fund who receives a contribution in respect of a member shall maintain–

(*a*) forty percent of that contribution for purposes of the member's personal savings; and

(*b*) sixty percent of the contributions for purposes of the member's pension benefits.

Access to benefits from a voluntary personal pension fund

18.—(1) A member may withdraw all or part of his or her benefits in his or her account maintained for purposes of personal savings in a voluntary personal pension fund in accordance with the governing rules of that fund, if the member has contributed to the fund for a period of not less than five years.

(2) The benefits in respect of a member which are meant for a member's pension in a voluntary personal pension fund shall only be accessed by the member, as a lump sum, when the member retires in accordance with section 87.

(3) A member who has been part of a voluntary personal pension fund for a period of not less than ten years and has not exercised the option in subsection (1), may access all or his or her benefits as a lump sum.

(4) Upon the death of a member, benefits in a voluntary personal pension fund shall be paid in accordance with the death benefit nominations in section 94.

(5) The provisions of section 90 shall not apply to voluntary personal pension funds.

Division III—Provident Funds

Employer may set up a provident fund

19.—(1) An employer may set up a provident fund over and above the pension fund under the mandatory occupational pension scheme.

(2) Where an employer, after setting up the provident fund, makes contributions to the provident fund on behalf of his or her employees, sections 89, 90, 98 and 100 shall not apply for purposes of calculation and payment of benefits in the provident fund.

Access to benefits from a provident fund

20.—(1) A member's benefits from a provident fund shall only be paid to the member, as a lump sum, if the member has met the conditions set out in section 87.

(2) The benefits of a member shall, on the death of the member, be paid in accordance with the death benefit nominations in section 94.

PART VII—LICENSING AND REGISTRATION OF PENSION ENTITIES AND EMPLOYERS

Division I—Licensing and Registration Requirements

Pension entities to be licenced or registered

21.—(1) A person shall not operate a pension entity, unless—

(*a*) the pension entity is licensed or registered under this Act; and

(*b*) the pension entity complies with the terms and conditions of the licence or registration.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine of K100,000,000 and to imprisonment for ten years.

(3) In the case of a continued contravention by the person convicted under subsection (2), that person shall commit a further offence and shall be liable to a fine of K125,000 for every day on which the contravention continues.

(4) For the purposes of this Part, a person operates a pension entity if that person—

(*a*) establishes or administers the pension entity; or

(*b*) exercises managerial functions in relation to the pension entity.

Registration criteria for a pension fund, a provident fund or a personal pension fund

22. Where an application is made for registration of a pension fund, a provident fund or a personal pension fund, the Registrar shall register the fund if—

(*a*) the fund is established under an irrevocable trust;

(*b*) the fund rules meet the requirements of this Act;

(*c*) the trustees of that fund satisfy fit and proper requirements;

(*d*) the fund meets minimum level of assets prescribed; and

(*e*) meets such other requirements prescribed in a directive issued by the Registrar.

Licensing criteria for trustees of pension entities

23. The Registrar shall not license an applicant to operate, as a business, a pension administrator, pension services company, pension broker, pension advisor or a programmed withdrawal provider, unless the Registrar is satisfied that such applicant–

(*a*) is a body corporate registered under the laws of Malawi;

(*b*) has such minimum paid up share capital as may be prescribed in a directive issued by the Registrar;

(*c*) has the requisite professional and technical capacity;

(*d*) has adequate operational system to perform its functions;

(*e*) satisfies fit and proper requirements for its significant owners, directors, executive officers, or managers prescribed under this Act; and

(*f*) meets such additional requirements as may be prescribed in a directive issued by the Registrar.

Licensing criteria for trustees of pension funds or provident funds

24. The Registrar shall not licence a person to act as a trustee of a pension fund or a provident fund, unless the person meets—

(*a*) the fit and proper requirements as prescribed in a Registrar's directive; and

(*b*) such other requirements as may be prescribed under this Act and other financial services laws.

Registration of employers and issuance of certificates of compliance

25.—(1) Every employer operating in Malawi shall furnish to the Registrar a return giving details of the employer and any other information as prescribed in the Registrar's directives.

(2) The Registrar shall issue a registration certificate to the employer upon registration.

(3) The Registrar shall, on an application by an employer, issue certificate of compliance to the employer where it is satisfied that the employer has complied with the provisions of this Act.

Division II—Licensing and Registration Procedures

Licensing and Registration Procedures

26.—(1) An application for a licence or registration of a pension entity shall be—

(*a*) made to the Registrar in a prescribed form;

(*b*) accompanied by such documents, statements and other information as are prescribed; and

(*c*) accompanied by a prescribed fee.

(2) The Registrar may require an applicant to provide further information in addition to the information prescribed under subsection (1), and where the Registrar requires additional information the Registrar shall not deal further with the application until the requirement is satisfied.

(3) The Registrar shall grant an application for a licence or registration if it is satisfied that–

(*a*) the documents submitted by the applicant are valid and the information contained therein is not questionable;

(*b*) the business to be carried out by the pension entity shall be conducted with integrity, prudence and professional skill;

(*c*) the nature and scope of the proposed operations shall meet the needs and convenience of the community or sector to be served;

(*d*) the pension entity has and shall maintain a sound financial position and not cause or promote instability in the financial system;

(*e*) its significant owners, directors, executive officers, or managers satisfy the fit and proper requirements under this Act; and

(*f*) the applicant meets and shall continue to meet the requirements of this Act.

(4) The Registrar may, within ninety days of receipt of a complete application, grant or refuse an application for a licence or registration.

(5) A licence or registration may be subject to conditions specified in the licence or certificate of registration, as the case may be.

(6) A person who knowingly or recklessly furnishes any document, which is false or misleading in a material particular in connection with an application for a licence or registration commits an offence and shall, on conviction, be liable to a fine of K100,000,000 and to imprisonment of ten years.

Issuance and publication of a licence or registration certificate

27.—(1) Where the Registrar grants an application for a licence, it shall issue a licence to the applicant.

(2) Where the Registrar grants an application for registration, it shall issue a certificate of registration to the applicant.

(3) The Registrar shall, once every year at its convenience, after the commencement of its financial year, publish in the *Gazette* a notice of names of licensed and registered pension entities.

(4) A licensed or registered pension entity shall prominently

display a copy of its licence or registration certificate, as the case may be, at all its places of business in Malawi.

(5) A licensed or registered pension entity that contravenes subsection (4) shall be liable to an administrative penalty.

Refusal of a licence or registration

28.—(1) The Registrar may refuse to license or register an applicant as a pension entity, as the case may be, if it is satisfied that—

(*a*) the information contained in the application for a licence or registration is false or misleading in any material particular; or

(*b*) the applicant does not meet the requirements for licensing or registration prescribed under this Act.

(2) Where the Registrar refuses to license or register an applicant as a pension entity, the Registrar shall, within ninety days of receipt of a complete application, notify the applicant of its decision specifying the reasons for the refusal.

Licensing or registration of pension business

29.—(1) A licensed or registered pension entity shall not conduct any pension business other than that which the Registrar has licensed or registered.

(2) A licensed or registered pension entity that contravenes subsection (1) shall be liable to an administrative penalty.

Pension business to be conducted in approved premises

30.—(1) A pension entity shall conduct its business at the place of business specified in its licence or registration certificate, and through branches and agencies approved by the Registrar.

(2) A licensed or registered pension entity that contravenes subsection (1) commits an offence and shall be liable to an administrative penalty.

Notice of registration to Commissioner General

31. A pension fund or provident fund, the trustee or operator of the fund shall notify the Commissioner General of the registration, within twenty-one days after such registration.

Effects of registration of a pension fund

32.—(1) Any pension fund registered in accordance with this Act shall assume liability for, and guarantee, the benefits offered to its members in accordance with its rules.

(2) Notwithstanding anything to the contrary in any written law, memorandum or articles of incorporation, constitution or rules of any person having control of the business of a pension fund or provident fund, all the assets, rights, liabilities and obligations pertaining to the business of the pension fund or provident fund shall be assets, rights, liabilities and obligations of the pension fund or provident fund to the exclusion of any other person.

(3) A person shall not have a claim on the assets or rights, or be responsible for any liabilities or obligations of a pension fund or provident fund under subsection (2), except in so far as the claim has arisen or the responsibility has been incurred in connexion with the transactions relating to the business of the pension fund or provident fund.

(4) The assets, rights, liabilities and obligations of a pension fund or provident fund, including any assets held by any person in trust for the pension fund or provident fund, existing immediately before its registration, shall vest in, and devolve upon, the pension fund or provident fund without any formal transfer or cession.

(5) A pension fund or provident fund shall be exempt from the payment of transfer duty, stamp duty, registration fees or charges and fees related to the vesting or devolution as provided under subsection (4).

(6) Any process in any legal proceedings against any registered pension fund or provident fund may be served by leaving it at the pension fund or provident fund's main registered office, and in the event of such place having ceased to exist, service upon the Registrar shall be deemed to be service upon the pension fund or provident fund.

Trustee to establish member account

33. Upon registration of a member, the trustee of a pension fund or provident fund shall establish and maintain a member account for the member in its books.

Restriction on transfer etc. of licence

34.—(1) A licence or certificate of registration shall not be transferred, assigned or encumbered in any way, except in the event of a merger, acquisition or similar restructuring transaction, on such terms and conditions as the Registrar may approve.

(2) The appointment of an agent, approved by the Registrar, who operates in accordance with approved terms shall not constitute an assignment of, transfer of, or encumbrance on, the licence.

Variation, suspension and revocation of licences or registration on request

35.—(1) The Registrar may, on written request by a licensed or registered pension entity, by notice to the entity—

(*a*) vary the conditions of the licence or registration, including by imposing additional conditions;

(*b*) suspend the licence or registration for the period specified in the notice; or

(*c*) revoke the licence or registration.

(2) The Registrar shall cause notice of the suspension or revocation of a licence or registration under this section to be published in the

Gazette, and in at least two newspapers of widest circulation in Malawi.

Variation, suspension and revocation of licences or registrations

36—(1) Where it appears to the Registrar that a licensed or registered pension entity—

(*a*) is not carrying on, or is likely not to carry on, the business in respect of which it is licensed or registered with integrity, prudence, professional skill or sound business principles;

(*b*) is in an unsound financial position or is likely to be in an unsound financial position;

(*c*) is causing or promoting instability in the financial system, or is likely to do so;

(*d*) is not complying or is likely not to comply with a financial services law;

(*e*) is or is likely to be involved in a financial crime;

(*f*) supplied false or misleading information when in its application for a licence or registration;

(*g*) has failed to commence pension business under the licence or registration within twelve months after the grant of the licence or registration;

(*h*) has ceased to conduct pension business in Malawi;

(*i*) has failed to comply with a condition to which the licence or registration is subject;

(*j*) is conducting business in a manner that is detrimental to consumers or the general public;

(*k*) has engaged in serious deception of the Registrar or the general public in respect of its financial condition, ownership, management, operations or other facts material to its business;

(*l*) no longer has the professional and technical capacity to perform its functions;

(*m*) no longer has adequate operational systems to perform its functions; or

(*n*) has gone into liquidation, has wound-up or dissolved,

the Registrar may, by notice to the pension entity, vary the licence or registration by restricting the activities that can be carried on under the licence or registration, or impose further conditions on the licence or registration, or suspend the licence or registration for the period specified in the notice, or revoke the licence or registration.

(2) The Registrar shall not vary, suspend or revoke a pension entity's licence or registration, unless the Registrar—

(*a*) has given the pension entity a written notice of the proposed action, setting out the reasons therefor;

(*b*) has given the pension entity, twenty-one days within which to make representations on the matter; and

(*c*) has taken into account any representations made by, or for, the pension entity within that period.

(3) The Registrar may suspend a pension entity's licence or registration without giving a notice under subsection (2) (*a*), where it is satisfied, on reasonable grounds, that it is necessary to do so to prevent or mitigate damage to the interests of the pension entity, clients of the pension entity or the financial system.

(4) The Registrar shall, as soon as practicable, after suspending a licence or registration pursuant to subsection (3),—

(*a*) give the licensed or registered pension entity a written notice of the suspension, setting out the reasons and conditions therefor, and giving the pension entity twenty-one days within which to make representations to the Registrar on the matter; and

(*b*) having considered any representations made by, or for, the pension entity, determine whether the suspension should be confirmed.

(5) Where a licence or registration is suspended pursuant to this section, the Registrar may—

(*a*) physically close the premises of the pension entity and all its branches; and

(*b*) freeze all accounts of the pension entity.

(6) The suspension or revocation of a licence or registration to operate shall not relieve a person of any obligation incurred or assumed during the period of validity of the licence or registration.

(7) A pension entity whose licence or registration is suspended or revoked shall not continue to operate the pension business.

