

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS SECOND AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No 22021 of 24 January 2001) (The English text is the
official text of the Bill)*

(MINISTER OF FINANCE)

[B 41—2001]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Pension Funds Act, 1956, so as to make new provision for the apportionment of actuarial surpluses and for minimum benefits; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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

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

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

“ ‘actuarial surplus’, in relation to a fund which is—

(a) subject to actuarial valuation, means the difference between—

(i) the value that the valuator has placed on the assets of the fund less the value of those contingency reserve accounts which are established or which the board of the fund deems prudent to establish on the advice of the valuator; and 15

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

(b) exempt from actuarial valuation, means the difference between— 20

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

(ii) the sum of the values of all the accounts held for individual members, whether contributory or paid-up, plus any other liabilities;”;

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

“ ‘commencement date’ means the date of commencement of the Pension Funds Second Amendment Act, 2001;”;

- (c) by the insertion in subsection (1) after the definition of “complaint” of the following definitions:
- “ ‘contingency reserve account’, in relation to a fund, means an account of the fund to which shall be credited or debited such amounts as the board of the fund concerned shall determine, on the advice of the valuator where the fund is not exempt from actuarial valuations, in order to provide for contingencies explicitly set out in the rules of the fund; ‘contribution holiday’, in relation to a—
- (a) defined benefit category of a fund, means payment by the employer of less than the difference between the standard contribution rate as defined in generally accepted actuarial practice and the contribution payable by members; or
- (b) defined contribution category of a fund, means payment by the employer of less than the employer contribution rate defined in the rules prior to application of any credit balance in any employer reserve account or employer surplus account;
- ‘conversion’, in relation to a category of a fund, means the change of the retirement benefit from defined benefit to defined contribution, or vice versa;”;
- (d) by the insertion in subsection (1) after the definition of “court” of the following definitions:
- “ ‘deferred pensioner’ means a member who has not yet retired but has left the service of the employer concerned prior to normal retirement age, as defined in the rules of the fund, leaving in the fund the member’s rights to such benefits as may be defined in the rules;
- ‘defined benefit category of a fund’ means a category of a fund other than a defined contribution category of a fund;
- ‘defined contribution category of a fund’ means a category of members in respect of whom the benefit on retirement has a value equal to the value of the fixed-rate contributions paid by the member and by the employer on behalf of the member, where such fixed rates are defined in the rules of the fund, less such expenses as the board of the fund determines should be deducted from the contributions paid, augmented by such investment returns as the board of the fund determines;”;
- (e) by the insertion in subsection (1) after the definition of “dependant” of the following definitions:
- “ ‘employer’, in relation to a fund, means an employer participating in the fund;
- ‘employer surplus account’, in relation to a fund, means an account of the fund to which shall be credited—
- (a) amounts allocated by the board of the fund in terms of section 15A for use by the employer;
- (b) such contributions as are specified in the rules to be credited to this account; and
- (c) investment return on the balance in the account from time to time at a rate determined by the board of the fund after taking account of the earnings of the fund,
- and to which shall be debited any surplus utilised by the employer;
- ‘fair value’, in relation to the assets of a fund, means the fair value of the assets of the fund determined in accordance with South African Statements of Generally Accepted Accounting Practice;”;
- (f) by the insertion in subsection (1) after the definition of “fund” of the following definition:
- “ ‘investment reserve account’, in relation to a fund which has a defined contribution category, means an account of the fund to which shall be—
- (a) credited the gross investment earnings of the fund; and
- (b) debited the investment returns credited to individual member accounts of members of defined contribution categories, the pensioner reserve account, any reserve accounts which provide benefits to members who belong to a defined benefit category and any contingency reserve accounts, and such expenses as the board of the fund determines are best levied against the gross investment

- earnings, including any tax payable on the investment buildup of the fund;”;
- (g) by the insertion in subsection (1) after the definition of “member” of the following definitions:
- “ ‘member’s individual account’, in relation to an individual member of a defined contribution category of a fund, means the amount determined in terms of section 15K(1);
- ‘member surplus account’, in relation to a fund, means an account of the fund to which shall be—
- (a) credited—
- (i) amounts allocated by the board of the fund in terms of section 15A to be used for the benefit of members; and
- (ii) investment return on the balance in the account from time to time at a rate determined by the board after taking account of the earnings of the fund; and
- (b) debited—
- (i) the cost of any benefit improvements funded from the account; and
- (ii) any expenses which would otherwise reduce benefits payable to members;
- ‘minimum contribution accumulation’, in relation to an individual member, means the amount determined in terms of section 15K(2);
- ‘minimum individual reserve’—
- (a) in relation to a member of a defined benefit category of a fund, means the amount determined in terms of section 15K(3)(a); and
- (b) in relation to a member of a defined contribution category of a fund, means the amount determined in terms of section 15K(3)(b);
- ‘minimum pension increase’ means the amount determined in terms of section 15K(4);”;
- (h) by the insertion in subsection (1) after the definition of “officer” of the following definition:
- “ ‘pensioner’, in relation to a fund, means a person who is in receipt of a pension paid from the fund;”;
- (i) by the insertion in subsection (1) after the definition of “prescribed” of the following definition:
- “ ‘principal employer’, in relation to a fund, means the employer defined as the principal employer in the rules of the fund;”;
- (j) by the insertion in subsection (1) after the definition of “regulation” of the following definitions:
- “ ‘reserve account’, in relation to a fund, means a contingency or investment reserve account, as the case may be;
- ‘retrenchment’, in relation to a member, means dismissal from employment based on the operational requirements of the relevant employer;”;
- and
- (k) by the insertion in subsection (1) after the definition of “rules” of the following definitions:
- “ ‘stakeholder’, in respect of a fund, means a current member, including a pensioner and a deferred pensioner, a former member and an employer participating in the fund;
- ‘statutory actuarial valuation’, in relation to a fund, means an investigation by a valuator contemplated in section 16;
- ‘surplus apportionment date’, in relation to a fund, means the effective date upon which any actuarial surplus is apportioned in terms of section 15B;”.

