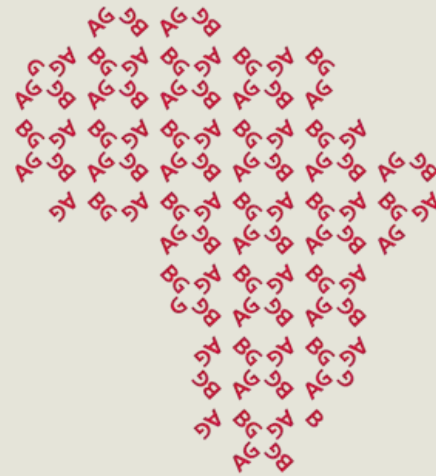


# PROPOSED AMENDMENTS TO THE PENSION FUNDS ACT

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CAPE TOWN  
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## INTRODUCTION

### History

- Amendments to PFA proposed its Financial Services Laws General Amendment Bill
- First draft released in March 2011 for comment by 2 May 2012
- Second draft released early 2013
- Not clear if third draft will be released for comment

### Themes

- Changes affecting fund governance, management & operation
- Changes affecting the registrar's powers
- Changes affecting the regulation of a fund's financial affairs
- Changes affecting benefits & surplus
- Other

# **CHANGES AFFECTING FUND GOVERNANCE, MANAGEMENT & OPERATION**

## BOARD OF TRUSTEES

*Are alternate trustees going to become more important?*

- Composition of board must be in its rules & vacancies to be filled within prescribed period -s7A(1A)
- Attain 'prescribed' level of skills and training within 6 months of appointment and retain throughout office – s7A(3)

*Are 'prescribed requirements' limited to governance requirements?*

- Duties – independence; extent of fiduciary duty specified (iro “accrued benefits/amounts”) & general compliance required with 'prescribed (governance) requirements' – s7C

*How much detail must be contained in the rules?*

- Power to delegate if
  - 'system of delegation' set out in the rules which
  - 'maximises administrative & operational efficiency' and has adequate checks and balances.
  - Can delegate to 'a person, group of persons, or sub-comm of the board' subject to conditions that board determines

## BOARD OF TRUSTEES

*Application to adjudicator proceedings?*

Liability of board members (S7F)

- ‘court’ can relieve trustee from liability if acted ‘independently, honestly or reasonably’ OR  
if having regard to the factors of the case including the appointment of the trustee it would be fair to excuse the board member
- Does not apply if there is willful misconduct or willful breach

## PRINCIPAL OFFICERS

*How long must the absence be for it to be ‘continuing’?*

*Liability of PO for deputy PO actions?*

- Must appt another PO within the prescribed period following the ‘commencement of a period of continuing absence or inability’
- Provision for appt of deputy PO with functions of PO delegated to deputy PO by the board
- PO not permanently divested of delegated functions
- Deputy PO acts as PO when PO absent until new appt made

## VALUATORS & AUDITORS

- Valuator must be natural person
- Previously – only 8(5) applicable to auditors & whole of s8 applicable to valuers
- Now – s8(4) & s8(5) applicable to auditors & s8(3) – (6) applicable to valuers
- What is the effect of this?
- Confirms that registrar has power to require board to terminate appointment of an auditor or valuator on the basis that she/it is no longer 'fit and proper'

*How will 'fit & proper' requirements be applied to an auditor who is a juristic person?*

## ADMINISTRATOR

### Changes to s13B

*Application of 'fit & proper' requirements to juristic person?*

*Prescribed financial resources need not be held separately from other assets*

*Any and all costs?  
Reasonableness of costs?*

- Reg can prescribe 'fit & proper' requirements
- Reg can ask for additional info or consider additional info from **any other source** when considering s13B application
- Must maintain prescribed financial resources
- Inspection not necessary before action taken against errant administrator BUT reg must have '**reasonable grounds**' to consider that member/public interest requires this
- If admin instructed to withdraw, the "costs" incurred by new administrator to be defrayed from former administrator's prescribed financial resources
- Fund information belongs to fund; must be kept in 'orderly format'; cannot be destroyed without fund consent & must be returned in manipulable format