(8) The decision of the Registrar to vary, suspend or revoke a licence or registration shall remain in force, unless reversed by the Registrar or set aside by the Financial Services Appeals Committee.

(9) The Registrar shall cause notice of the suspension or revocation of a licence under this section to be published in the Gazette, and in at least two newspapers of widest circulation in Malawi.

PART IX—REQUIREMENTS FOR PENSION ENTITIES

Division I—Corporate Governance

Board of directors or trustees

37.—(1) Every pension entity shall have a board of directors or trustees as provided under this Act, which shall be responsible for the management or supervision of the management of the business and affairs of the pension entity.

(2) The appointment of the directors or trustees of a pension entity shall be approved by the Registrar.

(3) The board of directors of a pension entity, other than a pension fund, shall be headed by a chairperson who shall be a non-executive director.

(4) The majority of the directors of a pension entity in subsection (3) shall be independent and shall reside in Malawi.

(5) For purposes of subsection (4), "independent" 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.

(6) The Registrar may disqualify and require a pension entity to remove from office a director or trustee of a pension entity if the Registrar is of the opinion that on the basis of competence, business record or character, the person holding the position of director or trustee is unsuitable to discharge the duties and responsibilities associated with the position.

(7) The Registrar shall notify the pension entity, in writing, of its intention to take the disqualification and removal action against the director or trustee and give the pension entity fifteen days to make representations, prior to the finalization of the Registrar 's decision.

Appointment of executive officers and management

38.—(1) The appointment of all executive officers and managers of a pension entity shall be approved by the Registrar.

(2) All executive officers and managers of a pension entity shall be resident in Malawi.

(3) a pension entity shall not, except with the prior approval of the Registrar, appoint a foreign national as an executive officer or senior management officer.

(4) A pension entity which contravenes this section shall be liable to an administrative penalty.

Removal of executive officers and managers

39.—(1) The Registrar may disqualify and require a pension entity to remove from office a person holding the position of executive officer or manager of the pension entity if the Registrar is of the opinion that on the basis of competence, business record or character, the person holding the position of executive officer or manager is unsuitable to discharge the duties and responsibilities associated with the position.

(2) The Registrar shall notify the pension entity, in writing, of its intention to take the disqualification and removal action against the executive officer or manager and give the pension entity fifteen days to make representations, prior to the finalization of the Registrar's decision.

Internal audit function

40. A pension entity shall, unless exempted by the Registrar, have within its employment, a suitably qualified and experienced internal auditor to perform the pension entity's internal audit function.

Fit and proper requirements

41. The approval by the Registrar of significant owners, directors, trustees, executive officers and managers of pension entities shall be subject to satisfaction of fit and proper requirements as prescribed under this Act.

Division II—Principal officers, Trustees, Directors, Advisory Committees and Service Providers of Pension Funds and Provident Funds

A pension fund or provident fund to have a principal office

42.—(1) A pension fund or provident fund shall establish a principal office in Malawi, within thirty days of registration.

(2) A trustee shall notify the Registrar of any change of address of the principal office within thirty days of the change.

Appointment of a principal officer

43.—(1) A pension fund or provident fund shall appoint a principal officer whose appointment shall be subject to the prior approval of the Registrar, in accordance with the fit and proper requirements, as prescribed under this Act.

(2) A pension fund or provident fund shall not remove or change its principal officer, except with the prior written approval of the Registrar.

(3) Where a pension fund or provident fund changes its principal officer without prior written approval of the Registrar, the pension fund or provident fund shall be liable to administrative penalties under this Act.

(4) Where anything is required by, or in accordance with, this Act to be done by a trustee, it shall be the duty of the principal officer to ensure that the thing so required to be done is in fact done.

(5) A principal officer shall—

(*a*) keep and maintain records of the pension fund or provident fund;

(*b*) attend to, and resolve, complaints made by members in accordance with this Act, and where necessary, refer any unresolved complaint to the trustee;

(*c*) report to the Registrar, within fourteen days of becoming aware, of any activity of a registered pension fund or provident fund—

(i) that is not compliant with the provisions of this Act; or

(ii) that may prejudice the interests of the members, and the activity is carried out without the approval of the Registrar or consultation as may be required by this Act;

(*d*) act as the secretary of the pension fund or provident fund; and

(*e*) perform any other duties as may be prescribed by the Registrar.

Trustees, and directors to consent to appointment

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

Trustees of pension fund or provident fund

45.—(1) A pension fund or provident fund shall have—

(*a*) at least six individuals as trustees called "a group of individual trustees"; or

(*b*) a corporate trustee.

(2) Where a pension fund or provident fund has a corporate trustee as a trustee of the fund, the trustee shall not be a related party to the employer, the investment manager or the custodian.

(3) Where as a result of a vacancy, there are less than six members of a group of individual trustees of a pension fund or provident fund, the vacancy shall be filled within ninety days from the date of occurrence.

(4) Where the vacancy referred to in subsection (3) is filled within the ninety days, any decision made by trustees of the pension fund or the provident fund during the period of the vacancy shall be deemed valid.

Equal representation rule

46.—(1) Where a pension fund or a provident fund has a group of individual trustees, the group shall consist of equal numbers of employer representatives and member representatives.

(2) A trustee shall ensure that the appointment of an additional or independent trustee does not contravene the equal representation rule.

(3) Where a vacancy occurs in the membership of a group of individual trustees in a fund to which the equal representation rule applies and that vacancy is filled within the ninety days, the fund shall be deemed to have been compliant to the equal representation rule during the period of the vacancy.

Advisory committees

47.—(1) A pension fund or provident fund that has a body corporate as a trustee, may arrange, through the fund rules, for the establishment and operation of one or more advisory committees for the fund.

(2) In the event of a dispute by a member of the fund, failure of the trustee to provide evidence that it has adequately responded 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.

Rules for appointment of member representatives

48.—(1) This section applies to a pension fund or provident fund to which the equal representation rule applies.

(2) The trustee shall establish rules—

(*a*) setting out a procedure for appointing the member representatives; and

(*b*) to ensure that member representatives so appointed are 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 the directives for the purposes of this section.

(3) The trustee shall publish the rules established in accordance with subsection (2) in such manner as to ensure that its members are aware their existence.

(4) Any person who contravenes subsections (2) or (3) shall be liable to an administrative penalty.

Appointment and removal of service providers

49.—(1) Subject to the approval of the Registrar, a trustee shall, at a minimum, appoint the following service providers for the pension fund or provident fund—

(*a*) a licensed—

(i) pension administrator;

(ii) investment manager; or

(iii) custodian;

(*b*) an external auditor; and

(*c*) in the case of a defined benefit pension fund, an actuary.

(2) The appointment or removal of a service provider shall be in writing.

(3) Notwithstanding anything contained in this section, the Registrar may authorize a trustee of a pension fund, subject to conditions as may be prescribed, to act as an administrator of the pension fund or provident fund.

Division III—Administrators, Pension Services Companies, Pension Brokers, Pension Advisors and Provider of Programmed Withdrawals

Requirements for other pension entities

50. An administrator, pension services company, pension broker, pension advisor or provider of programmed withdrawals, when engaged to discharge or discharging its duties to a pension fund or provident fund, shall—

(*a*) maintain adequate financial resources to fulfill its obligations to the fund;

(*b*) conduct its duties in a professional and responsible manner; and

(*c*) meet any other requirements as prescribed in the directives issued by the Registrar.

PART IX—REQUIREMENTS FOR FUND RULES OF PENSION FUNDS AND PROVIDENT FUNDS

Pension fund and provident fund rules to be enforceable

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

Contributions to be paid to the pension fund or provident fund

52. The fund rules of a pension fund or provident fund, as the case may be, shall provide that the contributions to the fund, whether employer contributions or employee contributions, shall be paid to the fund.

Pension funds and provident funds to be trusts

53. The fund rules of a pension fund or provident fund, as the case may be, shall provide that the fund assets be held by the trustee in trust for members, in accordance with this Act.

Covenants for pension funds or provident funds

54.—(1) The fund rules of a pension fund or provident fund, as the case may be, 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 be able 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 policy 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 realizing, and the likely return from, the investments from the fund having regard to its objectives and its expected cash flow requirements;

(ii) the composition of the investments from the fund as a whole, including the extent to which the investments are diverse or involve risks from inadequate diversification;

(iii) the liquidity of the investments from the fund 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 policy 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 belong 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 or surpluses of the fund, to formulate and to give effect to a policy for their prudential management and distribution; and

(*j*) such additional covenants as may be prescribed in directives for the purposes of this section.

(2) The covenant in subsection (1) (*h*) shall not prevent the trustee from engaging or authorizing persons to carry out specified actions on behalf of the trustee.

Consistency of covenants

55. A covenant prescribed for the purposes of section 54 (1) (*j*) shall be capable of operating concurrently with all the covenants referred to in section 54 (1) and the other provisions of this Act.

Covenants bind directors of trustee

56. Where the trustee of a pension fund or provident fund is a body corporate, the covenants also 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 covenants, and so operates as if the directors were parties to the fund rules.

Damages for breach of covenants

57.—(1) A breach of a covenant referred to in section 54 shall not result in the invalidity of a transaction, and a person who suffers loss or damage as a result of conduct of another person that is a breach of a 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—

(*a*) the making of an investment by, or on behalf of, a trustee of a pension fund or provident fund if it is proved that the investment was made in accordance with an investment policy formulated under the covenant set out in section 54(1) (*e*); and

(*b*) the management of reserves by a trustee of a pension fund or provident fund, if it is established that the management of the reserves was in accordance with the covenant set out in section 54 (1) (i).

(3) Subsection (2) shall apply to an action for loss or damage, whether brought under subsection (1) or otherwise.

Fund rules regarding indemnities, liability and advice

58.—(1) Subject to subsection (3), the fund rules of a pension fund or provident fund may provide for a trustee of that fund to be indemnified out of the fund assets in respect of a liability incurred while acting as such a trustee, and the trustee may be so indemnified out of the fund assets accordingly.

(2) The fund rules of a pension fund or provident fund shall not prevent a licensed trustee of the pension fund or provident fund from seeking advice from any person in respect of any matter relating to performance of the duties or the exercise of the powers as trustee.

(3) A provision in the fund rules of a pension fund or provident fund shall be void if—

(*a*) it purports to preclude a trustee of the pension fund or provident fund from being indemnified out of the fund assets in respect of a liability incurred while acting as trustee;

(*b*) it would have the effect of indemnifying a trustee of a pension fund or provident fund against a liability arising as a result of the trustee—

(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 was required to exercise;

(*c*) it purports to preclude a trustee from being indemnified out of the fund assets in respect of the cost of obtaining advice mentioned in subsection (2); or

(*d*) it limits any amount of indemnity referred to in subsections and (2).

Directors of corporate trustee may be indemnified

59.—(1) Subject to subsection (2), the fund rules of a pension fund or provident fund may provide for a director of the licensed trustee, who is a corporate trustee 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 provident fund shall be void if it would have the effect of indemnifying a director of the licensed trustee, being a corporate trustee 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.

Pension fund trustees not to be subject to direction

60.—(1) The fund rules of a pension fund or provident 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 a direction or order by any other person.

(2) Subsection (1) shall not apply to—

(*a*) an order given by a court;

(*b*) a direction given by the Registrar;

(*c*) a nomination; or

(*d*) a direction given by the Financial Services Appeals Committee.

(3) A provision of fund rules of a pension fund or provident fund shall be void to the extent of its inconsistency with subsection (1).

(4) Any person who improperly or unduly seeks to influence a trustee in the performance of the functions of the trustee, commits an offence and shall, on conviction, be liable to a fine of K100,000,000 and to imprisonment of ten years.

Pension benefits to be transferable

61.—(1) The fund rules of a pension fund shall permit an employee to transfer pension benefits accruing to his or her account to any unrestricted pension fund without giving any reason for the transfer, and upon such transfer the employer of the employee shall redirect the contribution that the employer is required to make under section 12 to the fund selected by the employee.

(2) An employee shall only be allowed to transfer pension benefits under this section, once in every two years at most, or as may be determined in a directive issued by the Registrar, from time to time.

(3) Where an employee transfers his or her pension benefits, the employer shall not be required to cover the cost of the transfer.

Portability of pension fund benefits

62.—(1) The fund rules of a pension fund shall provide that—

(*a*) if a member applies to transfer his or her pension benefits to another registered pension fund, the trustee shall pay the amount of the member's benefits in the fund to the trustee of the specified pension fund; and

(*b*) if a member ceases employment with an employer, the trustee shall pay the amount standing in the credit of the member account—

(i) on application by the member, to a pension fund appointed by the member, within thirty days of receiving the application; or

(ii) where the member has not applied to transfer his or her benefits, to a default pension fund, no later than thirty days after the lapse of six months from the date of last employment.