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

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

“(c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition—

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

Insertion of section 14A in Act 24 of 1956

3. The following section is hereby inserted in the principal Act after section 14: 15

“Minimum benefits

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

- (a) The benefit paid to a member who is retrenched shall not be less than the minimum individual reserve; 20
 - (b) the benefit paid to a member if the fund is terminated in terms of section 28 or 29 shall not be less than the minimum individual reserve: Provided that, where the fair value of the assets of the fund after recovery of any debt owed by the employer in terms of section 30(3) is lower than the sum of the total of the minimum individual reserves for all members who are being included in the distribution of the assets after adjustment for any benefits paid previously and the cost of annuity policies which will provide equivalent pensions to all existing pensioners and deferred pensioners, the minimum individual reserve may be proportionally reduced by the ratio which the fair value of the assets bears to the total of all the minimum individual reserves adjusted for any benefits paid previously plus the cost of such annuity policies; 25 30
 - (c) if a category of the fund is converted from a defined benefit category to a defined contribution category, the amount to be credited to the member’s individual account shall not be less than the minimum individual reserve; 35
 - (d) if a member is transferred from one fund to another, the transfer value shall not be less than the minimum individual reserve, provided such transfer is not the transfer of money to which the member has acquired a right following his or her resignation or dismissal from service; 40
 - (e) starting with the pension increase to be granted on the surplus apportionment date, and at least once every three years thereafter, the pension increase to be granted to pensioners and deferred pensioners shall not be less than the minimum pension increase; and 45
 - (f) if a member leaves the fund prior to retirement with a benefit in terms of the rules which is based upon the accumulation of the member’s own contributions with interest, the member shall not receive less than the minimum contribution accumulation in respect of his or her own accumulated contributions and any share of the contributions paid on his or her behalf by the employer. 50
- (2) (a) In respect of a fund which is registered on or after a date three months after the commencement date, subsection (1) shall apply on registration.
- (b) In respect of a fund which is registered prior to a date three months after the commencement date contemplated in paragraph (a)— 55
- (i) subsection (1)(a), (c) and (d) shall apply from a date 12 months after the surplus apportionment date;

- (ii) subsection (1)(b) and (e) shall apply from the commencement date; and
 - (iii) subsection (1)(f) shall apply from the scheme anniversary coincident with or next following the commencement date.
- (3) If the employer exercises any right that the employer has in terms of the rules of the fund to terminate the fund prior to the commencement date or to change the basis upon which future benefits accrue prior to the date from which subsection (1)(a), (c) and (d) applies to the fund, the members may not seek redress against the employer in respect of any increase in value of the benefits that would occur as a result of the application of minimum individual reserves to the fund.”.

Insertion of sections 15A to 15L in Act 24 of 1956

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

“Rights to use of actuarial surplus

- 15A.** (1) All actuarial surplus in the fund belongs to the fund.
- (2) Once actuarial surplus is apportioned to either the member surplus account or the employer surplus account in terms of sections 15B and 15C, members and the employer acquire rights to use such actuarial surplus as provided for in this section.
- (3) After the commencement date the only portion of the assets of the fund that may be utilised by, or for the benefit of, the employer is any credit balance in the employer surplus account: Provided that the employer may continue a contribution holiday which the employer was already taking immediately prior to the commencement date, upon the following conditions:
- (a) The value of any contribution holiday taken by the employer during any period between the commencement date and the surplus apportionment date, augmented by the investment return earned by the fund, nett of expenses, must be added to the actuarial surplus to be apportioned at the surplus apportionment date, and must be debited to the employer surplus account after the surplus apportionment.
 - (b) If the employer surplus account has a debit balance after such debit, the debit balance will represent a debt owed by the employer to the fund and the employer must redeem such debt within a period determined by the board of the fund, and the fund must then notify the registrar, in writing and in the prescribed manner, of the amount and terms of repayment of any such debt.
- (4) Any credit balance in the member surplus account must be used for the benefit of members as provided for in section 15D.

