

MALAWI GOVERNMENT

(Published 10th February, 2023)

Act

No. 4 of 2023

I assent

DR. LAZARUS MCCARTHY CHAKWERA

PRESIDENT

8th February, 2023

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Amendment of s. 63 of the Constitution
3. Amendment of s. 75 of the Constitution
4. Amendment of s. 76 of the Constitution
5. Amendment of s. 80 of the Constitution

ENACTED by the Parliament of Malawi as follows —

1. This Act may be cited as the Constitution (Amendment) Act, Short title
2023.

2. Section 63 (2) of the Constitution is amended, by deleting Amendment
paragraph (b) of the proviso and substituting therefor the following of s. 63 of the
new paragraph— Constitution

“(b) any by-election to fill the vacancy shall be held in the next quarter of the calendar year after the seat of the member becomes vacant, or if the circumstances do not so permit, then as expeditiously as possible, but a by-election shall not be held where a vacancy occurs within twelve months before the holding of a general election.”.

3. Section 75 of the Constitution is amended by—

(a) deleting subsection (1) and substituting therefor the following new subsection—

Amendment
of s. 75 of the
Constitution

“(1) There shall be a commission known as Malawi Electoral Commission which shall consist of a Chairperson who shall be a Judge, nominated in that behalf by the Judicial Service Commission and appointed by the President, and such other members, not being less than four and not more than six, as may be appointed in accordance with an Act of Parliament.”; and

(b) deleting the words “Electoral Commission” wherever they appear in the section and substituting therefor the words “Malawi Electoral Commission”.

Amendment
of s. 76 of
the
Constitution

4. Section 76 of the Constitution is amended—

(a) by deleting the words “Electoral Commission” wherever they appear in the section and substituting therefor the words “Malawi Electoral Commission”; and

(b) in subsection (2) (b), by deleting the word “five” and substituting therefor the word “ten”.

Amendment
of s. 80 of the
Constitution

5. Section 80 of the Constitution is amended by deleting subsection (2) and substituting therefor the following new subsection—

“(2) The President shall be elected by a majority of more than fifty percent of the valid votes cast through direct, universal and equal suffrage and where a majority of more than fifty percent is not obtained by any candidate in the first poll, a second poll shall be held within sixty days after declaration of the results in the first poll, in accordance with an Act of Parliament.”.

Passed in Parliament this thirteenth day of December, two thousand and twenty two.

FIONA KALEMBA
Clerk of Parliament

(Published 10th February, 2023)

Act

No. 5 of 2023

I assent

DR. LAZARUS MCCARTHY CHAKWERA

PRESIDENT

8th February, 2023

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Amendment of s. 5 of Cap: 37:01

An Act to amend the Public Audit Act

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Public Audit (Amendment) Act, 2023.
2. The Public Audit Act is amended in section 5 by deleting sub-section (3) and substituting therefor a new subsection (3) as follows—

Short title

“(3) A person shall be eligible for appointment as Auditor General if that person—

Amendment
of s. 5 of
Cap. 37:01

(a) is a Malawian citizen;

(b) possesses a minimum qualification of—

(i) a master's degree in Accounting, Finance or any relevant field; or

(ii) an equivalent professional qualification, obtained from an institution accredited or recognized under the National Council for Higher Education Act;

(c) is a member of a relevant Professional Accountancy Organization and the Malawi Accountants Board;

(d) has at least fifteen years post qualification

auditing experience, five of which are at senior management level; and

(e) is of high moral and ethical character and integrity.”

Passed in Parliament this second day of December, two thousand and twenty-two.

FIONA KALEMBA
Clerk of Parliament

(Published 10th February, 2023)

Act

No. 6 of 2023

I assent

DR. LAZARUS MCCARTHY CHAKWERA
PRESIDENT

8th February, 2023

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An Act to make provision for the regulation of matters of pension in Malaŵi; 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 Malaŵi as follows—

PART I—PRELIMINARY

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*.

Short title and
commence-
ment

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

Interpretation

“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);

Cap. 39:07

“Commissioner General” means the Commissioner General of the Malaŵi Revenue Authority appointed under section 17 (1) of the Malaŵi Revenue Authority Act;

“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;

Cap.44:05

“Financial Services Laws” has the same meaning as ascribed to that term under the Financial Services Act;

Cap.44:05

“Financial Services Appeals Committee” means the committee 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;

“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

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 Malaŵi.

Application

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

4. The objectives of this Act are to—

Objectives

(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 Malaŵi 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.

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

Application of the Financial Services Act Cap. 44:05

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.

Inconsistencies with other laws

PART II—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—

Functions and powers of the Registrar

(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 Malaŵi;
- (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 Malaŵi; 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

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

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

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

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 Malaŵi 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.

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.

Minister's
power to
exempt

(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

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—

Minimum
contribution
rates

(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.

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.

Life insurance
policy

(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

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

Member
ship to
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.

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.

Access to
benefits from
a provident
fund

(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

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

Pension
entities to be
licensed or
registered

(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.

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—

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

(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.

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

Issuance
and
publication
of a licence
or
registration
certificate

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

(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.

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.

Trustee to
establish
member
account

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.

Restriction on
transfer etc,
of licence

(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.

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

Variation,
suspension
and
revocation
of licences
or
registration
on request

(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 Malaŵi.

(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 Malaŵi.

(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.

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.

Removal of
executive
officers and
managers

(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.

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.

Internal audit
function

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.

Fit and proper
requirements

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

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

A pension
fund or
provident
fund to have a
principal
office

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

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.

Appoint-
ment of a
principal
officer

(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.

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.

Equal
representation
rule

(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.

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.

Advisory
committees

(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.

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

Rules for
appointment
of member
representa-
tives

(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.

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.

Contributions to be paid to the pension fund or provident fund

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.

Pension funds and provident funds to be trusts

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—

Covenants for pension funds or provident funds

(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.

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.

Fund rules regarding indemnities, liability and advice

(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).

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.

Directors of corporate trustee may be indemnified

(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.

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.

Trustee to accept payments in respect of a member

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.

Transfer of benefits under provident fund and voluntary personal pension fund

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—

Exercise of discretion in respect of pension funds

(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).

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—

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

(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.

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

Restrictions on amendments to fund rules

(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

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

(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.

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.

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

A pension fund or provident fund to maintain books of accounts

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

(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.

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—

Debits to
member
accounts

(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.

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

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

(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.

78.—(1) A trustee of a pension fund or provident fund shall not acquire an employer asset as an asset of the fund if—

Restriction on
employer
assets

(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 Malaŵi 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.

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

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.

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

Complaint
resolution
mechanisms
for pension
funds or
provident
funds

Fund
information
and member
information

Application
for
membership
of
unrestricted
pension
fund

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.

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—

Early
payment of
benefits

(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.

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.

Immediate
vesting of
contributions
for pension
funds

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

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—

Programmed
withdrawals,
annuities and
pension

(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.

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.

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

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—

Death benefit
nominations

(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).

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.

Payment of
proceeds from
life insurance
policy

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

Division II—Protection of Benefits

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, sequestered 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.

Benefits not
to be
attached, etc.

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.

Effect of
bankruptcy

(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.

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

Notice of
merger,
acquisition or
transfer

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 Malaŵi 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.

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.

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—

Appointment
of a trustee to
wind-up a
fund

Notice of
entitlements

- (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.

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

Termination
surplus

(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

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

Application
of this
Division

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

Winding-up
of other
pension
entities

(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.

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

Voluntary
winding-up

(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 Malaŵi 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.

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. Compulsory winding-up

(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 Malaŵi, 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.

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. Powers of liquidator

(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.

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.

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.

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.

Revocation of
pre-
liquidation
transfers

(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.

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.

Final
reporting

(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.

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

Offences
relating to
liquidation

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 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

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(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.

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

Offences
relating to
liquidation

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 Employment Act.

Cap. 55:01

(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.

141. A member of a pension fund under the mandatory occupational pension scheme shall hold and maintain one pension account at all times.

Member to hold one pension account

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.

Payment to employers restricted

(2) Subsection (1) shall not apply where its application would result in the arbitrary deprivation of a person's property.

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.

Victimization of trustees

(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.

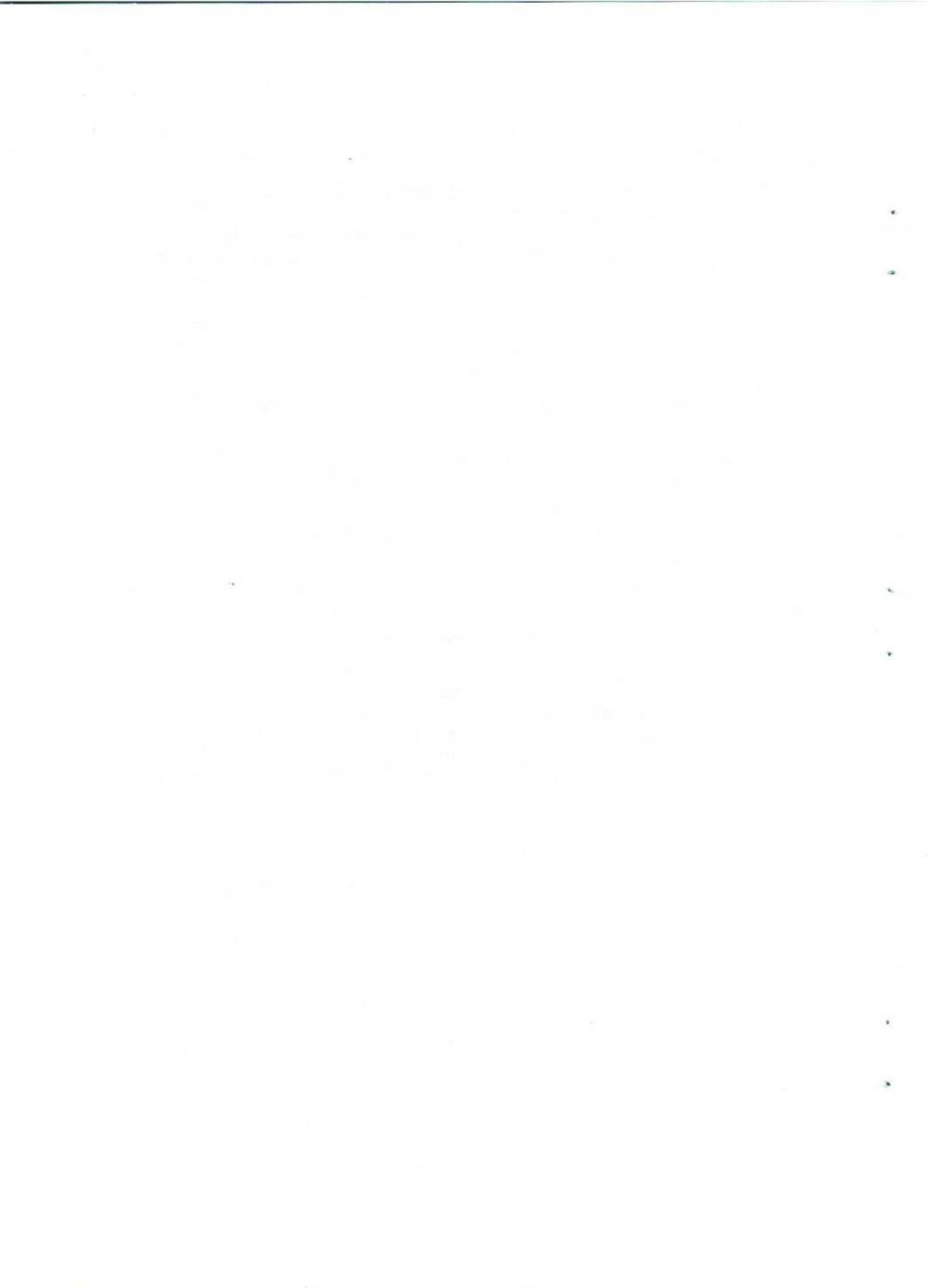
150.—(1) All pension entities that were licensed or registered under the Act repealed under section 149, shall at the date of commencement of this Act, be deemed to be licensed or registered under this Act.