## WHISTLE-BLOWING OBLIGATIONS

Who	Reportable	Effect	When
Principal Officer s8(6)(b)  Valuators [new] s9A(2) which makes 8(6)(b) applicable  Auditors S9(4)(c)	any matter	which may prejudice fund or members	on becoming aware
Trustees [new] S7A(4)(b)	any <b>material</b> matter	which may <b>seriously prejudice</b> the <b>financial viability</b> of the fund or members (too limiting?)	on becoming aware
Administrators	any <b>material</b> matter	which may prejudice the fund or its members	on becoming aware & <b>without undue delay</b>

Note: 'in the opinion of' & 'may' cause the prejudice



## WHISTLE-BLOWING OBLIGATIONS

- Principal officer & auditors currently must report perceived reason for termination of office within 21 days - [s8(6)9b) & [s9(4)9a)]
- Now also applicable to valuers [s9A(2) read with s8(6)] & to trustees [s7A(4)(a)]
- Trustees – only if not voluntary or because of the expiration of term of office.
  - But what if trustee ‘compelled’ or elects to resign because of fund conduct?
  - Is trustee required to report that fund conduct?

## WHISTLE-BLOWING PROTECTIONS

- **‘Disclosure’ – includes**
  - (a) disclosure of info about ‘any’ conduct of fund, admin, trustee, PO, valuator, officer, employee of fund or admin that has been made by any of these people;
  - (b) Information relating to the affairs of the fund which may prejudice the fund or its members
- ‘Protected disclosure’ is as defined in the Protected Disclosure Act (PDA) but now also includes a ‘disclosure’ as set out above

## WHISTLE-BLOWING PROTECTIONS

- **New s9B Protection of Disclosures**
  - Reg to provide process for the submission which ‘ensures confidentiality & provides appropriate measure for the protection of disclosures’
  - Encapsulates the protections in s8 and s9 of the PDA (ie protection from occupational detriment) but also protects fund officers from ‘other detriment’
  - Remedies if suffer any detriment
    - Remedies in PDA for occupational detriment
    - Approach a court for ‘appropriate relief’
    - Pursue any other process & seek any remedy provided in law

## RULE AMENDMENTS & S14 TRANSFERS

### Rule Amendments

- Still have to submit within 60 days of resolution [not 180 days as first draft said]
- Application lapses if registrar's queries not answered within 180 days
- Consolidated rules must be the 'same' not 'substantially the same'

### S14 Transfers

- Reg can withdraw s14 certificate if legislative change could prejudice the position of an effected member
- No approval needed for transfer between valuation exempt fund and insurer
- Special power to exempt any transaction from s14 requirements
- No commissions payable 'directly or indirectly' by agent, mandatory or 'representative'

## NON-PAYMENT OF CONTRIBUTIONS

- Was de-criminalised in 2007 and now to be re-criminalised
- Personal liability for ‘compliance’ with s13A ‘and for payment’ of the contributions:
  - (a) If employer is a company
    - Controlling shareholder
    - Each of its executive directors who are ‘regularly involved in the management of the company’s financial affairs’
  - (b) If employer is close corporation
    - Each of its executive directors who are ‘regularly involved in the management’
    - Each member who controls or is regularly involved in its overall financial affairs
  - (c) Any other body
    - Each person (including each trustee or partner) ‘in accordance with whose instructions the governing body of the employer acts or who controls or is regularly involved in the management of the employer’s overall financial affairs’

## NON-PAYMENT OF CONTRIBUTIONS

*Criminal sanction coupled with personal liability*

*Because 'responsible for compliance' referral to enforcement committee is also an option*

- Funds must ensure that the employer has agreed in writing to notify it of the identity of any person who would be personally liable

- If not

- all the directors of the company,
- all the members regularly involved in the management of the CC, or
- all persons comprising the governing body of the employer

shall be personally liable for non-payment of contributions.