Apportionment of existing surplus

- 15B.** (1) (a) Subject to paragraph (b), the board of a fund shall submit to the registrar a scheme for the proposed apportionment of any actuarial surplus (in this section referred to as the scheme) as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date.
- (b) The board of the fund shall submit the scheme not later than 15 months after the effective date contemplated in paragraph (a): Provided that if the board of the fund elects to apportion actuarial surplus at a date earlier than the effective date of the next statutory actuarial valuation, it may do so if the statutory valuation date is advanced to such earlier date: Provided further that if the fund is liquidated in terms of section 28 or 29 at a date prior to the effective date of the next statutory actuarial valuation, the effective date of the liquidation shall be the surplus apportionment date.
- (2) A scheme—
- (a) shall comply with such conditions as the registrar may prescribe by regulation; and
 - (b) may involve—

- (i) the improvement of benefits to existing members and pensioners;
 - (ii) increases to benefits or transfer values in respect of former members;
 - (iii) the crediting of an amount to the member surplus account;
 - (iv) the crediting of an amount to the employer surplus account; or
 - (v) any two or more of the matters contemplated in subparagraphs (i) to (iv).
- (3) After taking account of the financial history of the fund in such manner as may be prescribed by regulation, the board of the fund shall determine—
- (a) who may participate in the apportionment of actuarial surplus, and shall include in such apportionment such category of former members as may be prescribed;
 - (b) what amount of actuarial surplus has to be retained in contingency reserve accounts;
 - (c) an equitable distribution of the residual actuarial surplus between the various classes of stakeholders whom the board has determined shall participate in the apportionment, following which such portion as is due to the employer shall be credited to the employer surplus account; and
 - (d) how, in the case of existing members and former members, the allocated portion of actuarial surplus shall be applied for their benefit, including the crediting of any portion to the member surplus account or to the members' individual accounts, as the case may be.
- (4) At least 75 percent of the members of the board of the fund duly constituted in terms of section 7A must approve the scheme.
- (5) Notwithstanding anything to the contrary in the rules of the fund, no person other than the relevant board, or, in the event of a deadlock within the board, the special *ad hoc* tribunal referred to in section 15L, and the registrar may approve the scheme.
- (6) An apportionment in terms of this section shall be of no force or effect unless—
- (a) the scheme, including a copy of every actuarial and other statement taken into account for purposes of the scheme, has been submitted to the registrar;
 - (b) the registrar has been furnished with a certificate signed by the valuator stating whether or not the valuator finds the apportionment of the surplus between the stakeholders to be equitable and if not, why not, together with such additional particulars or such special report by the valuator as the valuator may deem necessary for purposes of this subsection;
 - (c) the registrar has been furnished with such additional report as he or she may require from an independent actuary appointed by him or her on such matters associated with the apportionment of the actuarial surplus as the registrar shall determine and including such information as may be prescribed: Provided that the registrar shall require such report where the board of the fund has been unable to reach agreement within the prescribed period, or where there are complaints in respect of the apportionment of surplus which have not been resolved to the satisfaction of the complainants concerned: Provided further that the costs resulting from the appointment of such independent actuary shall be borne by the fund;
 - (d) the employer and members have been informed of the scheme in a manner which is clear and understandable to the members and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the amounts of any actuarial surplus which it is intended to credit to the member surplus account and to the employer surplus account, respectively, and the costs of any benefit improvements for members and former members: Provided that—
 - (i) the type of information to be included in this communication may be prescribed, including a requirement that the independent

- actuary, the valuator or both shall certify that he or she is, or they are, satisfied that the communication material is objective and contains sufficient information to enable any stakeholder to judge the reasonableness of the scheme; and
- (ii) the communication shall be explicit about how and where any complaint should be lodged; 5
 - (e) the employer and members have had four weeks after receipt of the communication in which to complain to the board of the fund;
 - (f) the board of the fund has considered any objection contemplated in paragraph (e) before submitting the scheme to the registrar; 10
 - (g) the principal officer of the fund has furnished the registrar with details of all objections lodged with the board and the actions taken to address such objections;
 - (h) the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date; and 15
 - (i) the registrar has forwarded a certificate to the principal officer of the fund to the effect that all the requirements of this subsection have been fulfilled. 20
- (7) If the board of a fund fails to submit a scheme in terms of subsection (1) or if the registrar is not satisfied that the distribution is reasonable and equitable, the registrar shall refer the apportionment of the surplus to the special *ad hoc* tribunal referred to in section 15L, and such tribunal shall exercise the powers of the board in terms of this section and any reference in this section to the board shall be construed as a reference to the tribunal. 25

Apportionment of future surplus

- 15C.** (1) The rules of a fund may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account. 30
- (2) If the rules of a fund are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board of the fund taking into account the interests of all the stakeholders in the fund: Provided that, notwithstanding anything to the contrary in the rules of the fund, neither the employer nor the members may veto such apportionment. 35

Utilisation of surplus for benefit of members

- 15D.** (1) Notwithstanding anything to the contrary in the rules of a fund but subject to subsection (2), any credit balance in the member surplus account may only be used by the board of the fund to— 40
- (a) improve benefits for existing members;
 - (b) improve the benefits previously paid to former members or the amounts previously transferred in respect of former members;
 - (c) reduce current contributions due from members; and
 - (d) meet, in full or in part, expenses which would otherwise reduce the proportion of the members' contributions that are invested for retirement. 45
- (2) The credit balance contemplated in subsection (1) after the apportionment of actuarial surplus as at the surplus apportionment date shall be used as specified in the scheme submitted in terms of section 15B(1) if the scheme makes provision for the use of such credit balance. 50