(2) The transfer referred to in subsection (1) (*a*) shall not be from a pension fund under mandatory occupation pension scheme to a pension fund under voluntary pension scheme or vice versa.

Trustee to accept payments in respect of a member

63. The fund rules of a pension fund shall provide that if a person becomes a member, the trustee shall accept payments in respect of the member from the trustee of another registered pension fund or from the employer of the member and shall credit those amounts to the member account in the fund.

Transfer of benefits under provident fund and voluntary personal pension fund

64. The fund rules of a provident fund or voluntary personal pension fund shall provide that benefits that accumulate in a voluntary personal pension fund or a provident fund shall only be transferable to another voluntary personal pension fund or provident fund, respectively.

Exercise of discretion in respect of pension funds

65.—(1) Subject to this Act, the fund rules of a pension fund or provident 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, the directives issued for the purposes of this section.

(2) A provision of fund rules of a pension fund or provident fund shall be void to the extent of its inconsistency with subsection (1).

Restriction on requirement for approval of trustee's decision by employer

66. The fund rules of a pension fund or provident fund shall not require that a decision of the trustee, under those rules, to 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 costs to the employer; or

(*c*) is of a kind prescribed by directives issued for the purposes of this section.

Restrictions on amendments to fund rules

67.—(1) The fund rules of a pension fund or provident fund shall not permit those rules to be amended, unless—

(*a*) the trustees consent to the amendment;

(*b*) the amendment only confers on the trustee the power to

consent to amendment of the rules; or

(*c*) the amendment is for the purposes prescribed in a directive.

(2) The fund rules of a pension fund or provident 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) A provision of fund rules of a pension fund or provident fund shall be void to the extent of any inconsistency with subsection (1) or (2).

(4) Where the fund rules of a pension fund or provident fund are amended, the trustee or operator of the fund shall, within fourteen days of making the amendment, submit to the Registrar for approval, a copy of that amendment.

(5) An amendment to the fund rules of a pension fund or provident 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.

(6) The Registrar shall not approve amendment to the fund rules of a pension fund or provident fund if—

(*a*) in the case of a restricted pension fund and subject to subsection (7), 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; and

(*b*) in the case of an unrestricted pension 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.

(7) The fund rules of a restricted pension fund may be amended to permit an independent trustee to be paid a fee out of the fund assets for acting as trustee.

(8) 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 (4).

(9) The Registrar may, by notice in writing to the trustee, extend the period within which it shall consider an application under this section.

(10) A pension entity or provident fund who contravenes this section shall be liable to an administrative penalty.

PART X—PRUDENTIAL AND OTHER REQUIREMENTS FOR THE OPERATION OF PENSION FUNDS AND PROVIDENT FUNDS

Directives

68.—(1) The Registrar may issue directives with respect to the following—

(*a*) contributions to pension funds or provident funds, including—

(i) who may make contributions;

(ii) how contributions may be made;

(iii) the circumstances in which a pension fund or provident fund may accept contributions; and

(iv) clarification on what specifically constitutes guaranteed wages and other earnings as provided for in the definition of "pensionable emoluments" in section 2;

(*b*) payment of benefits from pension fund or provident 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 pension benefits from pension fund or provident funds;

(*d*) the design of an annuity or programmed withdrawal for funds accumulated in accordance with this Act;

(*e*) the application of surplus or reserve assets of pension fund or provident funds;

(*f*) funding requirements for a defined benefit pension fund or a hybrid pension fund;

(*g*) limits to the proportion of assets that may be held by pension fund or provident funds in specified classes of investments;

(*h*) requirements with respect to licensing or registration of pension entities;

(*i*) requirements with respect to registration of employers and issuance of certificates of compliance;

(*j*) fit and proper person requirements for pension entities;

(*k*) disclosure of information by pension entities;

(*l*) specifications of the types and forms of fees to be applied by pension entities, investment managers, custodians and trustees;

(*m*) maximum fees and charges to be charged on pension fund or provident fund administrators, custodians, investment managers pension brokers, and trustees;

(*n*) transferability and portability of benefits;

(*o*) risk management and governance of pension entities, including the number of individual trustees and the composition of boards or committees of trustees of pension fund or provident funds;

(*p*) financial condition, including funding and solvency of pension entities;

(*q*) minimum requirements for pension administration system;

(*r*) provision of information to the Registrar;

(*s*) standards of business conduct for pension entities;

(*t*) outsourcing of services by pension entities;

(*u*) record keeping;

(*v*) preparation and scope of financial, audit and actuarial reports in relation to pension entities and financial groups;

(*w*) the adequacy of resources, including human resources, technical resources, and financial resources, of, or available to, pension entities and financial groups;

(*x*) requirements relating to—

(i) amalgamation and transfer of business of pension entities: and

(ii) termination or winding-up of pension entities;

(*y*) transactions between a pension entity and a related party of a pension entity, including specifying rules and maximum limits for exposure of the pension entity to a related party; and

(*z*) categories of pension funds or provident funds.

(2) A specification in this Act of a matter in respect of which the Registrar may issue directives shall not limit the power of the Registrar to issue any other directives for better carrying out of the provisions of this Act.

(3) The Registrar shall not issue a directive under this section. unless—

(*a*) pension entities, and where necessary the most representative organization of employers and the most representative organization of employees, have had at least twenty-one days to make representations on the matter to the Registrar; and

(*b*) the Registrar has had regard to those representations, if any, in deciding whether to issue the directive.

(4) Notwithstanding section 21 (*e*) of the General Interpretation Act, the Registrar may, in directives made under this Act, prescribe a fine of up to K50,000,000 and imprisonment to four years for an offence committed in contravention of such directives. Cap. 1:01

(5) For purposes of this section, "financial group", in relation to a pension entity, means—

(*a*) a group consisting of two or more companies, one of which is a pension entity domiciled in Malawi and each body corporate of which that pension entity is a controlling party; or

(*b*) a group consisting of two or more companies, one of which is a pension entity, that have a common controlling party and the bodies corporate of which any of those companies is a controlling party.

A pension fund or provident fund to maintain books of accounts

69.—(1) A pension fund, provident fund and pension services company shall—

(*a*) maintain such books of accounts and other records as may be necessary for the purpose of the pension entity;

(*b*) within three months after the end of its financial year, submit to the Registrar a copy of its audited financial statements and such other reports in the format prescribed by the Registrar; and

(*c*) unless exempted by the Registrar, within four months after the end of its financial year, publish a copy of the balance sheet and profit and loss account submitted under subsection (1) (*b*), in at least one local newspaper of wide circulation.

(2) Any pension fund or provident fund which contravenes subsection (1) shall be liable to an administrative penalty.

A pension fund or a provident fund to maintain a financially sound position

70.—(1) A pension fund or a provident fund shall conduct its activities so as to remain in a financially sound condition at all times.

(2) Where it is revealed, after the Registrar's examination or otherwise, that a pension fund or provident fund is not in a financially sound condition and a satisfactory arrangement setting out measures for the purpose of bringing the fund into a financially sound condition within a reasonable period have not been submitted to it—

(*a*) the Registrar shall direct the fund to submit an arrangement setting out measures for the purpose of bringing the fund into a financially sound condition within such period as the Registrar deems reasonable; and

(*b*) the fund shall submit such arrangement to the Registrar within twenty-one days from the date of receiving the direction from the Registrar.

(3) The Registrar may, after considering an arrangement submitted in accordance with subsection (2)—

(*a*) approve the arrangement, subject to such conditions, if any, as it deems fit; or

(*b*) reject the arrangement, and whereupon the pension fund or provident fund shall, within twenty-one days, submit a new arrangement in accordance with the direction of the Registrar.

(4) Where, after consideration of an arrangement submitted in accordance with subsection (2), the Registrar is of the opinion that it is impossible or impractical to bring a fund into a sound financial condition within a reasonable period, the Registrar may direct that the whole or any part of the business of the pension fund or provident fund be wound-up.

(5) For purposes of this section, "financially sound condition" means—

(*a*) for a defined benefit pension fund, being fully funded; and

(*b*) for a defined contribution pension fund, having set up prudent investments of member funds as per investment policy and directive, and having no outstanding contributions made from employer or member.

Significant adverse effects to be notified

71.—(1) Where a trustee of a pension fund or provident 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 of becoming aware of the event, give written notice to the Registrar setting out particulars of the event.

(2) Where the pension fund or provident fund referred to in subsection (1) 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 the trustees.

(3) For the purposes of subsection (1), an event has a significant adverse effect on the financial position of a pension fund or a provident 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.

Credit to member account

72.—(1) The trustee of a pension fund or provident fund shall credit the following amounts to a member account—

(*a*) the amounts of the member contributions and where applicable, employer contributions paid to the trustee in respect of the member;

(*b*) investment returns, in accordance with the fund rules and directives;

(*c*) transfers from other funds in accordance with section 61;

(*d*) severance due entitlements transfers made pursuant to section 115;

(*e*) any payments made by trustees to a member account in accordance with the Registrar's directions or instructions; and

(*f*) any other payments required to be made under this Act.

(2) The trustee of a pension fund or provident fund who receives any amounts in respect of a member in a month, shall—

(*a*) allocate the amounts to the member account within fourteen days from the date of receipt of amounts; and

(*b*) ensure that amounts received in respect of a member are appropriately allocated into member and employer portions of the member account.

Debits to member accounts

73. The trustee of a pension fund or provident fund shall debit a member account, in accordance with the fund rules, and regulations and directives made hereunder, with the following—

(*a*) amount of benefits paid from the fund in respect of the member;

(*b*) pension levy;

(*c*) fees and charges as prescribed under this Act;

(*d*) amount owed by the member to the trustee in respect of the fund; or

(*e*) the proportion of the fund's investment losses allocated to the account in accordance with directives.

Trustee to ensure that a defined benefit pension fund or hybrid pension fund is fully funded

74.—(1) A trustee of a defined benefit pension fund or hybrid pension fund shall—

(*a*) ensure that the fund is fully funded at all times; and

(*b*) at least once in every three years, undertake an actuarial valuation to determine the adequacy of its pension fund assets and submit a report of the actuarial valuation to the Registrar for scrutiny.

(2) Where the actuarial valuation establishes that the defined benefit pension fund or hybrid pension fund, as the case may be, is

not fully funded, the trustees shall in addition to the report submitted under subsection (1) (*b*), furnish the Registrar with an action plan for restoring the pension fund to full funding.

(3) Where the Registrar is not satisfied with the action plan submitted pursuant to subsection (2) or where the fund is not fully funded within the period given by the Registrar, the Registrar may—

(*a*) direct the trustee to close the pension fund to new members;

(*b*) order the winding-up of the pension fund; or

(*c*) take any action that the Registrar may deem appropriate to safeguard the interests of the members.

Investment management agreements not to exclude liability for negligence

75. No provision in an agreement between a trustee of a pension fund or provident fund and an investment manager shall exempt or purport to exempt the investment manager from liability for negligence, or to limit that liability.

Provision of information in an investment management agreement

76. An investment management agreement shall include adequate provisions to empower the trustee to require the investment manager to provide—

(*a*) appropriate information as to the making of, and return on, the investments made with those assets; and

(*b*) any necessary information to enable the trustee to assess the capability of the investment manager to select and manage the investments, whenever it is necessary or desirable to do so.

Fund assets to be invested at arm's length

77.—(1) A trustee of a pension fund or provident 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 the transaction; and

(*b*) the terms of the transaction are no more favourable to the other party than is reasonable to expect if the trustee were dealing with the other party at arm's length in similar circumstances.

(2) Subsection (1) shall apply to the investment manager of a pension fund or provident fund in the same way as it applies to the trustee of a pension fund.

(3) Any person who contravenes subsection (1) shall be liable to an administrative penalty.

(4) A contravention of subsection (1) shall not affect the validity of the investment 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 to its own interests in relation to the transaction.

Restriction on employer assets

78.—(1) A trustee of a pension fund or provident 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*) the acquisition of the asset will result in the fund's employer asset percentage to exceed five per cent.

(2) Where at any time, including the time of commencement of this Act, the employer asset percentage of a pension fund or provident fund is more than five per cent—

(*a*) the trustee shall notify the Registrar as soon as practicable; and

(*b*) the trustee shall 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, within one month after the notification.

(3) Where the Registrar approves the plan referred to in subsection (2)(*b*), the trustee shall, subject to any directions under subsection (8), 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 per cent or less.

(4) The Registrar may permit exceptions to the limit specified in subsection (1) with respect to employers listed on the Malawi Stock Exchange and whose local market capitalization is more than ten percent of the corresponding total local market capitalization.

(5) The Registrar shall consider the risks to which members of the fund are exposed, when granting the exception in subsection (4).

(6) The exception permitted under subsection (4) shall be valid for a period not exceeding two years and on expiry—

(*a*) shall be subject to the notification contemplated in subsection (2)(*a*); and

(*b*) may be extended for such period as the Registrar may determine dependent on the merit of each case.