# **CHANGES AFFECTING THE POWERS OF THE REGISTRAR**

## POWERS OF THE REGISTRAR

- **Powers to ‘prescribe’**
  - By notice on the website rather than in the Govt Gazette
  - More efficient but ‘this Act’ includes ‘any matter prescribed’ so effectively law-making ?
- **Powers to intervene in the management of a fund [s26]**
  - Reg power to appt trustees & intervene in fund management now extended to where
    - (a) board cannot properly constitute a board
    - (b) where board fails to comply with prescribed requirements re prescribed skills & training
  - If reg has ‘reason to believe’ that trustee not/no longer ‘fit & proper’ can direct person to vacate office and replace him/her for specified period & subject to conditions determined by registrar



## POWERS OF THE REGISTRAR

### Communication

- s32A replaced to deal allow reg to **prescribe information** & intervals at which fund information must be communicated to stakeholders
- Can direct that if any communication is 'misleading, confusing or contains incorrect statement of fact' it not be published

### Inspections on fund or administrator (s25)

- Enhanced powers to search premises and data systems; make and remove copies of documents
- Document includes any electronic information
- After inspection can direct fund/administrator to stop any action or correct any action that amounted to a contravention of the PFA
- Can publish on website or other media (if disclosure is in the public interest) outcome , details, status of on-site visit or full inspection

# **CHANGES AFFECTING THE REGULATION OF A FUND'S FINANCIAL AFFAIRS**

## CHANGES AFFECTING REGULATION OF FUND'S FINANCIAL AFFAIRS

### Accounts

- ESA, MSA and all CRAs to be provided for in rules.
- 'Specific category of the contingency' iro CRA must be set out in the rules
- **Registrar empowered to**
  - Instruct fund to perform interim valuation if thinks that would show that fund not in a sound financial position (s16(5))
  - Prescribe valuation basis (through a change to definition of 'actuarial surplus')
  - Reject valuation as at SAD if of opinion that 'does not fairly take into considerations the interests of one or more stakeholders' (s19(9)(b))

## CHANGES AFFECTING REGULATION OF FUND'S FINANCIAL AFFAIRS

### Registrar approval required for fund's

- Direct or indirect ownership of +49% in single entity
- Direct or indirect control (ie +35% of voting rights or appt directors of entity with +35% of voting rights at board meetings)

*Previously, said that must be restored within a 'reasonable period' and fund determined the content of the scheme and the conditions*

### Fund's financial condition

- Prescribe criteria for 'financial soundness' (s18)
- Prescribe conditions & time period within which a s18 scheme must restore financial soundness to a fund
- Business rescue provisions from Companies Act to be applicable to funds – some aspects of it concerning and implications of this not all clear

# **CHANGES AFFECTING BENEFITS AND SURPLUS**

## CALCULATION OF A MEMBER'S BENEFIT

- Interest in the fund must be adjusted by 'fund return' from date of membership [s14B]
- Deduction of 'reasonable' expenses so greater protection of the benefit
- Expenses need not be deducted specifically from contributions - useful where no ongoing contributions being paid

## BENEFITS GENERALLY

- s14A(1)(d) - Minimum pension increases to be granted wef valuation date (no longer within 6 months of valuation date)

*Mere say-so is not enough!*

- s37A – Authorises payment to third party if member or beneficiary ‘provides sufficient proof’ that cannot open bank account

*Not date of death!*

- s37C – Any benefit that is unpaid ‘on date that fund becomes aware of death’ regulated by s37C

*Interesting that first draft included funeral benefits as a permissible deduction but this was removed in second draft*

- s37D – deduction expressly authorised for employee’s tax due as a result of a s37D deduction

## DIVORCE

- Housing loans **rank** above divorce order deductions regardless of whether housing loan payable or not
- Spouse or former spouse now included as '**complainant**'
- **Fund return** payable from date of deduction not from when 120 day election period expired
- **Non-member spouse**
  - Def amended to remove reference to the dissolution of the relationship or confirmation of such 'by a court order'. Now just refers to a person who was granted a share of the member's pension interest due to the dissolution of the relationship.
  - Implications?
    - Attempt to include former spouses where relationships not terminated by a court into the Divorce Act?
    - How effective given that s37D(1)(d)(1) which sets out the permissible deductions still refers to an amount assigned to the NMS into decree granted into s7(8)(a) of the Divorce Act