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



(Published 10th February, 2023)

Act

No. 7 of 2023

I assent

DR. LAZARUS MCCARTHY CHAKWERA

PRESIDENT

8th February, 2023

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An Act to provide for the administration, classification and regulation of public roads; and to provide for matters incidental thereto

ENACTED by the Parliament of Malaŵi as follows—

PART I — PRELIMINARY

Short title and commencement	1. This Act may be cited as the Public Roads Act, 2023, and shall come into operation on such date as the Minister may appoint by notice published in the <i>Gazette</i> .
Interpretation	2. In this Act, unless the context otherwise requires—
Cap. 69:08	“Administration” means the Roads Fund Administration established under section 3 of the Roads Fund Administration Act;
	“advertisement” includes any structure or apparatus erected, or intended to be erected, for the display of advertisements;
	“alternative land”, in relation to land, means land which, in accordance with any written law, can be made available to an occupier who suffers disturbance;
Cap. 69:07	“Authority” means the Roads Authority established under section 3 of the Roads Authority Act;
	“authorized officer” means an officer of the Authority or an officer of a road authority;
	“carriageway” means the part of a road designed and constructed to be used for vehicular traffic or used or reasonably usable for the time being for that purpose, but does not include a cycle track;
	“centre of the road” means the centre of the carriageway;
	“compensation board” means a compensation board constituted in accordance with section 60;
	“cycle track” means a portion of a road exclusive of a carriage way set aside for use solely by persons riding pedal cycles;
Cap. 58:02	“Deeds Registrar” means the Deeds Registrar appointed in accordance with section 3 of the Deeds Registration Act;
	“existing road” means a road over which the public exercised a right of way prior to the coming into force of this Act whether or not such road has been designated a public road under this Act;
	“footpath” means a portion of a road exclusive of the carriage-way set aside for use solely by pedestrians;
Cap. 69:08	“Fund” means the Roads Fund established under section 18 of the Roads Fund Administration Act;
	“improved land” means land on which there is a legally authorized improvement;

"improvement" means any work on land which has increased the value of such land in comparison with land in a similar area covered with natural vegetation and includes—

- (a) clearing land for agricultural purposes;
- (b) the erection, alteration or enlargement of buildings;
- (c) the installation of electricity supply;
- (d) the construction or improvement of a wall, road, bridge or permanent fence;
- (e) planting a live hedge;
- (f) contouring of land, land drainage and works of reclamation or irrigation;
- (g) the making and improvement of water courses;
- (h) the provision of water supply for agricultural or domestic purposes;
- (i) the installation of fixed machinery, laying out and cultivating gardens, nurseries and orchards; and
- (j) the application to land of purchased manure, including artificial manure, to the extent to which such work has so increased the value of the land;

"local government authority area" means the area over which a local government authority exercises jurisdiction;

"local government authority" has the meaning assigned thereto in the Local Government Act;

Cap. 22:01

"occupier", in relation to land, means any person lawfully occupying such land;

"owner", in relation to private land, means any person, other than a mortgagee not in possession, entitled, with or without the consent of any other person, to dispose of an interest in the land and, in relation to public or customary land, means the Minister responsible for lands;

"pedal cycle" has the meaning assigned thereto in the Road Traffic Act;

Cap. 69:01

"private road" means any road constructed by any person, not being a road authority, and passing through a land which is either private or public;

"public place" includes any public way or place, other than a building, to which for the time being the public are entitled or permitted to have access either with, or without, condition;

“public road” means any road classified as such in accordance with section 7;

“right of way” means the right to use a road;

“road” means any highway or other road to which the public have access and any place to which vehicles have access and any road in any residential area, whether access to it is restricted or not, and includes any bridge, causeway, culvert, dam, ditch, drain, embankment, fence, ferry, ford, pontoon, guide post, kilometre post or other works in the line of such road, any existing road and works in a road reserve constructed or maintained in accordance with this Act;

“road authority” means any authority responsible for the construction, rehabilitation, care and maintenance of any road or class of road pursuant to this Act;

“road furniture” includes traffic lights, sign posts, traffic signs, hard rails and fences that provide information to road users;

“road maintenance” means all works to preserve and to sustain the condition of the road, including riding quality, road shape, drains, culverts, bridges and other road facilities;

“road reserve” means any land reserved for use as a road reserve in accordance with section 17;

“storm water” means all flow of water directly due to rainfall, before such water joins a stream;

“stream” means a watercourse of natural origin through which water flows either continuously or intermittently, whether or not such watercourse is dry during any period of the year and whether or not its conformation has been changed by artificial means, and includes swamps and marshes, whether forming the source or found upon the course of, or feeding such watercourse;

“structure” includes—

(a) any building, pole, power line, petrol pump, machinery, wall, plantation, fence or hedge and any other object which could in like manner cause an obstruction; and

(b) any external alteration or addition to a structure;

“surface rights”, in relation to land with respect to which compensation is claimed, means the rights of a claimant to any interest in the crops, structures and other improvements on the land and, in the case of agricultural land which is used by a road authority for a temporary purpose or for taking materials and use of which is resumed by the owner or occupier or some person

claiming through or under him, includes the difference between the value, for agricultural purposes, of the surface soil before such soil was affected by works or things authorized by this Act and the value for such purpose of the surface soil as it is when use is so resumed;

“traffic sign” means any object or device, whether fixed or portable, for conveying warning, information, requirements, restrictions, or prohibitions of any description prescribed or authorized under this Act to traffic on any road, and includes any line or mark on a road that serves said purpose;

“traffic signal” means a road sign which by means of automatic signals, alternately directs traffic to stop and permits traffic to proceed;

“undertaker” means a road authority, body or person by whom a statutory power to execute works of an undertaker is exercisable in the capacity in which that power is vested in it;

“works of undertakers” means any works, including works executed or to be executed on behalf of the Government, for any purpose, other than construction or maintenance of a road, being works of any of the following kind—

(a) placing apparatus, inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, or changing the position of apparatus or removing it; or

(b) breaking up or opening a road, for the purpose of works referred to in paragraph (a), and tunnelling or boring under a road for those purposes, breaking up or opening a sewer, drain or tunnel for those purposes, and other works requisite for or incidental to those purposes, and includes laying of any pipeline, wire or cable on, over or under any road;

“valuation date”, in relation to the assessment of compensation for any property or interest therein, means the date at which the value of the property or interest therein is to be assessed; and

“works” includes any pipe, tube, tunnel, permanent excavation, quarry, irrigation works, borehole or well and any addition or alteration to such works.

PART II—ADMINISTRATION OF ROADS

3.—(1) The Minister shall be responsible for the overall administration and implementation of this Act.

Overall
admini-
stration

(2) Without prejudice to the generality of subsection (1), the Minister shall be responsible for—

(a) initiating and implementating the national road policy and defining its linkages with other modes of transport;

(b) creating an environment that nurtures, encourages and sustains the participation of private sector in the financing, the maintenance, the construction and the management of roads in Malawi;

(c) providing adequate network of roads for movement of goods and people, in Malawi and beyond;

(d) facilitating the continued development of the country's rural roads;

(e) promoting the construction of economically justified and environmentally friendly and safe roads; and

(f) enforcing appropriate road standards, designs and specifications.

Responsibilities of the Authority
Cap. 69:07

4. Subject to the Roads Authority Act, the Authority shall be responsible for ensuring that public roads are constructed, maintained and rehabilitated as provided under this Act.

Responsibilities of local government authorities
Cap. 22:01

5. Subject to the Local Government Act, local government authorities shall be responsible for—

(a) the construction, maintenance and rehabilitation of public roads as provided under this Act, within the respective jurisdiction of the local government authorities; and

(b) the mobilization of resources towards management of such roads.

Responsibilities of the Administration
Cap. 69:08

6. Subject to the Roads Fund Administration Act, the Administration shall be responsible for raising, administering and managing the Fund.

PART III—CLASSIFICATION AND DESIGNATION OF ROADS AND ROAD RESERVES

Division 1—Classification and Designation of Roads

Classification and vesting of roads

7.—(1) All roads shall be categorized as either public roads or private roads.

(2) A public road shall be classified as—

(a) a main road;

(b) a secondary road;

(c) a district road;

(d) a community road;

- (e) an urban road; or
- (f) an unclassified road.

(3) The Minister may, by notice published in the *Gazette*, designate any road to be a public road in accordance with this Act, and the road so designated shall vest in the Republic as public land.

(4) The use of all public roads shall be subject to such restrictions for users as the Minister may prescribe.

8.—(1) Main roads shall be—

Main roads

(a) any international or national arterial road being an inter-territorial road defined as such under any written law; or

(b) any territorial road so designated by the Minister by notice published in the *Gazette*.

(2) The Authority shall be the responsible road authority for all main roads, including main roads in a local government authority area.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of a main road shall be borne by the Authority.

(4) The Authority shall, prior to the commencement of any works, inform the relevant local government authority of any new construction, major improvements and maintenance activity affecting a main road within the jurisdiction of the local government authority.

9.—(1) A secondary road shall be any arterial road or collector road between main centres of population and other traffic generators of national importance so designated by the Minister by notice published in the *Gazette*.

Secondary roads

(2) The Authority shall be the responsible road authority for all secondary roads, including secondary roads in any local government authority area.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of a secondary road shall be borne by the Authority.

(4) The Authority shall inform the relevant local government authority of any new construction, major improvements and maintenance activity affecting a secondary road within the jurisdiction of the local government authority.

10.—(1) A district road shall be any collector road and a link between local centres of population and other traffic generators in

District roads

any district so designated by the Minister by notice published in the *Gazette*, after consulting the local government authority concerned.

(2) The relevant local government authority shall be the responsible road authority for a district road.

(3) The expenses of planning, designing, construction, care and maintenance of a district road shall be borne by the relevant local government authority.

Cap. 69:08

(4) Subject to the Roads Fund Administration Act, a local government authority shall be eligible to receive from the Fund, such funds as the Administration may, from time to time, determine towards the cost of construction, rehabilitation, care and maintenance of district roads for which the local government authority is the road authority.