(7) A person shall not take part in a scheme with the intention that the trustee of a pension fund or provident fund acquire, either directly

or indirectly through one or more interposed companies, partnerships or trusts, an employer asset contrary to this section.

(8) The Registrar may give a written direction to a trustee of a pension fund or provident fund, at any time, in relation to disposal of employer assets.

(9) Any person who contravenes subsection (1), (2) or (7) shall be liable to an administrative penalty.

Financial assistance to pension fund members

79.—(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, a trustee or a close relation of a member.

(2) For purposes of subsection (1), 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 ten per cent of the voting shares in the company.

(3) Any person who contravenes subsection (1) shall be liable to an administrative penalty.

Pension funds not to acquire assets from members or associates

80.—(1) The trustee or an investment manager of a pension fund or provident fund shall not knowingly acquire an asset from a member or an associate of a member, except as authorized by 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 or provident 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 directives.

(3) Any person who contravenes subsection (1) or (2) shall be liable to an administrative penalty prescribed under this Act.

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

Borrowing prohibited

81.—(1) a pension fund or provident fund shall not, unless authorized under this Act, borrow money or maintain an existing borrowing of money.

(2) A person who contravenes subsection (1) shall be liable to an administrative penalty.

Investments outside Malawi Cap. 45:01

82. Fund assets shall not be invested outside Malawi, except in accordance with the Exchange Control Act and this Act.

Complaint resolution mechanisms for pension funds or provident funds

83.—(1) The trustee of a pension fund or provident 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 lodge a complaint as specified in that subsection; and

(*b*) inquiries and complaints referred to in paragraph (*a*) are properly considered and dealt with within sixty days.

(2) For purposes of subsection (1) (*a*)—

(*a*) a beneficiary or former beneficiary of a fund may make an inquiry into, or lodge a 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 lodge a complaint about, the operation or management of the fund in relation to the former beneficiary; and

(*c*) any person may make an inquiry into, or lodge complaint about, a decision of a trustee of a fund with respect to the payment of a death benefit, if the person has or claims to have an interest in the death benefit.

PART XI—APPLICATION FOR MEMBERSHIP AND PROVISION OF INFORMATION TO FUND MEMBERS

Fund information and member information

84.—(1) The trustee of a pension fund or provident fund shall ensure that—

(*a*) a person who becomes a member is given fund membership information before, or, if that is not practicable, as soon as practicable after, the person becomes a member; and

(*b*) each member is given fund information, and member information relating to the member, at times prescribed by directives, for the purposes of this section.

(2) Information given under subsection (1) shall be meaningful, accurate and complete and written in a manner that enhances member understanding.

Application for membership of unrestricted pension fund

85.—(1) The Registrar may issue directives with respect to unrestricted pension funds.

(2) The directives may make provision with respect to offering membership in, and admitting persons as members of, unrestricted pension funds, including provision with respect to—

(*a*) application 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.

(3) An unrestricted pension fund shall not turn down an application for membership on the basis that contributions are too small.

Trustees to give information to fund members

86.—(1) The trustee of a pension fund or provident fund shall comply with any reasonable request by a member for information about—

(*a*) the fund; and

(*b*) the member's entitlements in the fund.

(2) The trustee of a pension fund or provident fund shall not be obliged to comply with a request under subsection (1) if the trustee complied with a similar request within the past six months.

PART XII—PENSION AND OTHER BENEFITS

Division I—Payment of Benefits

Conditions for payment of benefits

87.—(1) Subject to this Act, benefits in respect of a member of a pension fund under the mandatory occupational pension scheme shall be payable out of the fund only if, the trustee is satisfied that—

(*a*) the member has retired—

(i) upon reaching the retirement age;

(ii) having worked for a continuous period of twenty years or more with one employer or any other conditions under the fund rules, as approved by the Registrar; or

(iii) 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 permanently disabled from carrying out the functions of his or her office;

(*b*) the member is about to leave, or has left, Malawi permanently;

(*c*) the member has died;

(*d*) 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 to another pension fund as a transfer; or

(*e*) the member has met conditions in section 88.

(2) For purposes of this section, an application for payment of pension benefits 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, as may be prescribed in accordance with directives.

Early payment of benefits

88.—(1) Subject to this Act, on application by a member to the trustee, where a member has permanently left the service of an employer, whether because he has resigned or because the employer has terminated his or her employment for any reason otherwise than in circumstances described in section 87 (1), the trustee may pay benefits to the member out of the fund if the member—

(*a*) has not secured another employment for a period of at least three months before the date of the application; and

(*b*) has met the conditions specified in the directive on payment of benefits.

(2) Subject to section 107, benefits paid to a member under this section shall be limited to that part of the contributions paid by the member, at the employer, and any investment income on the member's contributions.

Immediate vesting of contributions for pension funds

89.—(1) For purposes of calculating and paying benefits in respect of a member of a pension fund, all contributions received by the trustee of the fund shall be taken into account and payment shall be made without any period having to elapse or any other condition being satisfied, including a condition that the employee should remain in service with the employer for a specified period.

(2) Subsection (1) shall not apply to provident funds.

Programmed withdrawals, annuities and pension

90.—(1) Except as provided by this Act, benefits payable in respect of a member of a pension fund who has retired shall be applied to any of the following, as the member directs—

(*a*) a programmed withdrawal arrangement with an authorized provider of programmed withdrawal of the member's choice;

(*b*) the purchase of an annuity from a licensed insurer of the member's choice; or

(*c*) a combination of the two options in paragraphs (*a*) and (*b*).

(2) In case of a defined benefit pension fund or a hybrid pension fund, a member may—

(*a*) be paid pension from the fund; or

(*b*) opt to commute pension and exercise the options in subsection (1).

(3) A payment on the basis that a member has retired shall not be made, unless the trustee is satisfied that the member has met the conditions for retirement prescribed in section 87 (1)(*a*).

(4) Notwithstanding section 90 (1) payment to a member who has retired due to permanent disablement and whose life is expected to reduce due to the permanent disablement, shall be made on an impaired life annuity basis.

Lump sum payment of benefits

91.—(1) Subject to this section, a trustee of a pension fund under the mandatory occupational pension scheme may permit the payment of pension benefits as a lump sum where the member has—

(*a*) met the conditions in section 87;

(*b*) met the conditions in section 88;

(*c*) died and the nominated beneficiary, except where the nominated beneficiary is a minor, has opted for a lump sum payment;

(*d*) left the country permanently in line with section 87 and has satisfied the prescribed conditions; or

(*e*) five years or less to retirement age.

(2) The maximum lump sum that may be accessed under subsection (1) shall be calculated as follows—

(*a*) where the member has retired or has five or less years to retirement age, up to fifty percent of accumulated benefits;

(*b*) where the member has left the service of the employer under section 88 or has retired, and the value of the benefits are less than the threshold stated in the directives, up to one hundred percent of accumulated benefits;

(*c*) where the payee is a nominated beneficiary, other than a nominated minor, and the beneficiary has opted for a lump sum payment, up to one hundred percent of accumulated benefits; or

(*d*) where a member has left the country permanently, up to fifty percent of accumulated benefits on grant of approval and the balance paid after twelve months.

Restriction on payment of benefits

92.—(1) A trustee shall not pay benefits out of a pension fund or provident fund to a member, unless the member has met the condition for payment of benefits under the fund rules and this Act.

(2) A trustee shall not pay a lump sum to a member of a pension fund who accessed another lump sum five or less years to retirement, whether in the current pension fund or another, unless—

(*a*) the amount of benefits accumulated by the member at

retirement is less than the threshold prescribed by the Registrar;

(*b*) the lump sum payment is for a member is leaving, or has left, the country permanently;

(*c*) the amount is fifty percent of the difference between accumulated benefits at retirement and accumulated benefits at the time of first access contemplated in section 91 (1)(*e*); or

(*d*) the payment is to a beneficiary.

(3) Any person who contravenes subsections (1) or (2) shall be liable to an administrative penalty.

Access of pension benefits accumulated prior to 1st June, 2011

93. Notwithstanding any other provisions in this Part, all rights of members of a pension fund to gain access to benefits in the pension fund in accordance with the rules of the pension fund existing prior to 1st June, 2011, shall be retained in respect of benefits accumulated up to 1st June, 2011.

Death benefit nominations

94.—(1) A member of a pension fund or provident fund shall submit to the trustee, within thirty days of becoming a member, a written nomination directing the trustee to pay the fund member's benefits on the member's death to any or all of the following—

(*a*) the member's widow or widower, as the case may be;

(*b*) the member's child;

(*c*) the member's close relation; or

(*d*) where the member's circumstances are such that paragraphs (*a*), (*b*) and (*c*) are not applicable, then any other person, who is financially dependent on the member.

(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 or if there is no amendment, confirm the nomination by written notice to the trustee in line with the fund rules, within twenty-four months of the previous nomination.

(4) A nomination shall be valid if it is signed by the member 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;

(*c*) commissioner of oaths; or

(*d*) a person prescribed by directives for the purposes of this section.

(5) The trustee shall not accept a nomination if it appears to the

trustee that the nomination was not made voluntarily.

(6) A trustee shall ensure that before accepting a nomination–

(*a*) the nomination has been duly signed by the member; and

(*b*) contact details of nominated beneficiaries have been included.

(7) For purposes of this section, a nomination shall be regarded as "signed" if the member—

(*a*) affixes his or her signature on the nomination; or

(*b*) is unable to write or sign, the member affixes his or her thumbprint impression on the nomination.

Revocation of a nomination

95.—(1) A member of a pension fund or provident fund may at any time revoke or amend a nomination by written notice to the trustee.

(2) A later nomination by a member, made in accordance with section 94 and accepted by the trustee, revokes the previous nomination.

(3) A trustee shall not permit a person other than a member to revoke or amend a nomination by the member.

Invalid nomination

96. A nomination shall be invalid if the nomination—

(*a*) is made before a divorce or subsequent marriage of the member;

(*b*) is not made voluntarily;

(*c*) is revoked by the member; or

(*d*) does not satisfy the conditions specified in section 94.

Payment of death benefits

97.—(1) Where a member's nomination submitted to the trustee of a pension fund or a provident fund is valid 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) Where, in relation to all or a part of the benefits payable on the death of a member of a pension fund or provident fund

(*a*) the nomination is invalid; or

(*b*) the beneficiary proportions set out in the nomination do not equal to one hundred percent of the total death benefits,

then, subject to this Act and notwithstanding any other written law to the contrary, the benefits, or that part of the benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee, being a person or persons who the trustee is satisfied, was or were financially dependent on the member at the

time of the death of the member.

(3) Where a person to whom benefits are to be paid under this section is under the age of eighteen years, the amount of the benefit shall be held by the trustee, to be paid to that person upon turning eighteen years and the following shall apply—

(*a*) the amount shall be part of the fund assets of the pension fund or provident fund and shall be invested and applied together with the 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; and

(*c*) the trustee shall not be under an obligation to see to the application of amounts paid under paragraph (*b*).

Payment of proceeds from life insurance policy

98.—(1) Where a member dies, the proceeds from the life insurance policy maintained under section 14 shall be paid to the member account of the deceased member.

(2) The trustee shall apply the amount paid under subsection (1) in accordance with the requirements of section 97.

Division II—Protection of Benefits

Benefits not to be attached, etc.

99.—(1) Except as provided under 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; or

(*c*) amounts paid out of a pension fund by way of benefits in respect of a member,

shall not be liable to be attached, sequestrated or levied upon for, or in respect of, any debt or claim whatsoever.

(2) A member's entitlement to benefits in a pension fund shall, unless provided otherwise under this Act, not be part of his or her estate.

Effect of bankruptcy

100.—(1) The bankruptcy of an employee, or an act of bankruptcy by an employee, shall not affect—

(*a*) any liability of his or her 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 written law, or any provision to the contrary in the employee's contract of employment or any other arrangement or understanding, express or implied, formal or informal, written or not and whether or not enforceable.

Benefits cannot be assigned or pledged

101.—(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.

Pension assets protected from custodian's creditor

102.—(1) Notwithstanding the provisions of any other written law, pension funds or assets under the custody of a custodian under this Act shall not be used to meet the claims of any of the custodian's creditors in the event of winding-up of the custodian.

(2) In the case of winding-up, cessation of business or otherwise of the custodian or any or all of its shareholders, the pension funds or assets under the custody of the custodian shall not be liable to be seized, attached, sequestrated or levied upon or stopped from transfer to another custodian.

PART XIII—MERGERS, ACQUISITIONS AND TRANSFERS

Mergers, acquisition and transfers

103.—(1) Subject to the provisions of this Part, and with the written approval of the Registrar—

(*a*) two or more licensed or registered pension entities may merge and become one pension entity; or

(*b*) a pension entity may transfer all or any of its assets and liabilities to another pension entity.