## UNCLAIMED BENEFITS

- Definition of 'unclaimed benefits fund' inserted – ' established for the receipt of unclaimed benefits'
- But nothing compelling the transfer of UB to UBF
- Amendments to definition of 'unclaimed benefit' to include
  - death benefit not paid within 24 months from **date that fund became aware of death,** or such **longer period as may be reasonably justified by the board in writing**
  - amount due to NMS not paid or claimed 24 months from the date of deduction contemplated in s37D(4)(a)(ii) – ie date of election or when 120 day election period expires
- Reg can authorise amounts payable by liquidator to UBF instead of Guardian's Fund (new s28(12A))
- Death benefits that cannot be allocated because no dependants, beneficiaries and no inventory for estate received by the Mater can be paid to UBF instead of Guardian's Fund. Same iro deceased member of a beneficiary fund. (s37C)

## **SURPLUS**

### **s15B (compulsory apportionment)**

- Reg need not get independent report from an actuary on on SAS if complaints remain unresolved
- Registrar may withdraw certificate of approval on application from board and subject to conditions determined by registrar

### **s15C (future surplus)**

- makes clear that can be apportioned to members & employer directly (not just to MSA & ESA)
- Only former members that exited on or after SAD can benefit from future surplus & only if 'reasonable & equitable'

### **15E (surplus in ESA)**

- Employer can 'require' instead of request board to use the surplus as indicated in s15E
- May be used to reduce employer's PIUS

## SURPLUS

### s15F trsf from ERA to ESA

- Reg may refuse application if not satisfied that the original allocation to the ERA was not only agreed by the majority of stakeholders but now also that this was reasonable & equitable

### s15K Tribunals

- Can be appointed if no SAS or nil scheme submitted, if not convinced by the nil scheme or if does not agree with the result of an investigation into PIUS
- Reg decides the members of the tribunal (can allow board to propose people) & can replace person who dies, becomes incapacitated, resigns or is no longer suitable to hold that position
- If tribunal costs likely to exceed the surplus, the tribunal 'may resign' & fund submits scheme
- If tribunal thinks that fund does not have to submit scheme must ask registrar to terminate the tribunal and fund submits scheme
- New s15K(6A) – (6C) specifies the info that fund must submit to the tribunal; powers of the tribunal & communication obligations of the tribunal

## CRIMINALISATION & PENALTIES

### S 37(1)

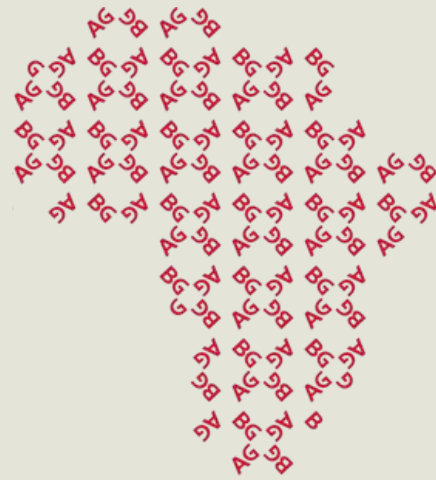
• Guilty of offence AND max fine of R10 mill AND/OR max prison sentence and/or 10 years for contraventions of:

- s4 -registration of funds
- s13A – payment of contributions
- s13B – administration of funds
- s31 – operating as an unregistered pension fund
- s35 – member’s right to obtain copies or inspect certain documents;

OR

- If induces/attempts to induce any person to become a member of or contribute to an unregistered fund;
- In any application to the registrar deliberately makes a misleading, false or deceptive statement or conceals material fact

**s30V** - the maximum prison sentence that the adjudicator can impose has been increased from 3 months to one year



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