Utilisation of surplus for benefit of employer

- 15E.** (1) Notwithstanding anything to the contrary in the rules of a fund, the principal employer or, with the approval of the principal employer, any or all other participating employers may use actuarial surplus allocated to the employer surplus account in terms of sections 15B and 15C for any of the following purposes, namely— 55

- (a) funding a contribution holiday;
 - (b) payment of pensions, or an increase in pensions in course of payment, so as to compensate members for the loss of any subsidy from the employer of their medical costs after retirement;
 - (c) meeting, in full or in part, expenses which the employer is obliged to pay in terms of the rules of the fund; 5
 - (d) improving the benefits payable to all, or a category of, members, as determined by the employer;
 - (e) transferring part, or all, of the employer surplus account in terms of subsection (2) to the employer surplus account in another fund where the employer is a participating employer; 10
 - (f) on liquidation of the fund, payment in cash to the employer in terms of section 15I; and
 - (g) in order to avoid retrenchment of a significant proportion of the workforce, payment in cash to the employer in terms of section 15J. 15
- (2) The registrar may approve the transfer of a portion of the employer surplus account from the fund to the employer surplus account in another fund, if the following conditions are satisfied, namely, that—
- (a) the employer who has control of the employer surplus account in terms of the rules of the fund has similar control of the employer surplus account in the transferee fund; 20
 - (b) employees of the employer are members or former members of the fund to which the transfer is made;
 - (c) the employer applies to the registrar for approval of the transfer, giving such details and supporting such reports as the registrar may require; and 25
 - (d) the registrar is satisfied that such transfer is necessary in order to achieve an equitable distribution of the surplus between the funds.

Existing employer reserve accounts

- 15F.** (1) On or after the commencement date, the board of a fund may apply to the registrar to transfer all or some of the credit balance in an existing employer reserve account to the employer surplus account. 30
- (2) The registrar may approve such transfer if he or she is satisfied that the allocation of actuarial surplus to such account was negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C. 35
- (3) Any remaining portion of the credit balance in an existing employer reserve account shall be treated as actuarial surplus to be distributed in terms of section 15B.

Right to share in surplus accounts on exit 40

- 15G.** (1) Notwithstanding anything to the contrary in the rules of a fund, the board of a fund must consider the degree to which members, who are transferring to another fund or who are leaving the fund with payment of the benefit defined in the rules, should benefit from any credit balances in the member surplus account, investment reserve account and any contingency reserve accounts. 45
- (2) Unless the board of the fund considers that it would be inequitable to remaining members, or that there are sound administrative reasons why it should not be done, in which case the board should determine some reasonable alternative, members who transfer out of the fund shall receive as part of their transfer values a share of any credit balances in the member surplus account and investment reserve account in the ratio that the liability of the fund in respect of the past service of the members transferring bears to the liability of the fund towards all its members in respect of past service at the date of transfer. 50
- (3) Notwithstanding anything to the contrary in the rules of a fund, existing members and former members may not participate in the employer surplus account when they transfer out of a fund or when they become entitled to a benefit, unless the relevant employer so directs. 55

Use of surplus accounts to fund deficits

- 15H.** (1) If a fund has credit balances in any of its reserve accounts, the member surplus account or the employer surplus account and the fund is found to have a deficit following an actuarial valuation, including a valuation carried out for the purpose of distributing assets on liquidation of the fund, such credit balances shall be reduced in the same proportion by the amount of the deficit: Provided that no credit balance may be reduced by more than the amount to which the account was in credit. 5
- (2) If the deficit exceeds the credit balances in the reserve accounts, the member surplus account and the employer surplus account, the credit balances shall be applied in full to reduce the deficit and shall be reduced to zero. 10

Application of surplus accounts on liquidation of fund

- 15I.** (1) On liquidation of a fund, any credit balances in any reserve accounts, the member surplus account and the employer surplus account may be drawn upon to secure the rights and reasonable benefit expectations of the members participating in the distribution: Provided that the credit balances in any such accounts shall be reduced by the same proportion. 15
- (2) On liquidation of a fund, any remaining credit balances in the member surplus account, any contingency reserve accounts and any surplus which has not been allocated to the member and employer surplus accounts, shall be used for the benefit of the members and former members of the fund, in such manner as the liquidator, acting on the advice of the valuator, shall determine. 20
- (3) On liquidation of a fund, any remaining balance in the employer surplus account shall be paid to the employer unless the employer has been liquidated, in which case it shall be distributed amongst the members at the date of liquidation and such former members as are eligible in terms of the rules to participate in the distribution. 25

Use of employer surplus to prevent job losses 30

- 15J.** (1) A fund may apply to the registrar for permission to pay any credit balance in an employer surplus account to an employer where negotiations in terms of section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), have confirmed the need to retrench employees if additional capital is not obtained. 35
- (2) The application shall be made to the registrar in the prescribed manner.
- (3) The registrar may only grant an application, and issue a certificate to the applicant to the effect that the requested payment may take place, if the registrar is satisfied that— 40
- (a) members have had full disclosure of the current financial position of the fund and the proposed distribution to the employer, and the need of the employer for additional capital in order to maintain employment;
 - (b) members have had a reasonable opportunity to consider the proposal;
 - (c) at least two thirds of the members currently in employment have approved the proposal; and 45
 - (d) negotiations in terms of section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), have confirmed the need to retrench more than 10 per cent of the membership of the fund as at the previous financial year end, if the payment is not made. 50