Community roads

11.—(1) A community road shall be any road that primarily provides access to land adjacent to the collector network serving travel over relatively short distances, and includes all rural roads not classified as arterial roads or collector roads, branch roads, estate roads, local access roads and private roads so designated by the Minister by notice published in the *Gazette*, after consulting the local government authority concerned.

(2) The relevant local government authority shall be the responsible road authority for a community road.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of a community road shall be borne by the local government authority.

Cap. 69:08

(4) Subject to the Roads Fund Administration Act, a local government authority shall be eligible to receive from the Fund, such funds as the Administration may, from time to time, determine towards the cost of construction, rehabilitation, care and maintenance of community roads for which the local government authority is the road authority.

Urban roads

12.—(1) The Minister may, after consultations with the local government authority concerned and by notice published in the *Gazette*, designate the following roads as urban roads—

(a) a collector road which is—

(i) a road linking a local centre with any other local centre;

(ii) a road linking a local centre with a ward centre; or

(iii) a road within an urban carrying through traffic which predominantly originates from out of town and links with either a main road or a secondary road; or

(b) an access road which is a road within an urban area that links a collector road and other minor roads within the vicinity and collects or distributes traffic between residential, industrial and principal business centres of a city, a municipality or a town, as the case may be.

(2) The relevant local government authority shall be the responsible road authority for an urban road.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of an urban road shall be borne by the local government authority concerned.

(4) Subject to the Roads Fund Administration Act, a local government authority shall be eligible to receive from the Fund, such funds as the Administration may, from time to time, determine, towards the costs of construction, care and maintenance of urban roads for which the local government authority is the road authority. Cap. 69:08

13.—(1) A road authority may—

Private roads

(a) authorize the establishment of a private road in any area within its jurisdiction; or

(b) designate any existing road, other than a public road, to be a private road, subject to such conditions as the road authority may prescribe.

(2) A private road may be used by the public, subject to such conditions as the owner of the land may determine.

(3) Where a public road is inaccessible or becomes impassable, a road authority may order the owner of a private road, subject to such conditions as the road authority may prescribe after consulting the owner or occupier of the land, to temporarily open the private road to the general public, until such time as the public road is accessible or becomes passable, as the case may be.

(4) Any damage to a private road caused by any additional traffic as a result of the road having been opened to the general public in accordance with subsection (3) shall be repaired by the relevant road authority.

14.—(1) A road authority may apply, in writing, to the Minister for the change in classification of any road or any part thereof.

Change in
classification
of roads

(2) The Minister may, if satisfied with the application made pursuant to subsection (1), change the classification of the road by notice published in the *Gazette*.

(3) Any change pursuant to subsection (2) shall comply with section 7.

Alteration to
management,
closure and
declassification
of public roads

15.—(1) A road authority shall publish a notice in the *Gazette* and in two newspapers, of wide circulation in the area concerned, of any proposal to—

(a) cease responsibility for the construction, care and maintenance of any road or any part thereof;

(b) close a road, or any part thereof, as a result of the deviation of the permanent alignment of any public road; or

(c) remove the classification of any public road for which it is responsible.

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

(a) give particulars of the proposal;

(b) clearly describe the road to be affected; and

(c) call upon any person objecting to the proposal to lodge any objection, in writing, to the office of the road authority within one month of the date of publication of such notice.

(3) A copy of the notice referred to in subsection (1) shall also be posted at a conspicuous place outside the office of the road authority responsible for the road.

(4) A road authority shall consider and notify the Minister of any objection lodged pursuant to subsection (2) (c) and shall make appropriate recommendations to the Minister.

(5) The Minister may after—

(a) considering any objection made under subsection (2) (c);

(b) considering the recommendations of the road authority under subsection (4); and

(c) registration of such plans, if any, as are required under section 52,

by notice published in the *Gazette* and in two newspapers, circulating in the area concerned, declare whether the proposal shall proceed or not.

(6) Where the declaration under subsection (5) is that the road or part thereof be used as a private road, the notice shall state that such road or part thereof, shall cease to be a public road and thereupon the road or part thereof—

(a) shall vest as a private road in the owners of the land adjoining the road or part thereof, unless immediately prior to becoming a public road it was customary land; and

(b) if immediately prior to becoming a public road, the land was customary land, the road shall be dealt with in accordance with the Customary Land Act, and, in either case, the road

(e) an urban road; or

(f) an unclassified road.

(3) The Minister may, by notice published in the *Gazette*, designate any road to be a public road in accordance with this Act, and the road so designated shall vest in the Republic as public land.

(4) The use of all public roads shall be subject to such restrictions for users as the Minister may prescribe.

8.—(1) Main roads shall be—

Main roads

(a) any international or national arterial road being an inter-territorial road defined as such under any written law; or

(b) any territorial road so designated by the Minister by notice published in the *Gazette*.

(2) The Authority shall be the responsible road authority for all main roads, including main roads in a local government authority area.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of a main road shall be borne by the Authority.

(4) The Authority shall, prior to the commencement of any works, inform the relevant local government authority of any new construction, major improvements and maintenance activity affecting a main road within the jurisdiction of the local government authority.

9.—(1) A secondary road shall be any arterial road or collector road between main centres of population and other traffic generators of national importance so designated by the Minister by notice published in the *Gazette*.

Secondary roads

(2) The Authority shall be the responsible road authority for all secondary roads, including secondary roads in any local government authority area.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of a secondary road shall be borne by the Authority.

(4) The Authority shall inform the relevant local government authority of any new construction, major improvements and maintenance activity affecting a secondary road within the jurisdiction of the local government authority.

10.—(1) A district road shall be any collector road and a link between local centres of population and other traffic generators in

District roads

any district so designated by the Minister by notice published in the *Gazette*, after consulting the local government authority concerned.

(2) The relevant local government authority shall be the responsible road authority for a district road.

(3) The expenses of planning, designing, construction, care and maintenance of a district road shall be borne by the relevant local government authority.

Cap. 69:08

(4) Subject to the Roads Fund Administration Act, a local government authority shall be eligible to receive from the Fund, such funds as the Administration may, from time to time, determine towards the cost of construction, rehabilitation, care and maintenance of district roads for which the local government authority is the road authority.

Community roads

11.—(1) A community road shall be any road that primarily provides access to land adjacent to the collector network serving travel over relatively short distances, and includes all rural roads not classified as arterial roads or collector roads, branch roads, estate roads, local access roads and private roads so designated by the Minister by notice published in the *Gazette*, after consulting the local government authority concerned.

(2) The relevant local government authority shall be the responsible road authority for a community road.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of a community road shall be borne by the local government authority.

Cap. 69:08

(4) Subject to the Roads Fund Administration Act, a local government authority shall be eligible to receive from the Fund, such funds as the Administration may, from time to time, determine towards the cost of construction, rehabilitation, care and maintenance of community roads for which the local government authority is the road authority.

Urban roads

12.—(1) The Minister may, after consultations with the local government authority concerned and by notice published in the *Gazette*, designate the following roads as urban roads—

(a) a collector road which is—

(i) a road linking a local centre with any other local centre;

(ii) a road linking a local centre with a ward centre; or

(iii) a road within an urban carrying through traffic which predominantly originates from out of town and links with either a main road or a secondary road; or

(b) an access road which is a road within an urban area that links a collector road and other minor roads within the vicinity and collects or distributes traffic between residential, industrial and principal business centres of a city, a municipality or a town, as the case may be.

(2) The relevant local government authority shall be the responsible road authority for an urban road.

(3) All expenses incurred in the planning, designing, construction, care and maintenance of an urban road shall be borne by the local government authority concerned.

(4) Subject to the Roads Fund Administration Act, a local government authority shall be eligible to receive from the Fund, such funds as the Administration may, from time to time, determine, towards the costs of construction, care and maintenance of urban roads for which the local government authority is the road authority.

Cap. 69:08

13.—(1) A road authority may—

Private roads

(a) authorize the establishment of a private road in any area within its jurisdiction; or

(b) designate any existing road, other than a public road, to be a private road, subject to such conditions as the road authority may prescribe.

(2) A private road may be used by the public, subject to such conditions as the owner of the land may determine.

(3) Where a public road is inaccessible or becomes impassable, a road authority may order the owner of a private road, subject to such conditions as the road authority may prescribe after consulting the owner or occupier of the land, to temporarily open the private road to the general public, until such time as the public road is accessible or becomes passable, as the case may be.

(4) Any damage to a private road caused by any additional traffic as a result of the road having been opened to the general public in accordance with subsection (3) shall be repaired by the relevant road authority.

14.—(1) A road authority may apply, in writing, to the Minister for the change in classification of any road or any part thereof.

Change in
classification
of roads

(2) The Minister may, if satisfied with the application made pursuant to subsection (1), change the classification of the road by notice published in the *Gazette*.

(3) Any change pursuant to subsection (2) shall comply with section 7.

Alteration to
management,
closure and
declassification
of public roads

15.—(1) A road authority shall publish a notice in the *Gazette* and in two newspapers, of wide circulation in the area concerned, of any proposal to—

(a) cease responsibility for the construction, care and maintenance of any road or any part thereof;

(b) close a road, or any part thereof, as a result of the deviation of the permanent alignment of any public road; or

(c) remove the classification of any public road for which it is responsible.

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

(a) give particulars of the proposal;

(b) clearly describe the road to be affected; and

(c) call upon any person objecting to the proposal to lodge any objection, in writing, to the office of the road authority within one month of the date of publication of such notice.

(3) A copy of the notice referred to in subsection (1) shall also be posted at a conspicuous place outside the office of the road authority responsible for the road.

(4) A road authority shall consider and notify the Minister of any objection lodged pursuant to subsection (2) (c) and shall make appropriate recommendations to the Minister.

(5) The Minister may after—

(a) considering any objection made under subsection (2) (c);

(b) considering the recommendations of the road authority under subsection (4); and

(c) registration of such plans, if any, as are required under section 52,

by notice published in the *Gazette* and in two newspapers, circulating in the area concerned, declare whether the proposal shall proceed or not.

(6) Where the declaration under subsection (5) is that the road or part thereof be used as a private road, the notice shall state that such road or part thereof, shall cease to be a public road and thereupon the road or part thereof—

(a) shall vest as a private road in the owners of the land adjoining the road or part thereof, unless immediately prior to becoming a public road it was customary land; and

(b) if immediately prior to becoming a public road, the land was customary land, the road shall be dealt with in accordance with the Customary Land Act, and, in either case, the road

authority shall cease to be responsible for the construction, care and maintenance of the road.

(7) Where the declaration under subsection (5) is that the public shall cease to use the road or part thereof, the Minister shall, by notice published in the *Gazette* and in two newspapers, circulating in the area concerned, declare that the road or part thereof shall be closed to use by the public, and thereupon the road or part thereof shall cease to be a public road and the land on which it was constructed may be disposed of or dealt with in any manner in which public land may properly be disposed of or dealt with.

16.—(1) A road authority may apply to the Minister, in a prescribed manner, for the Minister to designate a road as a public road in accordance with the classification under section 7.