(2) No transaction involving the merger or acquisition of any business carried on by a pension entity with any business carried on by any other person, irrespective of whether that other person is or is not a pension entity, or the transfer of any business from a pension entity to any other person shall have any force or effect unless—

(*a*) a report on the proposed merger, acquisition or transfer, including a copy of every actuarial or other statement taken into account for the purposes of the merger, acquisition or transfer, have been submitted to the Registrar;

(*b*) the Registrar has been furnished with such additional information or such other report as it may consider necessary;

(*c*) the Registrar is satisfied that the proposed merger, acquisition or transfer would not render any pension entity which is a party thereto and which will continue to exist if the proposed transaction is completed, unable—

(i) to meet the requirements of this Act;

(ii) to remain in a sound financial condition; or

(iii) in the case of a pension entity that is not in a sound financial condition, to attain such a condition within a period considered by the Registrar to be satisfactory;

(*d*) in the case of a pension fund or provident fund, the Registrar is satisfied that—

(i) a resolution of the trustee approving the merger or transfer has been made at an appropriate meeting; and

(ii) the provisions of the rules of every pension fund or provident fund which is a party to the merger or transfer have been complied with;

(*e*) adequate arrangements have been made to ensure that such provisions will be complied with at the appropriate time;

(*f*) the Registrar is satisfied that the proposed merger, acquisition or transfer has given full recognition to rights and legitimate expectations of affected persons, prior to the effective date of the merger, acquisition or transfer; and

(*g*) the requirements of this section have been satisfied and the Registrar has approved the transaction.

(3) Where a new pension entity is to be created as a consequence of the merger or transfer, reports required under subsection (2)(*a*) and (*b*) shall include an application for licensing or registration of the new pension entity, as the case may be, in accordance with this Act.

Notice of merger, acquisition or transfer

104.—(1) A pension entity shall give a written notice of its intention to lodge an application for merger, acquisition or transfer, together with such information as the Registrar may require to the following—

(*a*) the Registrar;

(*b*) each member of the pension fund or provident fund;

(*c*) each significant owner, where applicable;

(*d*) each executive officer, where applicable;

(*e*) each former member of a pension fund or provident fund, who has a right to claim from the fund;

(*f*) each participating employer in a pension fund or provident

fund;

(*g*) advisory committee, if any, of the pension fund or provident fund; and

(*h*) any other person entitled to a payment from the pension entity.

(2) A notice referred to under subsection (1) shall—

(*a*) be published in two newspapers of wide circulation in Malawi and on the pension entity's website or other means as Registrar may prescribe, at least six weeks prior to the lodging of the application; and

(*b*) set out—

(i) the terms of the proposed merger, acquisition or transfer;

(ii) the determination of the value of the pension entity; and

(iii) the sharing of any profit, surplus or reserves of the pension entity.

(3) A person who has rights or entitlements in any pension entity involved in the merger, acquisition or transfer may, during the notice period specified under subsection (1), lodge an objection to the proposed merger, acquisition or transfer, in writing, to any of the pension entities involved.

(4) An objection lodged under subsection (3) shall be considered by the pension entity before submitting an application to the Registrar, and a summary of any such objection and the action taken by the pension entity in response to the objection shall be attached to the application submitted to the Registrar.

Effects of merger, acquisition or transfer of pension funds

105.—(1) Upon completion of a merger of two or more pension entities.

(*a*) any pension entity that has ceased to have any assets and liabilities shall cease to exist and the Registrar shall remove it from the register and cancel its licence or registration; and

(*b*) where a new pension entity is created as a result of the merger, the relevant assets and liabilities of the entities that have so merged shall respectively vest in, and become binding upon, the resultant pension entity.

(2) Upon completion of a transfer of the assets and liabilities of a pension entity, the relevant assets and liabilities, or any portion thereof, shall respectively vest in, and become binding upon, the pension entity to which they are transferred.

106. A merger, acquisition or transfer effected under this Part shall not deprive any creditor or member of any right or remedy existing prior to the date of the merger, acquisition or transfer. Rights of creditors and members

PART XIV—WINDING-UP OF PENSION ENTITIES

Division I—Winding-up of pension funds and provident funds

107. This Division shall apply to the winding-up of pension funds and provident funds. Application of this Division

108.—(1) Trustees of a pension fund or a provident fund may terminate and wind-up their pension fund or provident fund, as the case may be, in whole or in part. Termination of a pension fund or provident fund by trustees

(2) Where trustees of a pension fund or provident fund have resolved to terminate and wind-up their fund, they shall give a written notice of their proposed termination and winding-up to—

(*a*) the Registrar;

(*b*) each member;

(*c*) each former member who has a right to claim from the fund;

(*d*) each participating employer;

(*e*) the advisory committee, if any, of the fund; and

(*f*) any other person entitled to a payment from the fund.

(3) In the case of a proposal to terminate and wind-up only part of a pension fund or provident fund, the trustees shall not be obliged to give a written notice of the proposal to any member, former member or other person, other than the Registrar, who will not be affected by the proposed partial winding-up.

(4) The notice of the proposal to terminate and wind-up a pension fund or provident fund shall contain the reason for termination and winding-up.

(5) The date of termination of a pension fund or provident fund that is being wound-up shall—

(*a*) in the case of contributory pension funds, be not earlier than the date the members' contributions, if any, ceased to be deducted; or

(*b*) in any other case, be on the date the notice is given to members.

(6) The Registrar, may, by order, where it deems necessary, change the commencement date of the winding-up of a pension fund or provident fund.

Winding-up order by the Registrar

109.—(1) The Registrar may, by order, direct the termination and winding-up of a pension fund or provident fund in whole or in part if—

(*a*) the fund no longer meets the registration requirements under this Act;

(*b*) there is a cessation or suspension of employees' contributions to the fund;

(*c*) the employer fails to make contributions to the fund as required by the Act;

(*d*) the employer has been declared or adjudged insolvent by a competent court of law;

(*e*) a significant number of members of the fund cease to be employed by the employer, as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(*f*) in the case of an unrestricted pension fund—

(*i*) there is a significant reduction of the number of members; or

(ii) there is a cessation of contributions under the pension fund or a significant reduction in such contributions; or

(*g*) there is an occurrence of any other prescribed event or circumstance.

(2) In the order made pursuant to subsection (1), the Registrar shall specify—

(*a*) the date of the winding-up;

(*b*) the person or class of persons to whom the trustee shall give notice of the order; and

(*c*) the information that shall be given in the notice.

Winding-up report

110.—(1) The trustees of a pension fund or provident fund that is to be wound-up in whole or in part shall submit to the Registrar, within ninety days of the approval to wind-up, a winding-up report that sets out—

(*a*) the final accounts of the fund, showing the financial position of the fund as at the date on which the winding-up takes effect;

(*b*) the assets and liabilities of the fund;

(*c*) the benefits to be provided under the fund to members, former members and claimants;

(*d*) the methods of allocating and distributing the assets of the

fund and determining the priorities for payment of benefits; and

(*e*) such other information as maybe required, from time to time, by the Registrar.

(2) No payment shall be made out of the pension fund or provident fund in respect of which notice of proposal to wind-up has been given, until the Registrar has approved the winding-up report.

(3) Subsection (2) shall not apply to prevent—

(*a*) continuation of payment of a pension or other benefit, the payment of which commenced before the giving of the notice of proposal to wind-up the pension fund or provident fund; or

(*b*) any other payment that is prescribed or is approved by the Registrar.

(4) The trustees of a pension fund or provident fund shall not make any payment out of the pension fund or provident fund, as the case may be, except in accordance with a winding-up report approved by the Registrar.

(5) The Registrar may, by order, refuse to approve a winding-up report that does not—

(*a*) meet the requirements of this Act and any subsidiary legislation made thereunder; or

(*b*) protect the interests of the members and former members of that pension fund or provident fund.

(6) On the partial winding-up of a pension fund or provident fund, the members, former members and claimants entitled to benefits under the fund shall, on the commencement of the partial winding-up, have rights and benefits that are not less than the rights and benefits which they would have on a full winding-up of the pension fund or provident fund.

Appointment of a trustee to wind-up a fund

111. —(1) Where a pension fund or provident fund that is to be wound-up in whole or in part does not have trustees or trustees fails to act, the Registrar may—

(*a*) act as a trustee; or

(*b*) appoint a person to act as a trustee.

(2) The reasonable administration costs for the Registrar or the person appointed pursuant to subsection (1)(*b*), whilst acting as a trustee, may be paid out of the fund.

Notice of entitlements

112. —(1) On the winding-up of a pension fund or provident fund in whole or in part, the trustee shall give to each person entitled to a benefit, a statement setting out—

(*a*) the person's entitlement under the fund;

(*b*) the options available to the person; and

(*c*) any other information as may be prescribed.

(2) A person to whom notice has been given pursuant to subsection (1) shall make an election of the options provided, within sixty days of receiving the notice.

(3) Where a person fails to elect an option within the time specified under subsection (2), that person shall be deemed to have elected a default option as may be provided by the trustee.

Determination of entitlement

113. For the purposes of determining the amounts of pension benefits and any other rights, benefits and entitlements on the winding-up of a pension fund or provident fund, in whole or in part, the trustees shall take into account the status of employment of each member affected by the winding-up.

Accrual of pension during notice of termination Cap.55:01

114. Membership in a pension fund or provident fund that is being wound-up in whole or in part shall include the period of notice of termination of employment required under the Employment Act.

Liability of employer on termination

115.—(1) Where a pension fund or provident fund is terminated in whole or in part, the employer or each participating employer shall pay into the fund, an amount equal to the total of all payments that, under this Act and rules of the fund, are due or that have accrued and have not been paid into the fund.

(2) The employer shall pay the money due under subsection (1) in the manner and time as may be prescribed under this Act.

(3) In any case where—

(*a*) any warrant of distress is executed against the property of an employer and the property is seized or sold in pursuance of the execution; or

(*b*) on the application of a secured creditor the property of an employer is sold,

the proceeds of the sale of the property shall not be distributed to any person entitled thereto, until the court ordering the sale has made provision for the payment into a pension fund or provident fund of any amounts due, in respect of both contributions payable by the employer and employees contributions deducted from the payroll but not credited to the fund.

Pension fund continues subject to this Act

116.—(1) A pension fund or provident fund that is being wound-up shall continue to be subject to the provisions of this Act, until all the assets of the fund have been disbursed.

(2) In the case of a defined benefit pension fund, where the money in a pension fund is not sufficient to pay all the pension benefits on the winding-up of the pension fund in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

(3) Where a pension fund or provident fund is wound-up, the registration shall be deemed to be cancelled, as soon as the distribution of assets has been completed.

Termination surplus

117. On termination of a pension fund or provident, the trustees shall distribute surpluses identified in the fund as follows—

(*a*) surpluses accruing from investment income in a defined contribution scheme shall be used wholly to augment members' benefits;

(*b*) surpluses arising from unvested benefits in the scheme shall be refunded to the defined contribution scheme sponsors; and

(*c*) surplus arising from a defined benefit scheme shall be apportioned between the members and the scheme sponsors in 80:20 proportion, respectively.

Division II—Winding-up of other pension entities

Application of this Division

118. This Division shall apply to the winding-up of pension entities other than pension funds and provident funds.

Winding-up of other pension entities

119.—(1) Notwithstanding any other law, other pension entities shall be liquidated only in accordance with this Act.

(2) A pension entity may terminate or wind-up in whole or in part—

(*a*) voluntarily; or

(*b*) upon an order of the Registrar.

(3) A pension entity shall not be subject to creditors' petition for winding-up.

Voluntary winding-up

120.—(1) A pension entity shall not be wound-up voluntarily, except with the prior written approval of the Registrar.

(2) The Registrar may give approval for voluntary winding-up of a pension entity, where it is satisfied that—

(*a*) the pension entity is solvent and has sufficient liquid assets to repay its creditors in full;

(*b*) the winding-up has been approved by holders of at least two-thirds of issued voting shares of the pension entity; and

(*c*) there is a satisfactory plan and procedures for repayments to

creditors, within a reasonable period of time.

(3) An application for voluntary winding-up of a pension entity shall be accompanied by a written declaration of the directors or trustees of the pension entity, that they have made a full inquiry into the affairs of the pension entity and have formed an opinion that the pension entity will be able to pay its debts and liabilities in full.