Determination of member's individual account, minimum contribution accumulation, minimum individual reserve and minimum pension increase

- 15K.** (1) (a) In determining the member's individual account in relation to an individual member of a defined contribution category of a fund, the board of the fund shall take into account the sum of the fixed-rate 55

contributions paid by the member and the employer on behalf of the member, less such expenses as the board of the fund determines should be paid out of the contributions plus any actuarial surplus apportioned to such account, augmented by such investment returns as the board of the fund determines having regard to the gross investment return earned by the fund and such expenses as the board of the fund determines should be paid out of the gross investment return: Provided that the board of the fund may elect to smooth these investment returns over a period which may not exceed 10 years.

(b) Where the board of the fund permits members to exercise choice over the investment portfolio into which members' and employers' contributions are invested on behalf of the member, the reference to 'gross return earned by the fund' in paragraph (a) shall be construed as a reference to the gross return that would have been earned on the investment portfolios selected by the member taking into account the timing and amount of money invested on behalf of the member.

(2) In determining the minimum contribution accumulation of a member the board of the fund shall take into account the value of the member's contributions, less such expenses as the board of the fund deems appropriate to deduct from the contributions, augmented by interest at a rate which is reasonable in relation to the investment return earned by the fund if all investment decisions are made at fund level, or in relation to the investment return appropriate to the investment portfolios selected by the member if investment decisions are made by the individual member, nett of such expenses as the board of the fund determines should be offset against the investment return, together with such share of the employer contributions paid in respect of the member as has vested in the employee in terms of the rules of the fund, augmented by the same rate of interest: Provided that the board of the fund may elect to smooth these interest rates over a period which may not exceed 10 years.

(3) In determining the minimum individual reserve of a member of a—
(a) defined benefit category of a fund, the board of the fund shall take into account the fair value equivalent of the present value of the member's accrued deferred pension: Provided that where there is not a uniform rate of accrual over the full period of membership of the fund, the accrued deferred pension shall be calculated assuming a uniform rate of accrual as if the member had remained in service until normal retirement age as defined in the rules of the fund: Provided further that the fair value equivalent and the present value shall assume rates of increase before and after retirement, mortality rates and rates of discount as prescribed by the registrar by notice in the *Gazette*;

(b) defined contribution category of a fund, the board of the fund shall take into account the value of the member's individual account together with a share of the investment reserve account, the member surplus account and such contingency reserve accounts as the board of the fund may determine should be included in terms of section 15G, in the proportion that the member's individual account value as at the effective date of the calculation bears to the total of all members' individual account values as at that date or such other method of apportionment as the board of the fund deems reasonable.

(4) In determining the minimum pension increase the board of the fund shall take into account the lower of—

(a) the rate of increase to all pensioners paid from the fund and all deferred pensioners that would result from—

(i) accumulating the liabilities for pensioners at their dates of retirement and deferred pensioners at their dates of termination of service, adjusted to an equivalent fair value of assets, less pension payments, cash amounts paid on retirement and those expenses that the board of the fund deems reasonable, augmented by the investment return earned on the assets of the fund less such expenses as the board deems reasonable, but the board of the fund may use the investment return earned on the assets backing

- pensioner and deferred pensioner liabilities instead of using the investment return earned on the assets of the fund if such assets have been invested separately from the other assets of the fund; and
- (ii) dividing the amount calculated in terms of paragraph (i) by the present value of current pensions and deferred pensions after making allowance for future pension increases at the rate determined by the board, mortality and expenses; and 5
- (b) the amount required to increase the pension to the pension payable in the month following retirement, nett of the commutation of any portion of the pension for cash or the deferred pension at the date of termination of service, increased by the change in the consumer price index from the date of retirement in the case of a pensioner or the date of termination of service in the case of a deferred pensioner, to the effective date of the calculation of the increase: Provided that the board may average the rate of increase in question across all pensioners and deferred pensioners. 10
- (5) For purposes of subsection (4), where the pension has arisen because of the death of a member rather than the member's retirement, any reference in that subsection to 'retirement' shall be construed as a reference to death. 15 20