Designation
of new
roads and
compensa-
tion

(2) A road authority shall ensure that, prior to making any application under subsection (1)—

(a) the construction of the road to be designated is complete; and

(b) the registration of plans for that road under the Deeds Registration Act has been done.

Cap. 58:02

(3) The Minister may, upon receipt of an application under subsection (1) and upon being satisfied that the proposed designation is in the public interest, designate a road as a public road.

(4) Upon a designation by the Minister under subsection (3), the road shall vest in the Republic as public land and the land on each side of the road to the extent specified in such notice shall be a road reserve.

Division 2—Road Reserves

17.—(1) There shall be a road reserve for each road as prescribed under section 18.

Designation
of a road
reserve

(2) The Minister may, by notice published in the *Gazette*, designate the width of a road reserve outside any planning area declared under the Physical Planning Act, in accordance with section 18.

Act No. 17
of 2016

18.—(1) The width of a road reserve shall be—

(a) for a main road, sixty metres;

(b) for a secondary road, thirty-six metres;

(c) for a district road, thirty-six metres;

(d) for an urban road, thirty-six metres; and

Width of
road reserve
and effect
of
reservation

(e) for a community road, eighteen meters.

(2) The centre line of the width for a road reserve shall be measured from the centre line of the carriageway.

(3) Where any existing road is designated as a public road under section 7, the land included within the boundaries of the width described in subsection (1), shall be reserved for use as a road and become a road reserve.

Change in
width of road
reserve

19.—(1) A road authority may apply to the Minister, in writing, for the change of width of any road reserve.

(2) The Minister may, if satisfied with the application made pursuant to subsection (1), by notice published in the *Gazette*, change the width of any road reserve.

(3) Any change pursuant to subsection (2) shall, with the necessary modifications, be in accordance with sections 14 and 15.

Entry into road
reserve

20. A road authority may, at any time, enter upon land comprising a road reserve for the purpose of exercising any powers conferred on it by this Act.

Damage to
structures in a
road reserve
and
compensation

21.—(1) Where a road authority intends to carry out any works in a road reserve, in a manner likely to cause damage to any structure which existed prior to the designation of the road as a public road, the road authority shall give to the owner or occupier of the land prior notice, in writing, of its intention to carry out the works.

(2) The notice period under subsection (1) shall be—

(a) in the case of a building, not more than three months; and

(b) in the case of any other structure, not more than one month, from the date of the notice.

(3) Where in carrying out the works notified under subsection (1) the owner or occupier of the land suffers damage as a result of the works, the road authority shall pay compensation, in accordance with Part VI, to the owner or occupier of the land with respect to the damage caused.

(4) An owner or occupier of the land desiring to be compensated pursuant to subsection (3) shall—

(a) in the case of a building, within three months; and

(b) in the case of a any other structure, within one month;

or such extended time, as the road authority may allow, submit a claim for compensation, in writing, to the road authority.

22.—(1) A person shall not, without a written consent of the relevant road authority, do any of the following in a road reserve—

Activity in
a road
reserve

(a) erect or alter any structure;

(b) plant any tree or bush; or

(c) cultivate or prepare for cultivation the land, unless the order declaring the land as a road reserve is made after commencement of the cultivation or preparation for cultivation.

(2) A road authority shall consult with, and have regard to the views of the Commissioner for Physical Planning before granting any consent to erect or alter a structure in the road reserve.

(3) Where a road authority grants consent under subsection (1) or a person acquires any interest in land in a road reserve and the road authority subsequently intends to carry out any works on the land, the person to whom consent was granted or acquired interest in the land shall not be entitled to compensation for any improvement done on the land.

23. Where an occupier or owner of land in a road reserve or any person seeks to effect service of a document on a road authority pursuant to this Act, service shall be deemed to have been satisfied by serving the notice upon a road authority in whose jurisdiction the concerned land is situated.

Service of
notice on a
road
authority

PART IV—EXECUTION OF ROAD WORKS

24.—(1) The Minister may, after consultations with the Minister responsible for Physical Planning, make regulations prescribing the number, location and design of points of access to main, secondary, district, community and urban roads.

Control
points of
access,
structures,
etc.

(2) Without prejudice to the generality of subsection (1), the regulations shall—

(a) require owners of buildings and property to provide service roads to give access to the buildings and property; and

(b) prohibit erection of buildings with direct frontage to any road or road reserve.

25.—(1) A road authority shall be responsible for the construction, care and maintenance of roads for which it is responsible.

Constru-
ction, care
and
maintena-
nce of road

(2) Except as otherwise provided under this Act, the responsibility to undertake the construction, alteration, care and maintenance of a public road includes the responsibility to pay all the costs incurred in such construction, alteration, care and maintenance.

(3) Where a road authority fails to maintain a public road under its charge or any part thereof, the Minister may, after giving reasonable notice to the road authority, arrange for the maintenance works to be carried out in such manner as the Minister may direct.

(4) A road authority may—

(a) enter upon any land to carry out any works and exercise any powers in relation to a public road or any proposed public road for which it is responsible;

(b) restrict the use of any public road or part thereof, under its charge, and may, for such purpose, use traffic signs or other notices in accordance with this Act or any written law;

(c) without prejudice to the generality of paragraph (b)—

(i) prohibit the entry of vehicles on a cycle track or footpath;

(ii) control the use of pedal cycles and movement of animals on a carriageway or footpath; and

(iii) forbid any pedestrian from using any part of a road; and

(d) subject to the special or general directions of the Minister and the payment of compensation in accordance with Part VI—

(i) widen or divert any public road within the limits of a road reserve;

(ii) require the removal of any tree or structure on a road reserve; and

(iii) where the owner of a tree or structure fails to remove the same after being required to do so, remove the tree or structure.

(5) Where a road is widened or diverted in accordance with subsection (4) (d) (i)—

(i) the land occupied by the widened or diverted road shall be deemed to have been declared public land and hence shall vest in the Republic as public land; and

(ii) thereupon the land bordering the road on each side, as prescribed under section 18, shall become road reserve without designation or other formality.

(6) A road authority shall prepare and accordingly register the plan, if any, relating to the widening or deviation as may be prescribed in regulations made hereunder.

(7) Any land which ceases to be part of a public road as a result of works under subsection (4) (d) (i) shall, vest in the owner of the adjoining land, upon the terms and conditions upon which he holds such land without formal transfer, unless such land was, immediately before becoming a public road, customary land.

26.—(1) A road authority may, for the purpose of carrying out a survey for a proposed road or conducting any investigation in connexion with a road, authorize, in writing, any member or officer of the road authority or other person, to enter upon any land with such assistants, workmen, apparatus, instruments, vehicles and tools as may be necessary for the survey or investigations.

Power to enter upon land for survey or investigation

(2) Entry under subsection (1) shall be made after giving prior notice in writing to the owner or occupier of the land concerned and the entry shall be during the day time.

(3) Subject to Part VI, no other compensation shall be payable to an owner or occupier of land with respect to any entry made pursuant to this section.

27.—(1) Where a road authority is satisfied that by reason of repair or construction works required or in progress on or near a public road for which it is charged with, it is desirable that the road be closed to traffic or to traffic of a particular classification or description, or that the use of the road be restricted in any way, the road authority may, by order, prohibit or restrict the use of the road, or any part thereof in such manner as may be specified in the order.

Power to control traffic

(2) The road authority shall publish in the *Gazette*, the order under subsection (1) twice, at least fourteen days and seven days before the effective date.

(3) Where the road authority is satisfied that, owing to the likelihood of danger to the public or serious damage to the road, it is necessary to prohibit or restrict the use of a road forthwith, it may make an order prohibiting or restricting the use of the road or any part thereof forthwith, without publication of the notice specified in subsection (2).

(4) A road authority may, at any time, by means of suitable barriers close or restrict the use of a road under its charge or any part thereof for the purposes of repair or reconstruction.

(5) Where a road is closed or access thereto is restricted in accordance with this section—

(a) the road authority shall redirect the affected traffic to an alternative route;

(b) wherever possible the alternative route shall be provided within or adjacent to the road reserve concerned; and

(c) all reasonable steps shall be taken to display adequate traffic signs in accordance with the Road Traffic Act, giving reasonable warning to traffic using the road.

Cap. 69:01

(6) A person who fails to comply with the controls under this section commits an offence.

Power to
control land for
proposed roads

28.—(1) Where, during or after a survey by a road authority for the purpose of determining the line or the course of a proposed road, the road authority has reason to believe that any person is doing or intending to do any act or thing likely or calculated to interfere with the survey or construction of the proposed road, the road authority may order the person, in writing, to cease or desist from doing such act or thing.

(2) Where any person fails or refuses to comply with an order under subsection (1), the road authority may request the Minister to issue a notice, by notice published in the *Gazette*, designating such land as the road authority considers appropriate in relation to the proposed road as controlled land for road purposes.

(3) A notice under subsection (2) shall specify the owner or occupier of the land and shall describe the area or areas so controlled.

(4) A notice under subsection (2) shall have the effect of prohibiting all activities on the designated land, other than an activity which the Minister or the road authority may, after consulting the Minister responsible for physical planning, authorize in writing, on such conditions as the Minister considers appropriate.

(5) A notice under this section shall lapse after the expiration of twelve months, except to the extent that it is continued as to any part of the land affected by a reservation effected under section 52.

(6) As soon as possible, after publication of a notice under subsection (2), the road authority that is carrying out the investigation shall lodge with the Deeds Registrar, two copies of a plan or plans showing the boundaries of the land affected by the notice.

(7) No person shall be eligible for compensation with respect to any loss or damage suffered by reason of the exercise by the Minister of the powers conferred by this section.

Power to take
materials for
road works

29.—(1) Subject to subsection (3), a road authority, or an authorized officer, may enter upon any land and—

(a) take therefrom any material, including water, necessary for the construction, maintenance or repair of a road or proposed road for which the road authority is charged with; and

(b) designate land for a labour camp, access road and space for stockpiling, and no compensation shall be payable except as provided under this section.

(2) No water shall be taken from an artificial dam, well or borehole pursuant to subsection (1), except with the consent of the owner or occupier of the land.

(3) The powers conferred under subsection (1) shall not be exercisable—

(a) on any land within the boundaries of a city, municipality or township;

(b) on any land comprised in any mineral right, non-exclusive prospecting licence, claim, permit, or other authority subsisting under the Mines and Minerals Act; and

(c) in an area protected under the Environment Management Act.

Act No. 8
of 2019

Act No. 19
of 2017

(4) A road authority may, where it exercises powers conferred under subsection (1), after prior consultation with the owner or occupier of the land, select any place from which to take the materials.

(5) Notwithstanding subsection (4), the owner or occupier of the land may propose an alternative place on the land from which the road authority may take the materials, and if the road authority finds the alternative place to be reasonably accessible and suitable with respect to quantity and quality of the materials, the road authority shall take the materials from the alternative place.

(6) A road authority shall not take possession of materials on which any person, other than its servant, has expended labour, or from a house, wall or other structure.

(7) The rights conferred on a road authority by this section shall be exercisable from time to time and the compensation provided for shall be payable from time to time with respect to each occasion on which such rights are exercised, and to the extent of any new loss or damage suffered by the owner or occupier of the land on each occasion.