(4) The pension entity shall, upon receipt of approval of the Registrar for voluntary winding-up—

(*a*) immediately surrender its licence or registration certificate and all copies thereof to the Registrar and thereupon the Registrar shall revoke the licence or registration forthwith;

(*b*) cease to do business;

(*c*) exercise its powers only to the extent necessary for orderly liquidation;

(*d*) retain only such staff as are necessary for an orderly winding-up;

(*e*) repay, in full, all its creditors;

(*f*) give notice of its winding-up to its creditors and other persons having an interest or claims in the funds or other property of the pension entity; and

(*g*) in the case of a local pension entity, wind-up all operations which were commenced or undertaken prior to receipt of the approval; or

(*h*) in the case of a foreign pension entity, wind-up all operations in Malawi which were commenced or undertaken prior to receipt of the approval.

(5) The approval of the Registrar for voluntary winding-up of a pension entity shall not adversely affect rights of—

(*a*) a creditor of the pension entity to full settlement of his or her claim;

(*b*) any person having an interest in the funds or property of the pension entity to full settlement of that interest; or

(*c*) an owner of funds or other property held by the pension entity, to the return thereof.

(6) All rights described in subsection (5) shall be settled by the pension entity within such time as the Registrar may determine.

(7) The liquidator of the pension entity shall distribute the remaining assets of the pension entity after settlement of all

obligations among shareholders of the pension entity, in proportion to their respective rights.

(8) The pension entity shall not distribute the remaining assets under subsection (7) where—

(*a*) there is a disputed claim, unless the pension entity deposits with the Registrar sufficient funds to meet any liability that may arise under that claim;

(*b*) a creditor disclosed in the records of the pension entity has not made his or her claim, unless the pension entity deposits with the Registrar the funds that are payable to the creditor; or

(*c*) there are funds or property to be returned to any person, unless the funds or property are deposited with, or transferred to, the Registrar together with the relevant records.

(9) Where the Registrar determines that the assets of a pension entity that is being voluntarily wound-up are not sufficient to fully discharge the obligations of the pension entity or that the completion of the winding-up is being unduly delayed, the Registrar may compulsorily wind-up the pension entity.

Compulsory winding-up

121.—(1) The Registrar may order the compulsory winding-up of a pension entity where the pension entity is not complying or is likely not to comply with the Act.

(2) Where the Registrar orders the winding-up of a pension entity, the Registrar shall—

(*a*) act as liquidator of the pension entity; or

(*b*) appoint another person, with relevant expertise and experience, to act as liquidator of the on such terms and conditions as the Registrar may determine.

(3) The Registrar shall cause to be published in the *Gazette* and in at least two newspapers of wide circulation in Malawi, a notice of the appointment of the liquidator under subsection (2).

(4) Where the Registrar appoints another person as liquidator, the appointment shall be for a period of twelve months, but the appointment may be extended for such period and on such terms and conditions as the Registrar may determine.

(5) The Registrar shall specify the effective date of the appointment of the liquidator in the instrument of appointment.

(6) The terms and conditions determined by the Registrar under subsection (2) may include benefits for meeting objectives set out in the instrument of appointment and penalties for failure to meet the objectives.

(7) All costs and expenses incurred on account of the liquidation of the pension entity, including expenses of the Registrar, shall be borne by, and charged to, the pension entity.

(8) Payments to the liquidator shall be made on a current basis where, in the judgment of the liquidator and on the written approval of the Registrar, the pension entity has sufficient liquid assets.

(9) Any moneys owing to the liquidator at the end of the term of liquidation shall be paid from the proceeds of the sale of assets of the pension entity in accordance with the priority of claims prescribed under this Act.

(10) The Registrar may indemnify the liquidator for the costs of any claim, cause of action, judgment, order, fine, amount paid in settlement of professional fees, and other expenses reasonably incurred by the liquidator in the performance of the functions of the liquidator, unless it is shown that the liquidator acted in bad faith and in a manner inconsistent with the performance of functions and duties of a liquidator, or the exercise of the powers under this Act.

(11) The Registrar may revoke the appointment of a liquidator at any time by notice in writing to the liquidator, and the liquidator shall, upon receipt of the notice, cease to act as liquidator of the pension entity.

Effect of appointment of liquidator

122. Upon appointment of a liquidator—

(*a*) all liabilities of the pension entity shall be deemed due and payable and interest shall cease to accrue on the liabilities;

(*b*) all employment contracts of members of staff of the pension entity shall be terminated;

(*c*) any term, statutory, contractual or otherwise, on the expiration of which a claim or right of the pension entity would expire or be extinguished, shall be suspended;

(*d*) the calculation of interest and penalties against obligations of the pension entity, shall be suspended and no other charge or liability shall accrue on the obligations of the pension entity;

(*e*) all legal proceedings against the pension entity shall be stayed and the exercise of any right on the assets of the pension entity shall be suspended;

(*f*) no right may be exerted over assets of the pension entity during the pension entity's liquidation, except rights given to the liquidator;

(*g*) no creditor may attach, sell or take possession of any asset of the pension entity as a means of enforcing the claim or initiate or continue any legal proceeding to recover a debt or perfect security interests in the assets of the pension entity;

(*h*) any attachment or security interest, except one existing six months prior to the effective date of the liquidation, shall be vacated, and no attachment or security interest, except one created by the liquidator shall attach to any of the assets or property of the pension entity so long as such liquidation continues;

(*i*) the rights of shareholders shall be extinguished, except for the right to receive proceeds, if any, under this Act; and

(*j*) the liquidator may sell the assets of the pension entity or arrange for the assumption of liabilities of the pension entity on such terms as the liquidator considers fair.

Powers of liquidator

123.—(1) A liquidator shall be the sole representative of the pension entity under liquidation and shall succeed to all rights and powers of shareholders, directors and management of the pension entity.

(2) Without prejudice to the generality of subsection (1), the powers of the liquidator shall include—

(*a*) holding title to the books, records and assets of the pension entity;

(*b*) transferring or disposing of assets and liabilities of the pension entity; and

(*c*) taking such other action, the liquidator considers necessary for the efficient liquidation of the pension entity and to maximize proceeds from the sale of assets of the pension entity, including—

(i) continuing or interrupting any operations of the pension entity;

(ii) borrowing money on the security of the assets of the pension entity or without guarantee;

(iii) subject to the approval of the Registrar, suspending or limiting the payment of debts;

(iv) hiring specialists, experts or professional consultants;

(v) employing or dismissing any officer, employee, agent or advisor;

(vi) bringing or defending any action or other legal proceeding in the name of, and on behalf of, the pension entity;

(vii) executing any instrument in the name of the pension entity;

(viii) restructuring the liabilities of the pension entity through arrangements with creditors of the pension entity, including through reduction, modification, rescheduling and novation, up to the amount determined by the Registrar and

(ix) suspending the payment of capital distributions in general, and payment of any kind to directors, officers and shareholders, however, the liquidator may pay base compensation to directors and officers for services rendered in their capacity as directors and officers of the pension entity.

(3) The liquidator shall have unrestricted access to, and control over, the offices, books of accounts and other records and assets of the pension entity in liquidation and its subsidiaries.

Duties of liquidator

124.—(1) The duties of a liquidator shall include—

(*a*) managing, operating and representing the pension entity;

(*b*) marshalling assets of, and claims against, the pension entity; and

(*c*) taking such other action as the liquidator considers necessary for the efficient liquidation of the pension entity and in order to maximize proceeds from the sale of assets of the pension entity, including—

(i) administering accounts of the pension entity;

(ii) collecting debts due to the pension entity;

(iii) recovering assets owed by third parties; and

(iv) establishing the financial position of the pension entity, based on his or her determination of liquidation values of the assets and liabilities of the pension entity.

(2) The liquidator shall act in accordance with directives, directions or guidelines issued by the Registrar and shall be accountable to the Registrar for the performance of duties and the exercise of powers under this Part.

(3) The liquidator may engage an officer of Malawi Police Service, to assist the liquidator to gain access to any premises of the pension entity or gain control over and secure properties, offices, assets, books and records of the pension entity.

(4) The liquidator may, on the prior written approval of the Registrar—

(*a*) arrange a merger with another pension entity;

(*b*) dispose of a pension entity's assets and liabilities through a purchase and assumption transaction;

(*c*) organize a restructuring of the assets and liabilities of the pension entity; or

(*d*) engage in any other option which the liquidator may consider to be in the interest of the creditors of the pension entity.

(5) Where the liquidator has reasonable cause to believe that a shareholder, director, executive officer, or any other person acting on behalf of the pension entity is engaging or has engaged in a criminal activity in relation to the business of the pension entity, the liquidator—

(*a*) shall immediately notify the Registrar;

(*b*) shall report the matter to the appropriate law enforcement agency; and

(*c*) may institute civil action seeking damages, restitution or such other relief as the liquidator may consider appropriate.

Taking possession of the pension entity

125.—(1) A liquidator shall, immediately after being appointed, post at a conspicuous place at each branch of the pension entity, a notice announcing the revocation of the licence or registration of the pension entity and his or her appointment, specifying the effective date of the appointment and time of his or her taking possession of the pension entity.

(2) The notice under subsection (1) shall, in addition to the announcement, specify that all authorizations previously granted by the pension entity to any person to undertake any financial transaction or acquire, manage, transfer or dispose of any property for, or on behalf of, the pension entity are revoked.

(3) The liquidator shall, within fourteen days of his or her appointment—

(*a*) deliver to all known creditors; and

(*b*) publish in the *Gazette* and two newspapers of wide circulation in Malawi,

a notice specifying the manner and time, not being later than sixty days from the date of delivery or publication of the notice, by which any claim against the pension entity shall be filed with the liquidator.

(4) The liquidator shall, within one month of taking possession of the pension entity, produce an inventory of the assets and liabilities of the pension entity and transmit a copy thereof to the Registrar who

shall make the copy available for public examination.

(5) The liquidator shall submit monthly progress reports on the liquidation process to the Registrar in such form as the Registrar may prescribe and, upon request, provide any other information as the Registrar may require.

Termination of certain contracts

126.—(1) The liquidator may, within thirty days of his or her appointment, terminate any unfulfilled or partially fulfilled contract on the basis that fulfillment of the contract is determined to be burdensome to the pension entity and the termination shall—

(*a*) promote the orderly administration of the affairs of the pension entity; and

(*b*) protect the interests of creditors of the pension entity.

(2) Notwithstanding any other written law, any liability arising from the termination of a contract under subsection (1), shall—

(*a*) be determined as at the date of termination;

(*b*) be limited to actual direct damages incurred; and

(*c*) not include any damages for loss of profits, opportunity, or any other non-monetary damages.

(3) Subject to any other written law, the liquidator may, where he determines as appropriate, terminate—

(*a*) employment contracts for employees of the pension entity;

(*b*) any contract for services to which the pension entity is a party; and

(*c*) any obligations of the pension entity as a lessee of property.

(4) A lessor of any property occupied by the pension entity under winding-up shall—

(*a*) be given notice, of not less than thirty days, of the intended termination of the lease;

(*b*) have no claim for rent other than rent accrued up to and including the date of the termination of the lease; and

(*c*) have no right to consequential or other damages which arise by reason only of the termination of the lease, notwithstanding any term of the lease to the contrary.

Schedule of actions for winding-up and objections

127.—(1) The liquidator shall, not later than ninety days after the last day specified in the notice for filing claims against the pension entity in liquidation—

(*a*) publish in the *Gazette* and in two newspapers of wide circulation in Malawi, once a week, for three consecutive weeks—

(i) a notice of the date and place where the schedule referred to in paragraph (*b*) shall be made available for inspection; and

(ii) the last date, not being earlier than thirty days from the date of publication of the notice, on which the liquidator will file that schedule with the Registrar;

(*b*) prepare and file with the Registrar, a schedule of proposed actions to be taken for the purpose of winding-up the pension entity;

(*c*) reject any claim, where the liquidator has reasonable cause to doubt the validity of the claim;

(*d*) determine the amount owing to each known creditor whose claim is allowed, and the priority of his or her claim under this Act; and

(*e*) notify each person whose claim is allowed.

(2) A creditor of the pension entity or shareholder of the pension entity may, within twenty-one days of the filing of the schedule under subsection (1)(*b*), object to any action proposed in the schedule by filing a notice with the liquidator, in writing, detailing particulars of the objection.

(3) The Registrar shall prescribe guidelines setting out criteria and procedure for—

(*a*) determining the validity of claims;

(*b*) liquidating assets of a pension entity under liquidation; and

(*c*) return of property of customers in the custody of the pension entity.

(4) The liquidator shall sell assets of the pension entity in a transparent and commercially reasonable manner.

Revocation of pre-liquidation transfers

128.—(1) A liquidator may revoke a transaction entered into by a pension entity in liquidation, prior to the effective date of the liquidation, where the liquidator is of the opinion that the transaction was based on a forged or fraudulent document and was executed to the detriment of creditors of the pension entity.