Specialist tribunal

- 15L.** (1) Where the board of a fund is unable to reach agreement on the apportionment of an actuarial surplus in terms of section 15B within the prescribed period, or if the registrar is not satisfied that the scheme submitted by the board in terms of section 15B is reasonable and equitable or if the registrar considers that unresolved complaints require investigation which may lead to a review of such scheme, the registrar shall appoint a special *ad hoc* tribunal to perform the functions of the board set out in section 15B. 25 30
- (2) The tribunal shall consist of at least three members who must all be independent of any stakeholder in the fund, and of whom—
- (a) one shall be a lawyer who satisfies the conditions set out in section 30C(2): Provided that such lawyer may also be the Adjudicator; and 35
- (b) one shall be an actuary who has experience in retirement fund financing.
- (3) The tribunal shall make the apportionment within such period as may be determined by the registrar.
- (4) Three members of the tribunal shall constitute a quorum.
- (5) The tribunal shall elect a chairperson from amongst its members and such chairperson shall have a deliberative vote but no casting vote. 40
- (6) At least two-thirds of the members of the tribunal must agree to any decision or step taken in the exercise of the powers contemplated in section 15B(7).
- (7) The tribunal may follow any procedure which it considers appropriate in conducting an investigation, including procedures in an inquisitorial manner, and affording any stakeholder the right to a hearing. 45
- (8) Notwithstanding section 22 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), the tribunal may obtain copies of any document or correspondence contained in the files of the registrar relating to a fund in connection with which the tribunal is conducting an investigation. 50
- (9) (a) For purposes of an investigation, the tribunal may—
- (i) under the hand of the chairperson, summon any person who in the opinion of the tribunal may be able to give material information concerning the subject matter of the investigation or who is believed by the tribunal to have in his or her possession or custody or under his or her control any book, document, record or thing which has any bearing on the subject matter of the investigation, to appear before it at a time and place specified in the summons, to be questioned or to 55

- produce that book, document, record, or thing, and may retain for inspection any book, document, record or thing so produced;
- (ii) through the chairperson administer an oath to, or accept an affirmation from, any person summoned under subparagraph (i) and question that person and require the person to produce any book, document, record or thing in his or her possession or custody or under his or her control. 5
- (b) A summons referred to in paragraph (a) shall be served in the same manner as a summons for the attendance of a witness at a civil trial in a magistrate's court.
- (c) In connection with the questioning of any person summoned under this section or the production by such person of any book, document, record or thing, the law relating to privilege as applicable to a witness summoned to give evidence or to produce a book, document, record or thing at a civil trial before a court of law shall apply. 10
- (d) (i) Any person summoned in terms of this subsection or who has given evidence before a tribunal shall be entitled to the same witness fees as if he or she had been summoned to attend or had given evidence at a civil trial in a magistrate's court held at the place where the investigation is held. 15
- (ii) Any fees which may become payable in terms of subparagraph (i) shall be paid by the fund. 20
- (10) The tribunal shall keep, whether in writing or by mechanical or electronic means, a permanent record of the proceedings relating to the determination of a matter before it, including the apportionment of actuarial surplus and any evidence given.
- (11) After the tribunal has completed an investigation, it shall send a statement containing its determination and the reasons therefor, signed by the members of the tribunal, to all parties concerned as well as to the registrar. 25
- (12) Any costs arising from the work of the tribunal, including periodical allowances or compensation for personal expenses of the members of the tribunal, shall be recovered from the fund out of the surplus being apportioned if the tribunal satisfies the registrar that such costs were reasonably incurred in the performance of the required functions. 30
- (13) Any member of the public may obtain a copy of the record on payment of a fee determined by the registrar." 35

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

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

- "(3) If a registered fund is terminated or dissolved in terms of section 28 or 29 after the date from which minimum individual reserves are payable on transfer or retrenchment, and the fair value of the assets of the fund, less any current liabilities, is less than the sum of the minimum individual reserves payable in respect of the existing members and former members who may participate in the distribution of the assets (with appropriate adjustment for benefits previously paid in the case of former members) and the cost of annuity policies which will provide equivalent pensions for the existing pensioners and deferred pensioners, the shortfall shall represent a debt payable by the employer to the fund." 40 45

Amendment of section 30H of Act 24 of 1956, as inserted by section 3 of Act 22 of 1996 50

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

- "(4) The Adjudicator shall not have jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B which relate to the decisions taken by the board of the fund or any stakeholder in the fund or any specialist tribunal convened in terms of section 15L." 55

Short title and commencement

7. This Act is called the Pension Funds Second Amendment Act, 2001, and comes into effect on a date to be determined by the President by proclamation in the *Gazette*.

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

1. INTRODUCTION

The Bill seeks to amend the Pension Funds Act, 1956 (Act No. 24 of 1956) (“the Act”), by the introduction of minimum values which are to be paid in future from retirement funds in defined circumstances, such as transfer, conversion or retrenchment. The Bill also proposes minimum levels of pension increase and minimum levels of interest to be added to member contributions in respect of early leavers. This will prevent the generation in future of surplus as a result of the inequitable treatment of members leaving the fund or receiving pension increases. Future surplus then ceases to be contentious, and can be left to be distributed by the board of the fund, either in terms of the rules of the fund or, if the rules are silent, in terms of the normal exercise of their fiduciary duties towards all stakeholders.

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

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

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

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

2. GUIDING PRINCIPLES

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

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

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

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

therefore represent the actuarial value of assets less such contingency reserves and the fund's liabilities.