(8) Whenever land is entered in accordance with the powers conferred by this section, compensation shall be paid by the road authority to the owner or occupier of the land with respect to surface rights in accordance with Part VI.

(9) The valuation date, for the purpose of compensation under subsection (8), shall be the date when the owner or occupier of the land suffered the loss or damage which gave rise to the claim.

(10) A person shall claim compensation under this section within six months of any loss or damage suffered.

(11) Where the land affected by the exercise of powers conferred by this section—

(a) is unimproved land;

(b) is not customary land; and

(c) exceeds, in area, one per centum of the area of the total estate of the person who is the owner or occupier thereof on the date of entry, compensation shall be paid to the owner or occupier for the value of any area so affected, in excess of the one per centum referred to in paragraph (c) to the extent to which the land so affected has been rendered less valuable for agricultural purposes, and in no case shall compensation be paid with respect to the value of the materials taken.

(12) A road authority may, where necessary, make an opening in a fence when constructing an access road to the site of quarry, excavation or other place from which materials are to be obtained.

(13) A road authority shall effectively close the opening referred to in subsection (12) against the straying of livestock during the operations and shall properly restore the fence on completion of the work.

(14) A road authority shall, on completion of any quarry or other excavation made in exercise of the powers conferred by this section, securely fence off, fill in or otherwise make safe any source of danger against danger to life and limb of persons or animals, including addressing any risk of the area becoming a breeding ground for water-borne parasites.

(15) Notwithstanding subsection (15), where circumstances are such that in the opinion of the road authority any delay in exercising any right under this section would be undesirable and occasion significant delays in implementation of the works, the road authority may take the materials forthwith, and the Minister may make such subsequent order in the matter as the Minister deems fit.

(16) An owner or occupier of land aggrieved by a decision of a road authority under this section may appeal to the Minister.

(17) The Minister may make regulations with respect to the procedure on appeals made under subsection (16).

Power to cut
and remove
trees

30. A road authority may, after consultation with an owner or occupier of land adjacent to any public road, enter upon the land for the purpose of cutting or removing the whole or any part of a tree which—

(a) overhangs such road;

(b) obstructs or interferes with light from a public lamp;

(c) obstructs or interferes with a traffic sign;

- (d) endangers or obstructs the passage of vehicles;
- (e) grows in a way that is likely to cause damage to the road;
- or
- (f) interferes with the proper performance or maintenance of the road.

31.—(1) A road authority may, for the purpose of protecting traffic on any public road from danger or making the crossing of any road less dangerous to pedestrians—

Power to undertake ancillary works

(a) erect, light, maintain, alter or remove places of refuge on the road; and

(b) construct, light, maintain, alter, remove or close any subway or overbridge for the use of pedestrians.

(2) A road authority may undertake and maintain works in the carriageway—

(a) along any length of a public road for separating a part of the road which is to be used by traffic moving in one direction from a part of the road which is to be used, whether at all time or at particular times only, by traffic moving in another direction;

(b) at public cross roads or other public road junctions for regulating the movement of traffic; and

(c) for providing places of refuge for the protection of pedestrians crossing a public road.

(3) The powers conferred by subsection (2) include power to—

(a) light any such works;

(b) pave, plant grass or otherwise cover works or any part of the works;

(c) erect pillars, walls, rails or other fences on, around or across works or any part of the works; and

(d) plant trees, shrubs and other vegetation, either for ornamental purposes or in the interest of safety.

(4) The power conferred by this section to construct works includes the power to alter or remove the works.

32.—(1) No undertaker shall execute any work on a public road or road reserve, except in accordance with this Act.

Regulation of works of undertakers

(2) Where a road authority objects to any works or emergency works carried out or proposed to be carried out by an undertaker, on any public road or road reserve and the road authority is unable to reach an agreement with the undertaker with respect to the objection, the road authority may refer the matter to the Minister, for a decision.

(3) The decision of the Minister on any reference under subsection (2) shall be final.

Execution of
works of
undertakers

33.—(1) An undertaker shall execute—

(a) works on a public road or road reserve in compliance with such proposals and details—

(i) as may have been agreed to under section 32 (2); and

(ii) the decision of the Minister pursuant to section 32 (3), with reasonable dispatch; and

(b) any works of an incidental nature and restore the road to a proper state of repair, with all reasonable dispatch, after completion of any part of the works to the reasonable satisfaction of the road authority concerned.

(2) A road authority may, upon agreement with an undertaker, reinstate the affected part of the road at the expense of the undertaker.

(3) Subject to receiving a written notice from a road authority, an undertaker shall be liable to pay to the road authority the cost of remedying any subsidence or deterioration of reinstatement work carried out by the undertaker if the subsidence or deterioration takes place within twelve months of the completion of the works and the subsidence or deterioration is attributable to defective workmanship or use of defective materials.

Undertakers
to provide
warning and
safety
precautions

34.—(1) An undertaker who is executing works on a public road shall, at its expense, ensure the restoration or other repair to any road occasioned thereby.

(2) An undertaker shall observe the following requirements during and in connexion with the execution of the works—

(a) whenever a road or road reserve is open or broken up, except in a place to which the public has no access and is not permitted to have access, the works are adequately fenced and guarded and all reasonable steps are taken to keep the works lighted in such manner as to give adequate warning to the public during night time;

(b) traffic signs are placed, and where so directed, operated and lighted in accordance with any directions which may be given by the Minister;

(c) no greater width or length of the road than is reasonably necessary is open or broken up at any one time;

(d) there is no greater obstruction to traffic on any road and no

interference with the normal use of the road than is reasonably necessary;

(e) any spoil or other material not required for the execution of the works or of any consequent restoration or repair to the road is carried away, as soon as it is reasonably practicable; and

(f) any other requirement imposed in accordance with any regulations made by the Minister or any relevant road authority are complied with.

(3) Where an undertaker fails to satisfy an obligation to which the undertaker is subject by virtue of subsection (2) as regards any requirement mentioned in paragraph (a), (b) or (c) thereof, the road authority may do anything necessary for securing observance of that requirement and the undertaker shall pay to the road authority an amount equal to any cost reasonably incurred in so doing.

(4) An undertaker who fails to comply with subsection (2) and (3) shall be liable to an administrative penalty of K100,000 for each day of such failure.

35.—(1) An owner or occupier of land situated adjacent to a public road who does not have reasonable access to the public road may apply to a road authority for a permit to construct an access road over any land lying between his land and the public road.

Construction of an access road

(2) An application under subsection (1) shall be in the prescribed form and shall be accompanied by the prescribed fee and a sketch or plan of the proposed access road.

(3) Where permission to construct an access road is granted, the road authority may, on reasonable grounds and upon giving fourteen days notice in writing to the owner of the access road, order the cancellation or alteration of the alignment of the access road.

36.—(1) A road authority may, where it considers it necessary or desirable, provide—

Provision for pedestrians, cyclists, etc.

(a) proper and sufficient footpaths on the sides of a road under its control for the safety, or accommodation, of pedestrians; and

(b) other margins or tracks by the side of a road under its control for the safety or accommodation of ridden horses, driven livestock, agricultural machinery, pedal cyclists or other special types of traffic.

(2) A road authority may control the manner of use of the footpaths, margins and tracks by different classes of the public.

(3) Where there is a proposal to provide a footpath, margin or track on land which is not public land, then sections 25 (4) (d) and

25 (5) shall apply to such proposal as though the road was being widened.

Ferries,
pontoon and
bridges

37.—(1) A road authority may construct and operate a ferry or pontoon to facilitate the crossing of any river or stream.

Cap. 71:01

(2) A ferry or pontoon operated under this section shall be operated in accordance with the Inland Waters Shipping Act.

(3) A road authority may construct a bridge over a river or stream and over or under a railway line or inland waterway.

Cap. 69:03

(4) Nothing in subsection (3) shall derogate the rights, powers, duties and functions conferred upon a railway company by the Railways Act.

Provision of
cattle grids

38. The Minister may, on the recommendation of the Authority, make regulations controlling the construction of cattle grids on any public road and providing for the recovery by a road authority of the cost incurred in constructing and maintaining any cattle grid.

Speed limit

39. A road authority may prescribe a speed limit for a public road under its charge or sections thereof, as the Minister may approve.

Storm water
from roads

40.—(1) A road authority may construct and keep open and unobstructed, ditches, drains, culverts and other works in, through, under or over, land adjoining or near a road or road reserve for draining, protection, preservation, improvement, repair, construction or diversion of a public road.

(2) Subject to subsections (3) and (5), a road authority may, discharge onto any land adjoining, or near, a public road or road reserve, any storm water flowing from a road or from a ditch, drain, culvert or other work referred to in subsection (1)

(3) Where storm water discharged under subsection (2) is likely to affect any adjoining land, the road authority shall, prior to carrying out any works for the discharge of the storm water, consult the owner or occupier of the land likely to be affected by the water and, so far as possible, agree with the owner or occupier a suitable place for the discharge.

(4) Where no agreement has been reached under subsection (3), the matter shall be referred to a relevant local government authority or the Minister, as the case may be, who shall advise on a suitable place, and the road authority shall act according to that advice.

(5) Where the storm water is not discharged into a stream or other proper outlet, the road authority shall pay to the owner or occupier of the land, compensation with respect to the cost of the works

reasonably necessary to be done by such owner or occupier to prevent any damage likely to be caused by such storm water.

(6) Save as provided for under subsection (5), a road authority shall not be liable otherwise with respect to the consequences of such discharge.

41.—(1) An owner or occupier of land adjoining or near a land adjoining a public road who constructs a drain or contour ridge for the purpose of improving or protecting his property, shall not cause or permit storm water to discharge from such drain or contour ridge on to a public road or into an existing road drain beside or under a public road without the permission of the road authority concerned.

Storm water
from land
adjoining

(2) Where a person applies for a permit under subsection (1), the road authority concerned shall only grant the permission if the applicant agrees to pay expenses of any additional drain or enlargement or alteration of an existing road drain which is considered necessary by the road authority.

(3) Where the road authority refuses to grant the permission or any dispute as to the necessity of an additional drain or enlargement or alteration of a drain arises, the matter shall be referred to the Minister for decision, who may, before making the decision, consult with the Minister responsible for water development.

42.—(1) A road authority may, after giving prior written notice of its intention to the owner or occupier of land, enter upon the land and construct or maintain thereon, a temporary diversion of a road for the purpose of facilitating the construction, deviation, repair or maintenance of a public road.

Temporary
diversions

(2) No road authority shall construct a diversion on improved land without—

(a) the approval of the Minister; and

(b) the concurrence of the owner or occupier of the land.

(3) Subject to Part VI, no compensation shall be payable with respect to any entry or acts under this section.

(4) Where a road authority has exercised any power under this section and the diversion is no longer required for the purpose for which it was constructed, the road authority shall make good the land affected thereby to the extent necessary to prevent soil erosion.