(2) The liquidator may recover from a third party or declare void the following transactions executed by the pension entity six months prior to the effective date of the liquidation—

(*a*) gratuitous transfers to, or persons related to, directors, officers, controlling shareholder or holder of substantial interest in the pension entity;

(*b*) gratuitous transfers to third parties;

(*c*) transactions in which the consideration given by the pension entity considerably exceeds the received consideration;

(*d*) any act done, with the intention of all parties involved, to withhold assets from creditors of the pension entity or otherwise impair their rights; and

(*e*) transfer of property of the pension entity to, or for the benefit of, a creditor which has the effect of increasing the amount payable to the creditor.

(3) The liquidator may declare void any transaction, executed within a period of one year prior to the effective date of the liquidation, entered into by the pension entity with any person related to the pension entity, which the liquidator determines to be detrimental to the interests of creditors.

(4) All declarations by the liquidator under this section with regard to validity of transactions or transfers, shall be made within a period of one year from the date of commencement of the liquidation.

(5) Notwithstanding subsections (1), (2) and (3), the liquidator may not declare void, a payment or transfer by the pension entity where the payment was—

(*a*) made in the ordinary course of the business of the pension entity; or

(*b*) part of a contemporaneous exchange for reasonably equivalent value,

on the basis that, following the transfer, the recipient extended new unsecured credit to the pension entity which had not been satisfied by the pension entity as at the effective date of the liquidation.

(6) The liquidator may recover property or the value of property from a second transferee of the property where the pension entity transferred the property to a first transferee who transferred the property to the second transferee and the second transferee did not give fair value for the property, and knew or reasonably ought to have known, that the initial transfer could be set aside.

(7) The liquidator may order that a declaration made under this section be recorded in the appropriate public records of title and property rights, and a person taking title to, or acquiring any security interest or other interest in such property, after the filing of the declaration, shall take his or her title or interest, subject to the right of the pension entity to recover the property.

(8) Where a pension entity enters irrevocable money and securities transfer orders into a payment or securities settlement system

recognized as such by the Registrar, the irrevocable money and securities transfer orders shall be legally enforceable and binding on third parties, only if the transfer orders become irrevocable before the winding-up of the pension entity.

(9) Where a pension entity enters irrevocable money or securities transfer orders into a payment or securities settlement system on the day the winding-up takes effect, the transfer orders shall be legally enforceable and binding on third parties, unless the liquidator proves that the system operator was aware of the winding-up before the transfer orders became irrevocable.

(10) Any netting rules and arrangements regarding transactions issued or adopted before the decision to wind-up the pension entity and appointment of the liquidator takes effect shall be binding on the liquidator.

(11) Nothing in this Act shall prevent or prohibit a set-off by operation of law of obligations between a pension entity in liquidation and its counterparties.

(12) A termination provision of an eligible financial contract between a pension entity in liquidation and its counterparty shall be effective in determining rights and obligations between the pension entity and the contractual counterparty.

(13) The net termination value determined in accordance with this section shall be a claim of the pension entity on the counterparty or shall be admitted after its validation as a claim of the counterparty on the pension entity.

(14) Subject to subsection (11), a set-off shall not be allowed with respect to a claim on the pension entity acquired—

(*a*) within three months before the winding-up; or

(*b*) after the winding-up takes effect.

(15) Subject to this Act, claims on the pension entity shall be set-off against any sum due by a creditor to the pension entity as at the date on which the winding-up takes effect as follows—

(*a*) automatically, where such sum is matured or past due; or

(*b*) at the option of the creditor, where the sum is not matured or past due.

(16) For purposes of this section—

(*a*) a transfer order entered into a payment, clearing or securities settlement system becomes irrevocable at the time defined by the laws of that system;

(*b*) "netting" means the conversion into one net claim or one net obligation, of claims and obligations resulting from transfer orders which a participant in a settlement system either issues to, or receive from, one or more participants in that system with the result that, only a net claim or a net obligation remains;

(*c*) "eligible financial contract" means any of the following agreements—

(i) a swap agreement;

(ii) a spot, future, forward or other foreign exchange agreement;

(iii) a forward rate agreement;

(iv) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities;

(v) any derivative, combination or option in respect of, or agreement similar to, an agreement referred to in subparagraphs (i) through (iv);

(vi) any master agreement in respect to an agreement referred to in subparagraphs (i) through (v);

(vii) any master agreement in respect of a master agreement referred to in subparagraph (vi);

(viii) a guarantee of the liabilities under an agreement referred to in subparagraphs (vii); and

(ix) any agreement of a kind prescribed by the Registrar; and

(*d*) "net termination value" means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.

Priority of claims

129.—(1) Notwithstanding the provisions of any other written law, any agreement or Articles of Association of a pension entity in liquidation, allowed secured claims shall take priority over allowed unsecured claims and shall be paid to the extent of the realization of security.

(2) Notwithstanding provisions of any other written law, the following unsecured claims shall have priority of settlement against the general assets of the pension entity—

(*a*) necessary and reasonable expenses incurred by the liquidator, including professional fees;

(*b*) insured amounts payable in terms of the prevailing law relating to deposit insurance schemes in Malawi or such deposit as may be determined by the Registrar at the time of liquidation,

as the case may be;

(*c*) claims from an approved deposit insurance fund or agency to the extent of the limit of any payouts by such fund or agency, to insured depositors;

(*d*) claims from customers of the pension entity;

(*e*) wages and salaries of officers and employees of the pension entity that accrued during the three months immediately preceding the appointment of the liquidator;

(*f*) fees and other payments owing to the Registrar;

(*g*) all unsecured claims of creditors;

(*h*) all accrued taxes due and other imposts owing to the Government of Malawi; and

(*i*) subordinated debts.

(3) Unmatured liabilities shall be discounted to present value at the rate of interest to be determined by the Registrar.

(4) The liquidator shall, after payment of all claims filed against the pension entity with interest at such rate as the Registrar determines, pay claims against the pension entity that were not filed within the time limit prescribed for filing claims under this Part.

(5) Where the amount available to pay claims of any class of claimants specified in this section is not sufficient to provide payment in full to all claimants in that class, the liquidator shall distribute the available amount on a pro rata basis among the claimants in that class.

(6) Where any assets remain after final payment of claims against the pension entity, the liquidator shall distribute the remaining assets among the shareholders of the pension entity in proportion to their respective rights.

Final reporting

130.—(1) The liquidator shall, upon completion of distribution of the assets of the pension entity and fulfilling all his or her obligations under this Act and the instrument of appointment, submit to the Registrar a final report that include an audited statement of income and expense and sources and uses of funds during the period of liquidation.

(2) Where the Registrar is satisfied with the report submitted under subsection (1), the Registrar shall publish a notice of the winding-up in the *Gazette* and serve a copy of the notice on the Registrar of Companies or the relevant authority that was responsible for the incorporation of the wound-up pension entity.

(3) The Registrar of Companies or relevant authority referred to in subsection (2) shall, upon receipt of a notice under subsection (2)

strike out the name of the pension entity from their register and publish notice thereof in the *Gazette*.

(4) The liquidator shall, upon publication of the notice under subsection (2), be relieved of any further obligations in connection with the pension entity.

PART XV— APPEALS

Appeal to the Registrar

131.—(1) A member of a pension fund or provident fund who is dissatisfied with a decision of a pension entity may, in writing, appeal to the Registrar for review of the decision.

(2) A copy of the appeal under this section shall be served on the pension entity.

Appeals to the Financial Services Appeals Committee

132. A person aggrieved by a decision of the Registrar to withdraw, cancel, suspend vary or revoke a licence or registration, or to refuse an application for licence or registration, or an order to wind-up, or to impose a direction, or an administrative penalty imposed on the person under this Act may appeal to the Financial Services Appeals Committee, within twenty-one days of receipt of the decision from the Registrar's.

PART XVI—OFFENCES, AND PENALTIES

Offences relating to contravention of this Act

133.—(1) A person convicted of an offence under this Act, for which no penalty is provided, shall be liable to a fine of K100,000,000 or to an amount equal to the financial gain generated by the commission of the offence, whichever is greater and imprisonment for ten years.

(2) A person who misappropriates fund assets commits an offence and shall, on conviction—

(*a*) be liable to a fine of an amount of up to three times the amount so misappropriated and to imprisonment for four years; and

(*b*) shall, in addition to the penalty prescribed in paragraph (*a*), refund the amount so misappropriated.

(3) A person who, without reasonable excuse—

(*a*) fails, refuses, omits or neglects or is party to a failure, refusal, omission, or neglect to provide any information requested under this Act;

(*b*) does not afford the Registrar full and free access to the premises, records or documents of the institution as are relevant to the Registrar 's inspection;

(*c*) hinders the Registrar from freely interviewing any officer,

director, employee, agent, consultant, auditor, actuary or legal practitioner for a pension entity or an employer;

(*d*) refuses or fails to comply with any order or direction of the Registrar; or

(*e*) knowingly presents to the Registrar or any person authorized by the Registrar a false or forged document or makes a false statement with intent to deceive or mislead the Registrar or any person authorized by the Registrar,

commits an offence and shall be liable, in the case of—

(i) a pension entity, to an administrative penalty; or

(ii) a person other than a pension entity, on conviction, to a fine of K100,000,000 and to imprisonment for ten years.

(4) Where an offence is committed by a body corporate, each director, employee or agent of the body corporate shall also commit the offence and on conviction, shall be liable to the same penalty, unless—

(*a*) it is established that the director took reasonable precautions and exercised due diligence to avoid the commission of the offence; or

(*b*) the director proves that the offence was committed without his or her knowledge.

(5) Where a body corporate is convicted of an offence under this Act, the court may, if it considers fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on an individual convicted of the same offence.

Offences relating to liquidation

134. A person who—

(*a*) interferes with a liquidator's access to or control over the offices, records, books of accounts and assets of a pension entity under liquidation;

(*b*) refuses or fails to comply with a requirement of the liquidator which is applicable to that person, to the extent to which that person is able to comply;

(*c*) obstructs or hinders the liquidator in the exercise of the liquidator's powers under this Act; or

(*d*) furnishes information or makes a statement to the liquidator which that person knows to be false or misleading in any material particular,

commits an offence and is, on conviction, liable to a fine of

K15,000,000 and to imprisonment for seven years.

Administrative penalties

135.—(1) Where the Registrar is satisfied, on reasonable grounds, that a person has contravened this Act, the Registrar may impose administrative penalties on the person by doing one or more of the following—

(*a*) giving the person a written warning;

(*b*) directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes—

(*i*) to remedy the effects of the contravention;

(*ii*) to compensate persons who have suffered loss because of the contravention; or

(*iii*) to ensure that the person does not commit further contraventions of this Act; or

(*c*) requiring the person to pay a monetary penalty as may be prescribed.

(2) Notwithstanding subsection (1) (*b*), a directive may require the establishment of compliance programmes, corrective advertising or, in the case of a direction to a pension entity, change in the management of the institution.

(3) 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, on conviction, be liable to a fine of K100,000,000 and to imprisonment for ten years.

(4) In addition to subsection (3), where the administrative penalty imposed by the Registrar is a monetary penalty and the person on whom the monetary penalty has been imposed does not pay the monetary penalty for a period of more than twenty-one days from the date of first demand in writing by the Registrar, the amount in respect of the monetary penalty shall be recoverable by the Registrar as a civil debt.

PART XVII—MISCELLANEOUS

Accrued severance liability

136.—(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 up to 31st May, 2011.

(2) For employers not providing pension or gratuity prior to 1st June, 2011, the severance entitlement referred to in subsection (1) shall be calculated in accordance with the provisions of the Cap. 55:01 Employment Act.

(3) For employers providing pension or gratuity prior to 1st June, 2011, the severance due entitlement referred to in subsection (1) shall

be calculated as having a value equal to the value of—

(*a*) the severance due entitlement calculated in accordance with the provisions of the Employment Act; and Cap. 55:01

(*b*) less the sum of the accumulated employer pension contributions made or gratuity paid prior to 1st June, 2011 and any growth on such contribution.

(4) The severance due 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 1st June, 2011 and any growth on such contribution.

(5) Where the severance due entitlement is equal to or less than the sum of the accumulated employer pension contributions made or gratuity paid to the employee prior to 1st June, 2011 and any growth on such contributions the severance due entitlement shall not be recognized as pension.

(6) The severance due entitlement as calculated under subsection (2) and subsection (3) shall, subject to subsection (7), be transferred into a pension fund of the employee's choice on the date of commencement of this Act.

(7) The severance due entitlement shall be escalated for each year from 1st June, 2011 up to the date of commencement of this Act, at the rate of the average annual consumer price index as published by the National Statistical Office, from time to time.

(8) Any severance due entitlement that remains unpaid on the date of commencement of this Act shall be deemed as an outstanding employer contribution and shall be paid, subject to subsection (9), into a pension fund of the employee's choice with a penalty interest calculated at the rate of the Reserve Bank of Malawi policy rate plus 10 per cent.