- (b) A regime must be put in place for the future which will ensure that members who transfer out of the fund, who experience a conversion in the basis of funding, or who are retrenched get sufficient funds to enable them to invest the proceeds in assets with a reasonable chance that the assets will grow to achieve a matching benefit on retirement to that which is foregone. Similarly, pensioners must get the increases for which the trustees make provision, and members who resign or their dependants if they die must get a fair rate of interest added to the accumulation of their own contributions. This set of conditions has given rise to a concept of minimum benefits, which is introduced for the first time.
- (c) The minimum benefit regime will, in some funds, effectively improve benefits payable to members. The cost of this improvement may be unaffordable to employers. Such funds, members and employers must have an opportunity to assess the financial impact of the new regime, determine if their benefit structure is affordable, negotiate any changes and give effect to them before the new regime comes into effect. Members should not be able to claim additional benefit value if a fund terminates during this window period.
- (d) An additional burden should not be placed on the employer without the employer's consent, except where an action has been taken in the past to unduly benefit decision-makers or the employer at the expense of the members in general. This has been interpreted to require that we must work only with existing surplus in regard to the correction of past inequities plus the value of certain benefit improvements, which may not have been properly considered by the trustees.
- (e) Existing surplus should be equitably apportioned between members, former members and the employer, with appropriate checks and balances to prevent abuse and to ensure that the unequal bargaining power between employer appointed and member-elected members of the board is neutralised, including the appointment of a specialist tribunal which will perform the apportionment for the board if the latter deadlocks or if there are material complaints which remain unresolved. An independent actuary may be required in cases of deadlock or doubt as to the independence of the valuator to the fund from the employer.
- (f) Members and the employer must get rights to whatever actuarial surplus has been apportioned to them. These rights must specify not only how surplus will be used, but also rights on termination of the fund.
- (g) The employer should be able to use surplus allocated to it to fund a contribution holiday, subsidise expenses, improve benefits, transfer it between funds, and repatriate it (pay to the employer), only on liquidation of the fund and when due process in terms of section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), has shown that repatriation is needed to prevent significant job losses.

3. PROPOSED AMENDMENTS TO ACT

3.1 Clause 1

Definitions

- (a) Various definitions need to be added to the Act to define terms used in the new sections. These are in line with generally accepted actuarial practice.
- (b) "Surplus apportionment date" is required for the following reason:
Actuarial investigation will be required to achieve each apportionment. In order to avoid funds incurring additional costs through requiring an unscheduled valuation, and to spread the work out across a three year period, the apportionment has been timed to coincide with the next statutory valuation.
- (c) A definition of "minimum individual reserve" is introduced. Under a defined benefit fund, this is the market value equivalent of the present value of the retirement benefit promised in relation to the member's accrued service. Under a defined contribution fund, this is the member's own contributions and

the employer's contributions, nett of expenses, accumulated to date of exit with a reasonable rate of interest, plus a proportionate share of any investment reserve. In either case, if invested until the member's retirement, the amount should grow sufficiently to replace the benefit promised by the fund.

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

There is a concern amongst the parties negotiating in NEDLAC that economic conditions could change without the minimum benefit basis being adjusted quickly enough.

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

As economic conditions are expected to change over time, the assumptions are not specified in the Act, but are prescribed by the Registrar. The Register will be assisted by a technical committee which will review the basis annually, or more often at the request of any of the parties represented in NEDLAC.

3.2 Clause 2

Minimum benefits

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

Section 14(1)(c)(i) and (ii) is being to address an anomaly in the law as it currently stands. Unlike regulation 15 of the regulations made under section 36 of the Act, section 14 does not confine the operation of "rights and reasonable benefit expectations" to benefits which have arisen as a result of past service. Only the transferor fund should be responsible for the transferring member getting satisfaction for rights and expectations in terms of past service. It is then desirable to bring section 14(1)(c)(i) and (ii) into line with a "past service only" approach, because there needs to be consistency between the "minimum benefit" and the transfer value that would otherwise be determined.

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

3.3 Clause 3

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

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

- * If members leave voluntarily they can reasonably be expected to have taken any loss of benefit value into account when deciding to leave. This is not so when members leave involuntarily. Such members should therefore receive a greater measure of protection.
- * After consideration it was decided that dismissal should be treated similarly to resignation, rather than treating it in the same way as retrenchment. If the dismissal is unfair, the employee has the right to seek redress through the labour courts. Part of this redress would be the loss of benefit value.

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

Trustees must give a reasonable rate of interest when a member leaves with a benefit which depends on the accumulation of his or her own contributions.

Section 14A(2) provides that the minimum benefit provisions apply immediately for a new fund. Existing funds would have been designed prior to the introduction of minimum benefits. Stakeholders will have negotiated contribution rates without having considered the minima. Their introduction could force some of these funds into deficit. Some employers will be unable or unwilling to fund the additional costs. Accordingly,

section 14A(2)(b) provides for a window period of 12 months after the surplus apportionment date to enable the necessary negotiation to take place. Where the employer cannot afford the increased contribution rate required, the employer will either have to persuade members to agree to reduced benefits or will have to terminate participation in the fund. If a fund which would be in deficit on introduction of the minimum benefits is terminated or converted during this window period, members will not be entitled to claim the additional value that would accrue at the end of the window period.

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

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

3.4 Clause 4

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

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

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

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

Section 15B requires that existing actuarial surplus at a certain date must be apportioned between members, former members and the employer in an equitable manner. The equitable distribution of existing surplus is prescribed by regulation 34 of the regulations made under section 36 of the Act. Section 15B distributes only the existing surplus. This means that the distribution is not retrospective.