43.—(1) Nothing contained in this Part shall prevent—

(a) an authorized officer from making a temporary use of any part of a public road, for purposes of executing a public service; or

Erection of
temporary
premises

(b) a road authority from granting an authorization to any person to erect temporary fences and enclosures upon a public road for the purpose of building, pulling down or repairing their houses and other buildings or for the erection of temporary decorations.

(2) Any person may apply, in a prescribed manner, to a road authority for an authorization to erect a temporary fence or enclosure on any public road for the purpose of building, pulling down or repairing a structure or erection of temporary decorations.

(3) The length and breadth of an enclosure under subsection (1) shall be described in the authorization.

(4) A person authorized under this section shall provide sufficient—

(a) room for vehicles to pass;

(b) lighting from sunset to sunrise; and

(c) road signs at conspicuous places.

(5) A person who fails to comply with subsection (4) commits an offence.

Prevention of
damage,
obstruction
etc, to roads

44.—(1) A person shall not, otherwise than in accordance with this Act—

(a) encroach on any public road or road reserve by making, erecting or altering any structure, ditch or other obstacle or by planting trees or otherwise;

(b) leave, place or negligently allow to fall on a public road any object, of whatever material, so as to obstruct the road or endanger persons using the road;

(c) deposit rubbish, debris or other material on a public road;

(d) intentionally or negligently damage, in any way, any part of a public road;

(e) gather, heap up or take away any gravel, crushed stone, sand, soil or other material from a public road;

(f) fill in, or obstruct, any ditch or drain made to carry water off a public road or road reserve;

(g) construct a dam, ditch, drain or carry out any works that cause flooding of, or damage to, a public road;

(h) cause or allow any heavy object, material or thing, not being wholly raised above the ground on wheels, to be moved along or across a public road;

(i) cause or permit soil or refuse from his premises or land to

be washed on to a public road;

(j) obstruct free passage on a public road by exposing goods or merchandise of any description thereon; or

(k) cause, permit or suffer any damage to a public road as a result of failure to comply with any written law limiting the type, weight or dimension of vehicles or load carried thereon.

(2) Subsection (1)(a) shall not apply to a barrier of a pattern and in a position approved by a road authority and duly erected in accordance with any written law.

(3) A road authority may, by notice in writing, order any person who contravenes subsection (1) to do or desist from doing a specified act, including carrying out specified remedial measures to mitigate the impact of the breach, within the period stated in the notice.

(4) Where a person fails to comply with an order given under subsection (3) within the prescribed period, the road authority may carry out the action specified in the order or implement any measure as would stop the breach.

(5) The road authority may recover the cost incurred in implementing the order under subsection (4) as a civil debt from the person to whom the order was addressed.

(6) A driver of a vehicle which transports road construction materials or other similar materials shall cover the materials to prevent them from falling off or being blown by wind, spilling onto the road or causing harm to other road users.

(7) A road authority may exempt any person, in writing and on such terms and conditions as the road authority may impose, from application of this section.

(8) Subject to subsection (6), a person who contravenes subsection (1), (3) or (6) commits an offence.

45.—(1) A road authority may construct or maintain—

(a) a public road, or part thereof, for the exclusive use of specified kind of traffic or traffic moving in one direction; or

(b) adjacent to a public road, a track or passage for the exclusive use of pedestrians or ridden or driven animals.

(2) A road authority may, in exercise of the powers conferred under subsection (1) —

(a) give orders prohibiting the use of a public road by any class or classes of traffic; or

Construction
of special
roads

(b) regulate or restrict the manner in which a public road, or any part thereof, may be used.

(3) Where the road authority exercises its power under subsection (2), the road authority shall erect appropriate traffic signs, at such places and in such manner as the road authority determines necessary.

Works at
railway
crossing

46.—(1) An undertaker executing works on a public road at a railway level crossing shall comply with—

(a) any agreed specifications for the execution of the works; and

(b) terms and conditions imposed upon him by the authority having the management of the railway, for purposes of—

(i) securing the safety of persons employed in connection with the works; and

(ii) ensuring that interference with traffic on the railway caused by the execution of such works is reduced, so far as is practicable.

(2) An undertaker who fails to comply with subsection (1) commits an offence.

Removal of
apparatus

47.—(1) Where—

(a) apparatus required in connexion with building operations or other work on land adjacent to a public road is placed on the public road or in a road reserve; and

(b) the apparatus is not removed after completion of the building or other works, a road authority may give the undertaker a notice in writing to remove the apparatus.

(2) Where the apparatus is not removed within seven days from the date the notice is given, the road authority may remove the apparatus, and the undertaker shall pay, to the road authority, an amount equal to the cost reasonably incurred in such removal and for any restoration or repair to the road occasioned by the presence or removal of the apparatus.

Contractors
may exercise
rights granted
to road
authority

48.—(1) A contractor may exercise the rights granted to, and the obligations of, a road authority under sections 29, 40, 42 and 51, under the supervision or direction of the road authority engaged in the construction or repair of public roads or proposed roads and on behalf of any road authority.

(2) Any damage done by a contractor for which compensation is payable under this Act shall be paid by the road authority concerned.

49. Where any written law confers power on any person to make an electricity undertaking in relation to a public road or street which requires to be exercised with the consent or approval, or subject to the requirement or superintendence of a road authority, the power shall, in so far as it relates to the doing of work in, or over, any road, street, road reserve or street margin, be exercised in accordance with this Part.

Powers
exercised
by
electricity
undertakers

50.—(1) A statutory power of undertakers to break up or open a public road, being a power conferred for any purposes other than road purposes or purposes of a railway undertaking, shall not be exercisable on, or under, any road during the twelve months following either—

Limitation
of time in
which
works may
be executed

(a) the end of any period during which the use by vehicles of the carriageway of such road has been prohibited or the width thereof available for vehicular traffic has been reduced to less than two-thirds of its normal width for the purposes of execution of works for road purposes; or

(b) the completion of a resurfacing extending to one-third or more of the width of the carriageway of such road.

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

(a) a road authority has given a written notice to the undertaker concerned, at least three months before the date on which the works for road purposes or resurfacing, as the case may be, have substantially began, stating the works intended to be carried out and specifying the date of their commencement; and

(b) the works for road purposes or resurfacing, as the case may be, have substantially began on, or within one month of the date so specified or, if any works of undertakers were in progress in the road on that date, within one month from the completion of such works of undertakers or in either case within such extended period as may have been agreed between the road authority and the undertaker concerned.

(3) Nothing in this section shall apply to any breaking up or opening of a public road in any of the following cases—

(a) for the carrying out of any emergency works;

(b) in relation to any part of a road other than a carriageway, in the case of works relating only to the installation, maintenance, repair or removal of a service pipe or service line or overhead telegraph line or overhead electric cable;

(c) where the execution of such works by an undertaker is in fulfillment of an obligation imposed upon the undertaker by this Act and could not reasonably be effected without breaking up or opening the road as the case may be; and

(d) in the case of any breaking up or opening of a road, executed with the consent of the road authority concerned.

(4) Any undertaker who fails to comply with this section—

(a) shall be liable to pay, to the road authority concerned, an amount equal to any cost reasonably incurred by the road authority in restoring or repairing the part of the road affected; and

(b) without prejudice to its liability under paragraph (a), commits an offence.

Road
authorities and
employees may
park vehicles,
erect huts, etc,
on private land

51. A road authority and persons employed by it in the construction or repair of a public road or proposed public road, may, after giving reasonable notice to, and after consultation with the owner or occupier of private land affected or which will be affected—

(a) park vehicles and erect tents, huts or other temporary buildings on any site convenient to it or them, subject to the conditions that—

(i) no tents, huts or other temporary buildings shall be erected within one hundred and eighty metres of any dwelling house without the consent of the occupier of the dwelling house; and

(ii) where the owner or occupier of such land objects to any site chosen for the erection of tents, huts or other temporary buildings, the matter shall be referred to the Minister who may make such order thereon as he may deem just and reasonable;

(b) place and store plant and equipment on the land outside the road reserve where there is insufficient room on the road reserve;

(c) take and otherwise make provision for water necessary for the proper execution of the work and for animals and labourers, however, no water shall be taken from any artificial dam, furrow, well or borehole save with the consent of the owner; and

(d) cut down and remove trees or bushes on land forming part of a road reserve where necessary in the construction or repair of public roads and, when cut down, such trees shall belong to the owner or occupier of the land upon which the said trees were cut.

PART V — RESERVATION OF LAND

52.—(1) Where the course of any proposed road has been demarcated, the Minister shall, as soon as possible, by notice published in the *Gazette* and in at least two newspapers of widest circulation in the area, reserve a strip of land not exceeding sixty metres wide along the course of the proposed road, and shall notify such reservation, in writing, by registered post or by delivery to the individual owners or occupiers of the land so reserved.

Reservation
of land

(2) A notice referred to in subsection (1) shall include a list of the properties affected by the reservation and shall specify the office at which plans showing the reserved strip of land may be inspected.

(3) The publication of a notice under subsection (1) shall have the effect of —

(a) reserving the strip of land described in the notice for road construction purposes and authorizing the construction of a road thereon;

(b) prohibiting any activity upon the land so reserved; and

(c) canceling any control effected under section 27 of land not included in such notice.

(4) A road authority shall, as soon as possible after land is reserved under this section, lodge a copy of the plan showing the course of the proposed road with the Surveyor General and the Deeds Registrar.

(5) The Minister may, after consulting with the Minister responsible for land, make regulations regarding the scale and nature of the plans provided under this section and any other plans referred to in this Act and the registration and inspection thereof.

(6) The registration of a reservation under this section shall not debar the owner or occupier of the affected land from transferring or otherwise dealing with the land, but the assessment of compensation shall not be affected or influenced in any way by such transfer or dealing.

(7) Where in the construction of the road any variation in the course of the road is found necessary or desirable, a fresh plan shall, before designation of the road under section 16, be prepared and lodged in accordance with subsection (4) showing the actual course of the road as completed, and compensation shall be adjusted according to the loss or damage actually suffered.

53. The Minister may withdraw or modify any control or reservation made under section 28 or section 52, by notice published in the *Gazette*, and subsequently serving the notice on the Deeds

Withdrawal
or
modification
of control or
reservations

Registrar, the Surveyor General and the owner or occupier of land affected by the withdrawal or modification.

Unauthorized
acts on
controlled or
reserved land

54.—(1) Where a person does an act—

(a) calculated to impede the purposes for which the land has been controlled or reserved; or

(b) which has not been authorized by the Minister or a road authority, on land controlled or reserved under sections 18, 28, 52 or 53, the Minister or the road authority may, by notice in writing, order the person to restore the land to the condition in which it was immediately before the act, within the period specified in the notice.

(2) A person who fails to comply with the order under subsection (1) commits an offence.

(3) Where the person fails to comply with the order under subsection (1), the Minister or the road authority may cause to be carried out such work as may be necessary to restore the land and may recover the expense incurred in carrying out the restoration work from that person as a civil debt.

PART VI — COMPENSATION

Assessment of
compensation
generally and
for surface
rights

55.—(1) An owner or occupier of land having an interest in land or surface rights affected by the exercise of powers conferred by this Act may be paid compensation as is provided for under this Part according to the nature and extent of their respective interests.