(9) Notwithstanding subsection (6), the severance due entitlement shall, upon termination of an employment contract between the employer and employee become immediately payable to a pension fund of the employee's choice.

(10) A person who contravenes subsection (6) commits an offence and shall, on conviction, be liable to a fine of K150,000,000 and to imprisonment for twelve years.

(11) In addition to the sentence imposed under subsection (10), a court may order the convict to compensate the victim the amount due under subsection (6).

(12) In this section, "gratuity" means contractual gratuity as stipulated in an employment contract.

Pension levy

137.—(1) The Minister may, on the recommendation of the Registrar, by order published in the *Gazette*, impose a pension levy.

(2) The order made under subsection (1) shall set out the basis of calculation of pension levies for a financial year and how the levies shall be collected.

(3) In arriving at different bases of calculation under this section, the Minister may prescribe different rates of pension levy for each category of pension business.

(4) The order made under subsection (1) may include provision for imposing interest on unpaid pension levy, and for imposing penalty levy for cases where a miss-statement or other non-compliance by a pension entity leads to an under-collection of pension levy, and other financial services laws in relation to pension business.

(5) The pension levy under subsection (1) shall be utilized in performing the duties conferred under this Act.

Non-application of supervisory levy
Cap. 44:05

138. The pension entities licensed or registered under this Act shall be exempt from payment of supervisory levy imposed under the Financial Services Act.

Missing member

139. Notwithstanding anything to the contrary contained in any other written law, where a member is reported missing and is not found within a period of three years from the date he was reported missing, the trustee of a pension fund or provident fund, in collaboration with law enforcement agencies, shall conduct an investigation and if the trustee concludes that it is reasonable to presume that the member has died, the provisions of section 95 shall apply.

Treatment of unclaimed benefits

140.—(1) Where benefits have become due, a trustee shall take all necessary measures to trace and pay the beneficiaries.

(2) Any benefit due to a beneficiary which has remained unpaid on the basis that the beneficiary cannot be traced or found after a period of at least seven years shall be presumed to be an unclaimed benefit.

(3) Any benefit presumed to be unclaimed in accordance with subsection (2) shall be paid by the trustee to any person who may prove financial dependence on the missing beneficiary.

(4) Where a trustee has failed to trace any beneficiary under subsection (3), the trustee shall transfer the unclaimed amount to the fund of the Registrar.

director, employee, agent, consultant, auditor, actuary or legal practitioner for a pension entity or an employer;

(*d*) refuses or fails to comply with any order or direction of the Registrar; or

(*e*) knowingly presents to the Registrar or any person authorized by the Registrar a false or forged document or makes a false statement with intent to deceive or mislead the Registrar or any person authorized by the Registrar,

commits an offence and shall be liable, in the case of—

(i) a pension entity, to an administrative penalty; or

(ii) a person other than a pension entity, on conviction, to a fine of K100,000,000 and to imprisonment for ten years.

(4) Where an offence is committed by a body corporate, each director, employee or agent of the body corporate shall also commit the offence and on conviction, shall be liable to the same penalty, unless—

(*a*) it is established that the director took reasonable precautions and exercised due diligence to avoid the commission of the offence; or

(*b*) the director proves that the offence was committed without his or her knowledge.

(5) Where a body corporate is convicted of an offence under this Act, the court may, if it considers fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on an individual convicted of the same offence.

Offences relating to liquidation

134. A person who—

(*a*) interferes with a liquidator's access to or control over the offices, records, books of accounts and assets of a pension entity under liquidation;

(*b*) refuses or fails to comply with a requirement of the liquidator which is applicable to that person, to the extent to which that person is able to comply;

(*c*) obstructs or hinders the liquidator in the exercise of the liquidator's powers under this Act; or

(*d*) furnishes information or makes a statement to the liquidator which that person knows to be false or misleading in any material particular,

commits an offence and is, on conviction, liable to a fine of

K15,000,000 and to imprisonment for seven years.

Administrative penalties

135.—(1) Where the Registrar is satisfied, on reasonable grounds, that a person has contravened this Act, the Registrar may impose administrative penalties on the person by doing one or more of the following—

(*a*) giving the person a written warning;

(*b*) directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes—

(*i*) to remedy the effects of the contravention;

(*ii*) to compensate persons who have suffered loss because of the contravention; or

(*iii*) to ensure that the person does not commit further contraventions of this Act; or

(*c*) requiring the person to pay a monetary penalty as may be prescribed.

(2) Notwithstanding subsection (1) (*b*), a directive may require the establishment of compliance programmes, corrective advertising or, in the case of a direction to a pension entity, change in the management of the institution.

(3) 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, on conviction, be liable to a fine of K100,000,000 and to imprisonment for ten years.

(4) In addition to subsection (3), where the administrative penalty imposed by the Registrar is a monetary penalty and the person on whom the monetary penalty has been imposed does not pay the monetary penalty for a period of more than twenty-one days from the date of first demand in writing by the Registrar, the amount in respect of the monetary penalty shall be recoverable by the Registrar as a civil debt.

PART XVII—MISCELLANEOUS

Accrued severance liability

136.—(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 up to 31st May, 2011.

(2) For employers not providing pension or gratuity prior to 1st June, 2011, the severance entitlement referred to in subsection (1) shall be calculated in accordance with the provisions of the Cap. 55:01 Employment Act.

(3) For employers providing pension or gratuity prior to 1st June, 2011, the severance due entitlement referred to in subsection (1) shall

be calculated as having a value equal to the value of—

(*a*) the severance due entitlement calculated in accordance with the provisions of the Employment Act; and Cap. 55:01

(*b*) less the sum of the accumulated employer pension contributions made or gratuity paid prior to 1st June, 2011 and any growth on such contribution.

(4) The severance due 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 1st June, 2011 and any growth on such contribution.

(5) Where the severance due entitlement is equal to or less than the sum of the accumulated employer pension contributions made or gratuity paid to the employee prior to 1st June, 2011 and any growth on such contributions the severance due entitlement shall not be recognized as pension.

(6) The severance due entitlement as calculated under subsection (2) and subsection (3) shall, subject to subsection (7), be transferred into a pension fund of the employee's choice on the date of commencement of this Act.

(7) The severance due entitlement shall be escalated for each year from 1st June, 2011 up to the date of commencement of this Act, at the rate of the average annual consumer price index as published by the National Statistical Office, from time to time.

(8) Any severance due entitlement that remains unpaid on the date of commencement of this Act shall be deemed as an outstanding employer contribution and shall be paid, subject to subsection (9), into a pension fund of the employee's choice with a penalty interest calculated at the rate of the Reserve Bank of Malawi policy rate plus 10 per cent.

(9) Notwithstanding subsection (6), the severance due entitlement shall, upon termination of an employment contract between the employer and employee become immediately payable to a pension fund of the employee's choice.

(10) A person who contravenes subsection (6) commits an offence and shall, on conviction, be liable to a fine of K150,000,000 and to imprisonment for twelve years.

(11) In addition to the sentence imposed under subsection (10), a court may order the convict to compensate the victim the amount due under subsection (6).

(12) In this section, "gratuity" means contractual gratuity as stipulated in an employment contract.

Pension levy

137.—(1) The Minister may, on the recommendation of the Registrar, by order published in the *Gazette*, impose a pension levy.

(2) The order made under subsection (1) shall set out the basis of calculation of pension levies for a financial year and how the levies shall be collected.

(3) In arriving at different bases of calculation under this section, the Minister may prescribe different rates of pension levy for each category of pension business.

(4) The order made under subsection (1) may include provision for imposing interest on unpaid pension levy, and for imposing penalty levy for cases where a miss-statement or other non-compliance by a pension entity leads to an under-collection of pension levy, and other financial services laws in relation to pension business.

(5) The pension levy under subsection (1) shall be utilized in performing the duties conferred under this Act.

Non-application of supervisory levy
Cap. 44:05

138. The pension entities licensed or registered under this Act shall be exempt from payment of supervisory levy imposed under the Financial Services Act.

Missing member

139. Notwithstanding anything to the contrary contained in any other written law, where a member is reported missing and is not found within a period of three years from the date he was reported missing, the trustee of a pension fund or provident fund, in collaboration with law enforcement agencies, shall conduct an investigation and if the trustee concludes that it is reasonable to presume that the member has died, the provisions of section 95 shall apply.

Treatment of unclaimed benefits

140.—(1) Where benefits have become due, a trustee shall take all necessary measures to trace and pay the beneficiaries.

(2) Any benefit due to a beneficiary which has remained unpaid on the basis that the beneficiary cannot be traced or found after a period of at least seven years shall be presumed to be an unclaimed benefit.

(3) Any benefit presumed to be unclaimed in accordance with subsection (2) shall be paid by the trustee to any person who may prove financial dependence on the missing beneficiary.

(4) Where a trustee has failed to trace any beneficiary under subsection (3), the trustee shall transfer the unclaimed amount to the fund of the Registrar.

(5) The unclaimed benefits so transferred to the Registrar under subsection (4), shall form part of the funds of the Registrar.

(6) Any person who lodges a claim for any unclaimed benefits transferred to the Registrar pursuant to subsection (5) shall have the unclaimed benefits paid to him upon providing evidence of such entitlement to the satisfaction of a competent court.

Member to hold one pension account

141. A member of a pension fund under the mandatory occupational pension scheme shall hold and maintain one pension account at all times.

Payment to employers restricted

142.—(1) Except as provided in subsection (2), the trustee of a 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.

Victimization of trustees

143.—(1) A person shall not victimize a trustee of, or an officer or employee of a trustee of a pension fund or provident fund.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine of K100,000,000 and to imprisonment for ten years.

(3) Where a person victimizes a trustee of, or an officer or employee of a trustee of a pension fund or provident 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—

(*a*) "victimize" means subject, or threaten to subject, the trustee, officer or employee of the trustee to a detriment on the ground that the trustee, officer or employee of the trustee—

(i) 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

(ii) 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;

(*b*) an employer subjects a trustee, or an officer or employee of a trustee, who is an employee of the employer to a detriment if the employer—

(i) dismisses the employee;

(ii) abuses the employee in his or her employment; or

(iii) alters the position of the employee to the employee's prejudice; and

(*c*) an employer shall not be deemed to subject an employee to a detriment merely because the employer permanently ceases to exist;

(5) In proceedings under subsection (3), it shall—

(*a*) not be necessary for the plaintiff to prove the defendant's reason for the alleged action; and

(*b*) be a defence if it is established that the action was not motivated, whether in whole or in part, by the alleged reason.

Rule against remoteness of vesting

144. The rule of law against remoteness of vesting shall not apply in relation to a pension fund.

Jurisdiction of the Industrial Relations Court Cap.54:01

145.—(1) 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 54:01

(2) In any labour related dispute arising out of this Act, the Industrial Relations Court may make any orders which are necessary for the purposes of enforcing this Act.

Public statement of a contravention

146.—(1) Where it appears to the Registrar that a person has contravened a requirement imposed on the person by, or under, this Act, the Registrar may publish a statement to that effect.

(2) After a statement under this section is published, the Registrar shall send a copy of the statement to the person.

Regulations

147.—(1) The Minister may, on recommendation of the Registrar, make regulations for the better carrying out of this Act.

(2) Without derogating from the generality of the foregoing, the Regulations made under this Act may be with respect to—

(*a*) the management, control and administration of the National Pension Fund;

(*b*) the investment of fund assets and the management of those investments;

(*c*) other requirements to facilitate compliance with this Act; and

(*d*) anything required to be prescribed under this Act.

(3) Notwithstanding section 21 (*e*) of the General Interpretation Act, the Regulations made under this Act may prescribe a fine of up to K10,000,000 and imprisonment for one year for an offence committed in contravention of such regulations.

148. The Deceased Estates (Wills, Inheritance and Protection) Act, the Estate Duty Act and any other law relating to deceased estates, shall not apply to the administration, distribution, payments and oversight of a member's entitlement to benefits in a pension fund or provident fund.

Non-application of the Estate Duty Act and any other law relating to deceased estates
Cap. 10:02
Cap. 43:02

149.—(1) The Pension Act is repealed.

Repeal and savings
Cap. 55:02

(2) Any subsidiary legislation made or issued under the Pension Act repealed under subsection (1)—

(*a*) shall remain in force, unless in conflict with this Act, and shall be deemed to be subsidiary legislation made under this Act; and

(*b*) may be replaced, amended, or repealed by subsidiary legislation made under this Act.

150.—(1) All pension entities that were licensed or registered under the Act repealed under section 149, shall at the date of commencement of this Act, be deemed to be licensed or registered under this Act.

Transitional

(2) All pension entities referred to under subsection (1) shall, within twelve months from the date of commencement of this Act, meet the requirements prescribed under this Act.

Passed in Parliament this fifteenth day of December, two thousand and twenty two.

FIONA KALEMBA
Clerk of Parliament