Section 15B provides for a process to ensure that the trustees and the members give their informed consent:

- * At least 75% of the trustees must approve it. This majority will ensure that at least half of the member-elected or employer-appointed trustees must approve the apportionment.
- * The actuary must endorse the distribution as equitable.
- * Before stakeholders can give their informed consent, they must have had adequate information, adequate time to consider it, and any complaints must have been properly considered.
- * Members must be informed. The registrar has a right to prescribe what should be included in such an information pack, to ensure that members are told in a clear and objective manner.
- * Members must have at least four weeks thereafter to consider the distribution, and to complain, if they so wish. Details of any outstanding complaints must be forwarded to the registrar with the application for distribution.
- * The registrar has the right to require an independent actuary to review the distribution.
- * Where the board of management is able to reach agreement using its own valuator, there is no need to force it to seek a second opinion from an

independent actuary. Where, however, there is conflict an independent actuarial opinion becomes essential and will be required by the registrar.

- * The registrar must be satisfied that the process has been followed correctly and that the distribution is reasonable and equitable. The registrar's responsibility will be to check that the process has been followed, complaints have been addressed, and to decide on the merits of any outstanding complaints that the board has been unable to resolve. Any party aggrieved by the action of the registrar will have the right to appeal to the Appeal Board established in terms of the Financial Services Board Act, 1990 (Act No. 97 of 1990).

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

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

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

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

Section 15D defines the manner in which surplus may be used after apportionment. The uses for members and former members are straightforward. The uses by the employer are constrained: in particular, payment in cash to the employer is permitted in only two circumstances — the liquidation of the fund and where the employer and members have reached agreement after discussion in terms of section 189 of the Labour Relations Act, 1995, that repatriation is necessary to save jobs.

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

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

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

Section 15G extends rights to members on transfer. In particular they must get a proportionate share of any credit balance in the member surplus account and a share of the contingency reserves should be considered. Members will get a share of the

investment reserve automatically within the definition of the minimum benefit payable on transfer in a defined contribution fund. Members will get a market value equivalent to their accrued liability from a defined benefit fund.

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

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

Section 15J sets out the conditions required before surplus can be repatriated to an ongoing fund in order to prevent significant job losses.

Section 15K sets out how minimum benefits are to be calculated.

Section 15L enables a specialist tribunal to take over the decisions that the board of the fund would otherwise take, when the board is deadlocked or there are significant unresolved complaints. The specialist tribunal can also be used to resolve disputes over the amount which is added to existing surplus in respect of any past disproportionate benefit improvements for senior employees or other use of surplus in the past for the benefit of the employer (See Regulation 34).

3.5 Clause 5

Deficits to become a debt payable by the employer to the fund

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

3.6 Clause 6

Exclusion of the right of the Adjudicator to determine complaints in regard to the operation of section 15A(2)

Section 30H(4) clarifies who will have jurisdiction over disputes relating to the appropriation of existing surplus in terms of section 15A(2).

4. CONSULTATION

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

The only other stakeholders that might be affected are pensioners. Two associations representing the interests specifically, namely the Association of Retired Persons and Pensions and the Institute of Retirement Funds, have made submissions to the Portfolio Committee.

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

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill has no direct financial implications for the State.

The costs of the specialist tribunal will be recovered from the surplus that they apportion.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers, the Financial Services Board and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

ANNEXURE A**THE QUANTUM AND DISTRIBUTION OF ACTUARIAL SURPLUS
AMONGST SOUTH AFRICAN RETIREMENT FUNDS**

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

The reason for this is as follows:

- * Twenty years ago most retirement funds were defined benefit pension funds. That is, the retirement benefit was expressed as a pension of a certain percentage of earnings at or near retirement age for each year of pensionable service. The funds were governed by employer-appointed trustees and were perceived largely as an extension of the employer.
- * Retirement benefits were often good, but early leaver benefits were deliberately little more than a refund of the member's own contributions with a low rate of interest. This encouraged staff retention by penalising resignation.
- * In the 1980's and early 1990's most employees moved from these defined benefit pension funds to defined contribution funds. The defined contribution funds had retirement benefits equivalent in value to the accumulated member and employer contributions rolled up to retirement, nett of expenses, using the investment return earned by the fund. The resignation benefits were often substantially better than their defined benefit predecessors.
- * The reasons for this shift had little to do with the subject matter of this Bill, but suited both members and employers.
- * Members usually got—
 - * better resignation and retrenchment benefits;
 - * a funding structure which they would find easier to understand;
 - * the possibility of managing contributions more flexibly within a package approach to remuneration;
 - * a share in the management of the funds; and
 - * the reward of the high real returns earned (that is the difference between the rates of investment return and salary increases).
- * The employer enjoyed—
 - * a transfer of the investment and expense risks from the employer to members; and
 - * employee benefit costs were capped.
- * In the early transfers, members often moved with only their resignation benefits leaving behind the balance of the interest earned and the employer contributions. Later they moved with their accrued liability, representing the present value of benefits expected to be paid in future as a result of service prior to the date of transfer. Seldom were members given any benefit of the provision held within the fund to protect the fund against a fall in the stock market, or of any actuarial surplus.
- * This left behind not only excess assets but also any provision in the defined benefit fund for a fall in the stock market (which can loosely be described as the rationale for the difference between the fair value of the assets and the value placed on the assets by the actuary, which has normally been less than the fair value). Surplus was therefore released by such transfers, resulting in a concentration of surplus within the residual defined benefit funds.

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

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

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

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