(2) Where an owner or occupier of customary land or private land is entitled to compensation, compensation shall be limited to existing surface rights, and shall be assessed as follows—

(a) with respect to customary land, the amount of compensation shall be assessed in accordance with section 56;

(b) with respect to private land, the amount of compensation shall be based on the loss or damage suffered by the owner or occupier of the land arising from damage to, or destruction of, the interest in surface rights of the owner or occupier of the land valued at the valuation date; and

(c) where, the owner or occupier of the land is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change, but shall not include any sum with respect to improvements on land in a road reserve effected after the land is declared to be a road reserve.

(3) The loss or damage suffered by the owner or occupier of land under subsection (2)(b) includes—

(i) the damage, if any, sustained by the owner or occupier of the land by reason of the severance of the land from the owner's or occupier's other land; and

(ii) the damage occasioned by any other injurious matter affecting the other property, movable or immovable, of the owner or occupier of the land.

56.—(1) Where an owner or occupier of land is entitled to compensation with respect to customary land which has become public land under this Act, subject to subsection (3), the owner or occupier shall be entitled to reasonable compensation with respect to disturbance which shall be assessed, after consultation with a traditional authority of the area in which the land is situated, and be based on the loss suffered by the owner or occupier of the land arising from damage to or destruction of his interest in the surface rights on such land under the relevant customary law, but may include compensation for other disturbance—

Compensation for land which becomes public land

(a) where the owner or occupier of the land has to move his residence or place of business;

(b) where no alternative land can be made available to owner or occupier of the land and the land remaining available to owner or occupier for agricultural purposes is not, in the opinion of an agricultural officer, an economic unit; and

(c) where alternative land is made available to the owner or occupier and the making of the alternative land, equally as fit for cultivation as the land of which the owner or occupier has been deprived is likely to involve a loss in terms of money, materials or work, but in assessing compensation under this paragraph, the total compensation for disturbance shall not in one case exceed the total of —

(i) what would have been the value of the land in its improved condition at the valuation date less its value at such date in an unimproved condition if it had been freehold land;

(ii) the damage, if any, sustained by the owner or occupier by reason of severing such land from other land occupied by him; and

(iii) the reasonable expenses, if any, incidental to a change of residence or place of business if, in consequence of the matters giving rise to the claim, he is compelled to effect such change.

(2) Where an owner or occupier of land is entitled to compensation with respect to private land which has become public land, the person interested in such land shall, according to his respective interest therein, be entitled to compensation which shall,

subject to subsection (3), be assessed in accordance with section 57.

(3) In the case of land which was a road reserve, no compensation shall be paid with respect to improvements effected since the land became a road reserve.

Matters to be
considered
when assessing
compensation
for alienated
land

57.—(1) In assessing the amount of compensation payable under this Part, only the following matters shall be taken into consideration—

(a) the market value of land or interest therein of the claimant at the valuation date;

(b) the damage, if any, sustained by the owner or occupier of the land, at the valuation date, by reason of the severance of such land from owner or occupier's other land or other injuries, affecting the owner or occupier's other property, moveable or immovable, by reason of the exercise of the powers conferred by this Act;

(c) where, in consequence of the matters giving rise to the claim, the claimant is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to the change;

(d) any increase in the value of the other land or other benefit of the owner or occupier at the valuation date likely to accrue from the construction of the road; and

(e) the relief obtained by the claimant as a result of the taking of the land from the necessity of carrying out in whole or in part any order or direction against the land taken made under any written law for the time being in force relating to the use and protection of land when the work required by the order or direction has not been commenced or completed at the valuation date.

(2) For the purpose of subsection (1)(a)—

(a) where the market value has been increased by means of any improvement made by the claimant or his predecessor in interest within two years before the valuation date such increase shall be disregarded, unless it is proved that the improvement was made in good faith and not in contemplation of the construction of the road; and

(b) the following matters shall be disregarded—

(i) any enhancement of the market value due to the proposal to construct or extend the road;

(ii) any increased value thereof due to use of the land or any premises thereon which is contrary to law;

(iii) any damage sustained by the claimant which, if caused by a private person, would not be a good cause of action;

(iv) the special suitability or adaptability of the land for road purposes;

(v) the degree of urgency which has led to the taking of the land; and

(vi) any unwillingness of the owner or occupier of the land to part with the interest in the land.

(3) For the purpose of subsection (1) (d), the increase in value of the other land and the other benefit likely to accrue shall, where the land forms part of an estate—

(a) not less than one hundred and sixty hectares and not more than four hundred hectares in extent, be deemed equal in value to two per centum of the total area of the estate; and

(b) exceeding four hundred hectares in extent, be deemed equal in value to four per centum of the total area of the estate, however—

(i) where the land taken is improved land, this subsection shall not operate to deprive the person interested, of compensation with respect to damage to or destruction of surface rights existing at the valuation date of the land taken; and

(ii) where the land taken forms part of an estate less than one hundred and sixty hectares in extent, it shall not, in the absence of evidence, be assumed that there is any increase in the value or other benefit to be taken into consideration.

58. A person shall not be entitled to compensation where the person—

(a) cultivates crops or grow trees in a road reserve; or

(b) erects or lays utility service facilities or any other structure in a road reserve.

Compensation for crops, trees and utility service facilities, etc

59.—(1) Every claim for compensation under this Act shall—

(a) be made, in writing, addressed to a road authority liable to pay the compensation;

(b) within three months from the date when the damage or destruction was caused; and

(c) give particulars of the amount claimed and the basis of the claim.

Claims for compensation

(2) Where a claim in subsection (1) is in respect of customary land, the claim may be made orally to the chief for the area, who

shall forward the claim to the officer responsible for land matters within the district and such officer shall in turn forward the claim to the relevant road authority.

(3) On receipt of a claim, a road authority responsible shall agree to pay the claim, or forthwith make a written offer to the claimant in settlement thereof.

(4) For purposes of this Part, the "valuation date" for compensation shall be—

(a) for purposes of any construction, care and maintenance of a road or road reserve in accordance with section 25, the date when notice of intention to enter was given by the road authority concerned;

(b) for purposes of carrying out any survey or investigations in accordance with section 26, the date when notice of intention to enter was given;

(c) for purposes of constructing and keeping open and clean ditches, drains, culverts and other works in, through, under or over, land adjoining or near a road or road reserve for the draining, protection, preservation, improvement, repair, construction or diversion of any public road in accordance with section 40, the date of entry on the adjoining land; and

(d) for purposes of constructing a temporary diversion under section 42, the date when notice of intention to enter was given.

Compensation board

60.—(1) Where compensation has not been agreed within two months after the date of the claim, the assessment of compensation may be referred, by a road authority or the claimant, as the case may be, to a compensation board constituted in accordance with this section.

(2) A compensation board shall consist of—

(a) a resident magistrate nominated by the Judicial Service Commission; and

(b) two assessors appointed by the Minister.

(3) A compensation board shall have jurisdiction with respect to all claims for compensation under this Act, irrespective of the amount claimed.

(4) Where compensation is related to disturbance of an occupier of any customary land, a compensation board may consult a relevant chief in the land and any other relevant experts as it may deem necessary.

(5) A compensation board shall, after giving the claimant and a road authority concerned, an opportunity to be heard, proceed to assess the amount of compensation, and the compensation board may award a reasonable amount of compensation and costs as may be necessary in the circumstances of the claim.

(6) A compensation board may, where it deems appropriate and just, extend the time for making a claim prescribed under this Part.

(7) The Minister may, in consultation with the Chief Justice, make rules regulating—

(a) how a compensation board will be constituted; and

(b) the procedure to be followed by a compensation board.

61. Any person dissatisfied with a decision of a compensation board may appeal to the High Court, within thirty days of the decision, by way of petition.

Appeals to
the High
Court

PART VII—TRAFFIC SIGNS, ADVERTISEMENTS AND STRUCTURES

62.—(1) A road authority shall erect necessary traffic signs on public roads under its jurisdiction, as may be prescribed under this Act or any written law.

Traffic signs

(2) Subject to, and in conformity with, such general or other traffic signs directions, a road authority may cause or permit traffic signs to be placed on or near any road in its area.

(3) An authority managing a railway line may place traffic signs at a level crossing without obtaining prior permission of a road authority.

(4) A road traffic sign shall be of such specification as the Minister may prescribe.

(5) A road authority may give directions for the placing on any road of a traffic sign of any prescribed type or authorized specification.

(6) A person who removes, mutilates, obscures or in any way damages or interferes with or, attaches any notice or other thing to any traffic sign, without the permission of the road authority concerned, commits an offence and shall, upon conviction, be liable to a fine of K15,000,000 and to imprisonment for three years.

(7) The Minister may, by regulations, create exemptions to the application of this section or any part thereof.

Temporary
traffic signs

Cap. 69:01

63.—(1) Where a need arises to erect or place a temporary traffic sign on a road, a person, acting under a general or specific written authorization of a road authority may, subject to the Road Traffic Act, erect or place the temporary traffic signs on the road.

(2) A temporary traffic sign under this section may indicate such prohibitions, restriction or other requirements relating to vehicular traffic, as may be necessary or expedient to prevent traffic in consequence of an accident or other unforeseen or extraordinary circumstances.

(3) A traffic sign placed in accordance with subsection (1) shall be removed as soon as the circumstance or work on account of which it was erected or placed ceases to exist or is completed.

Control of
advertisement
and structures

64.—(1) A person shall not erect, place or display an advertisement or construct a structure for purposes of displaying advertisements on a public road or a road reserve, without prior written approval of the road authority concerned.

(2) A road authority may grant or refuse an application for erection, placement or display of an advertisement or structure on such terms and conditions as the road authority may determine appropriate.

(3) A road authority may prescribe—

(a) specifications for advertisements and structures, to be erected, placed or constructed;

(b) the period during which the advertisement or structure, may be displayed, erected, placed or constructed; and

(c) the manner, place, conditions or circumstances under which an advertisement or structure can be erected, placed or displayed on a public road.

(4) A road authority may, at any time, alter the terms and conditions attached to an approval granted under subsection (2) or revoke the approval.

(5) A road authority may, by notice in writing, require the owner of any object or device, whether fixed or portable, which obstructs the line of vision of road users or a line of vision to a traffic sign, to modify or remove the object or device.

(6) Where the owner of the object or device fails to comply with a notice under subsection (5), the road authority may remove or modify the object or device and recover, summarily, as a civil debt from the owner, the expenses incurred in removing or modifying the object or device.

65.—(1) Where an advertisement or structure erected, placed, displayed or constructed on a public road pursuant to this Part—

Removal or
alteration of
advertisements
and
structures

(a) is erected, placed, displayed or constructed without the written approval of a road authority or after the expiration or revocation of the approval;

(b) does not comply with any terms and conditions prescribed under section 64 (2); or

(c) is displayed in a manner, at a place, in circumstances or under conditions other than those specified in the approval in accordance with section 64 (3), the road authority may, by a written notice, order the person erecting, placing, displaying the advertisement or constructing the structure to remove the advertisement or structure, as the case may be or effect such alteration in the nature of the advertisement or structure or in a manner, place or circumstance, as the case may be, in which it is being displayed or erected as may be specified in the notice.

(2) A person who fails to comply with an order under subsection (1) shall be liable to an administrative penalty of K500,000 and a further penalty of K50,000 for each day of continued default.

(3) Notwithstanding the penalty imposed under subsection (2), the road authority may cause the advertisement or structure to which the order relates to be removed or altered as specified in the order and the road authority may recover the cost of the removal or alteration as a civil debt from the person to whom the order was addressed.

PART VIII – OFFENCES AND PENALTIES

66.—(1) A person who, without approval of a road authority—

Destroying
a road reserve
or road
furnitures

(a) destroys, puns up, defaces, breaks or damages any milestone, lamp post, or bridge, arch, wall, dam, drain, sluice, lock or embankment, abutment, mound, lamp post, traffic light, railing, chain or fence, road reserve, edge marker, marker posts or any other road furniture or facility on a public road or erected at or near any pit opened or used for getting road materials;

(b) removes any fence, post, stone, log or other thing laid or erected by a road authority, on or in any public road, for the temporary prevention of the use of the road, or for preventing danger or injury to persons passing along the road;

(c) gathers, heaps up or takes away any stone, gravel, sand or other material, or any dirt or soil from a public road;

(d) cultivates or constructs anything in a road reserve;

(e) makes or causes to be made any drain, dam, ditch, drain, watercourse or speed hump upon or across a public road, or otherwise breaks up or damages the surface of any public road; or

(f) constructs a structure which projects over or encroaches upon a public road, commits an offence and shall, upon conviction, be liable to a fine of K20,000,000 and imprisonment for five years.

(2) Notwithstanding the penalty imposed under subsection (1), a court may order—

(a) where the convict has gained, financially or materially, from the commission of the offence, that the gain be paid or transferred to the relevant road authority;

(b) the convict to restore the road, road furniture or road reserve to its original state; or

(c) where the road authority has restored the road, road furniture or road reserve, that the cost incurred by the road authority be recovered from the offender.

Causing
damage,
obstruction,
etc to a public
road

67.—(1) A person who, in such manner as to cause damage to the public road—

(a) drives or permits a motor vehicle, trailer or engineering plant to be driven on a public road;

(b) conducts or permits to conduct any business on the road shoulders or pedestrian walkways of a public road; or

(c) drives or permits to be driven any animal from, on, off or into any public road, commits an offence and shall, upon conviction, be liable to a fine of K25,000,000 and imprisonment for five years.

(2) A person who—

(a) obstructs or causes to be obstructed the passage of water from a public road or from any ditch or drain leading from the road;

(b) being the owner or occupier of any land adjacent or contiguous to a public road, permits any water, filth or other matter or thing to flow from such land into or upon the public road;

(c) causes accumulation of objects, dirt or rubbish from his land which is likely to impede the flow of the water in any ditch or drain on a public road;

(d) hauls or draws upon any public road any object or other thing, other than a wheeled vehicle, or causes any object or other

thing which shall be carried wholly or in part upon a wheeled vehicle to drag or trail upon such public road to damage the road;

(e) digs up, adds, removes or alters in any way or permits such acts to be done on the soil or surface of a public road or a road reserve or, if the digging, alteration, addition is done for the purpose of moving a vehicle, the road condition is not restored thereafter to its previous state; or

(f) spills any product or substance on a public road which damages or is likely to damage the road, commits an offence and shall, upon conviction, be liable to a fine of K25,000,000 and imprisonment for five years.

(3) Notwithstanding the penalty prescribed under this section, a court may order the convict to pay the cost of repairing the damaged road.

68.—(1) A person who fixes or places an overhead rail, beam, restriction on pipe, cable, wire or other similar apparatus over, along or across a public road, without the written consent of the relevant road authority, commits an offence and shall, upon conviction, be liable to a fine of K15,000,000 and imprisonment for three years.

Restriction
on rails,
pipes etc
over public
roads

(2) The court may, in addition to the penalty under subsection (1), order the convict to—

(a) remove the overhead rail, beam, restriction on pipe, cable, wire or apparatus; and

(b) repair any damage occasioned by the fixing or placing of the overhead rail, beam, restriction on pipe, cable, wire or apparatus that was fixed or placed over, along or across the public road.

69.—(1) A person who resists, obstructs, hinders, molests another person acting in the discharge of any duty or the performance of any act which the other person is authorized or required to perform under this Act commits an offence.

Obstruction
of
authorized
officers

(2) A person who incites, assists or procures another person to commit an offence under subsection (1), commits an offence.

(3) A person convicted of an offence under subsection (1) or (2) shall be liable to a fine of K15,000,000 and imprisonment for three years.

70.—(1) A person who commits an offence under this Act, for which no penalty has been specifically prescribed, shall be liable to a fine of K25,000,000 and imprisonment for five years.

General
penalty

(2) A court may, in addition to the penalty under subsection (1), order—

(a) order the offender referred to in subsection (1) to pay the relevant road authority expenses incurred or to be incurred in the process of making good such damage or act; or

(b) if the damage is attributable to a vehicle, order the owner of the vehicle to pay the relevant road authority the expenses referred to in paragraph (a).

(3) A certificate of a relevant road authority, as to the cost of making good any damage caused by an offence under this Act, shall be *prima facie* evidence of the cost of the required works to make good the damage caused by the offence.

PART IX — MISCELLANEOUS

Service of
notices

71.—(1) A notice under this Act shall be served on an owner or occupier of customary land by delivering the notice to the traditional authority of the area in which the land is situated.

(2) Where a notice is served on a traditional authority under subsection (1), the traditional authority shall, immediately, deliver the notice to, and inform the owner or occupier of the land of the purport and effect of the notice.

(3) A notice under this Act shall, where practicable, be served on an owner or occupier of private land by delivering the notice to the person named therein.

(4) Where the person named in a notice to be served under subsection (3) cannot be traced after reasonable inquiry, the notice may be served by —

(a) delivering the notice to an adult member of the family of the owner or occupier of the private land or where no adult member of the family is available by delivering the notice to any adult person at the last known residential address of the owner or occupier of the private land;

(b) fixing the notice on the outer door of the house in which the person therein named ordinarily dwells or carries on business; or

(c) fixing the notice on a conspicuous place on the land.

(5) A copy of a notice served under this section shall be fixed on a notice board of the local council under whose jurisdiction the land in question is situated.

(6) Where it is uncertain as to who owns the land in question,

notice shall be served by delivering a copy of the notice to every person who claims to be interested in the land.

(7) An occupier of land who is served with a notice under this Act, relating to land of which he is not the owner, shall, forthwith deliver the notice to the owner of the land and inform that owner of the land of the purport and effect of the notice.

(8) Where the name of an owner or occupier of land is not known and has not been ascertained after reasonable inquiry, it shall be sufficient to address a notice under this Act to the owner or occupier by that description and give an adequate description of the land in question.

(9) Where an owner of land is not in Malawi, a notice under this Act shall be served by post to the last known address of the owner of the land and the notice shall be deemed to have been duly served on such person on the date when it would ordinarily be delivered in due course of post.

(10) Where prior notice to the owner of land is required to be given before a power of entry under this Act is exercised and the owner of the land is not in Malawi, the requirement shall be deemed to be satisfied by delivering the notice to the occupier of the land.

(11) Where this Act requires that the owner or occupier of land should be consulted and the owner or occupier of the land cannot be found after reasonable inquiry, it shall be sufficient to serve a notice of the intended consultation on the the owner or occupier of land as prescribed under this section, informing him of the matter with respect to which consultation is required.

72. A road authority shall not be liable for any loss or damage caused to any person or property—

Indemnity of
a road
authority

(a) as a result of—

(i) the condition of a public road; or

(ii) the failure of the public road to sustain the weight of a vehicle; or

(b) by reason of—

(i) use of a public road; or

(ii) the placing of anything on, under or over, or maintenance of the public road.

73.—(1) An authorized officer shall not be personally liable for any action, claim or demand whatsoever for—

Liability of
road
authorities
and
authorized
officers

(a) anything done or omitted to be done by a road authority;

(b) a contract entered into by a road authority; or

(c) any matter or thing done or omitted to be done by the authorized officer, if the matter or thing was done or omitted to be done, or the contract was entered into *bonafide* in pursuance of the duties of the road authority or authorized officer with respect to any public road, and any expense incurred by the authorized officer in connexion with any such action, claim or demand, shall be paid by the road authority.

(2) Nothing in subsection (1) shall debar a suit where an act or omission has been occasioned by negligence on the part of the road authority, or an authorized officer as would create liability under any other written law.

(3) The liability of a road authority under any other written law with respect to any injury, damage or loss which may accrue to any person or property through the failure of any public road to sustain any vehicle shall be limited to liability for physical damage to such person or property caused by such failure within the prescribed road reserve width.

Plans of public
roads

74.—(1) The Minister shall cause a survey of each public road to be conducted and a plan thereof to be prepared and shall, from time to time, cause follow-up surveys to be conducted updated plans to incorporate any change or alteration to the plan to be prepared.

(2) The plans or survey shall be authenticated by a licensed surveyor or other public officer authorized by the Minister.

(3) The Minister shall lodge copies of the survey and plan under subsection (1) with the Surveyor General and Lands Registrar.

Regulations

75.—(1) The Minister may make regulations for the carrying into effect of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may—

(a) authorize any road authority to demand and receive a toll from a person using a bridge, ferry or pontoon maintained by the road authority and the regulations may provide exemptions from payment of the toll;

(b) restrict the use of public roads or a class of public roads;

(c) regulate, subject to any other written law, the construction of public roads crossing over tramways or railways;

(d) provide for the safety of the public in the use of public roads;

(e) prescribe and regulate the fixing of mileposts or stones, road furniture, advertisements and billboards on public roads;

(f) prescribe the width of roads and bridges;

- (g) regulate the management of road reserves;
- (h) prescribe criteria and procedure for classification of roads;
- (i) governing the execution of works, including emergency works, by undertakers;
- (j) prescribe a scheme to protect the environment and promote sustainable development in the road sector; and
- (k) prescribe anything that needs to be prescribed under this Act or in furtherance of the objectives of the Act.

(3) Notwithstanding section 21(e) of the General Interpretation Act, the regulations made under this section may create offences the contravention of which may attract a fine not exceeding K5,000,000 and imprisonment for term not exceeding twelve months.

76.—(1) The Public Roads Act is hereby repealed.

(2) Any subsidiary legislation made under the Act repealed by subsection (1), in force immediately before the commencement of this Act—

Repeal and
savings
Cap. 69:02

(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.

77. Any—

- (a) act done;
- (b) notice issued;
- (c) consent granted;
- (d) authorization granted;
- (e) direction given;
- (f) restriction imposed;
- (g) claim made;
- (h) action commenced; and
- (i) any other power or authority exercised,

Transitional

under the Act repealed under section 76 immediately prior to the commencement of this Act, shall be deemed to have been done, under this Act.

Passed in Parliament this fifteenth day of December, two thousand and twenty-two.

FIONA KALEMBA
Clerk of Parliament

