

REPUBLIC OF SOUTH AFRICA

TRANSNET PENSION FUND AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No 29303 of 12 October 2006)
(The English text is the official text of the Bill)*

(MINISTER FOR PUBLIC ENTERPRISES)

[B 30—2006]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Transnet Pension Fund Act, 1990, so as to—

- delete or amend certain definitions and to define certain expressions;
 - provide for the continued existence of the Transnet Pension Fund under the new name of the Transport Pension Fund;
 - reflect the new status of the Transport Pension Fund as a multi-employer defined benefit fund;
 - enable the continued membership of the Transnet Retirement Fund for those of its members who ceased to be employed by a Transnet employer and became employed by an SOE employer;
 - provide for the creation of subfunds in the Transport Pension Fund;
 - provide that general rules will determine the governance and management of the Transport Pension Fund;
 - provide that special rules will determine contributions, obligations and benefits applicable to members of a subfund;
 - provide for the establishment of subfund boards;
 - provide for the valuation of each subfund;
 - provide for the deduction from benefits of amounts payable in terms of maintenance orders;
 - protect the special tax status of the Transport Pension Fund; and
 - empower the Minister to make regulations; and
- to provide for matters connected therewith.

PREAMBLE

WHEREAS the Transnet Pension Fund was established on 1 October 1990 for employees and pensioners of the South African Transport Services and Transnet;

AND WHEREAS the Transnet Second Defined Benefit Fund was established on 1 November 2000 for persons who immediately before the date of commencement of the Transnet Pension Fund Amendment Act, 2000 (Act No. 41 of 2000), were pensioner members of the Transnet Pension Fund;

AND WHEREAS the Transnet Retirement Fund was established in 2000;

AND WHEREAS there is a need to restructure the Transnet Pension Fund into a multi-employer pension fund for employees and pensioners of the Transnet group of employers and SOE employers who were such employees and pensioners on 11 November 2005,

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

Amendment of section 1 of Act 62 of 1990, as amended by section 39 of Act 52 of 1991 and section 1 of Act 41 of 2000

1. Section 1 of the Transnet Pension Fund Act, 1990 (hereinafter referred to as the principal Act), is hereby amended—
- (a) by the insertion before the definition of “**Company**” of the following definition:
 “**‘actuary’** means an actuary who is a fellow of an institute, faculty, society or chapter of actuaries approved by the Minister of Finance;”;
- (b) by the deletion of the definition of “**Company**”;
- (c) by the insertion before the definition of “**employer**” of the following definition:
 “**‘dependent pensioner’**, in relation to the Transport Pension Fund, means a person who is entitled to a pension paid by that fund and whose entitlement to such pension is derived from the membership of that fund of a deceased member or a deceased pensioner;”;
- (d) by the substitution for the definition of “**employer**” of the following definition:
 “**‘employer’** means [the Company or any other company of which an employee is a member of the Fund] a Transnet employer or an SOE employer;”;
- (e) by the deletion of the definition of “**Fund**”;
- (f) by the insertion before the definition of “**Minister**” of the following definition:
 “**‘general rules’**, in relation to the Transport Pension Fund, means the Rules applicable to the Transport Pension Fund as a whole;”;
- (g) by the substitution for the definition of “**Minister**” of the following definition:
 “**‘Minister’** means the Minister of [Mineral and Energy Affairs and] Public Enterprises or the shareholder Minister responsible for Transnet;”;
- (h) by the insertion after the definition of “**Minister**” of the following definitions:
 “**‘pensioner’**, in relation to the Transport Pension Fund, means a person who is entitled to a pension paid by that fund and whose entitlement to such pension is derived from his or her membership of that fund;
 ‘principal employer’ means—
 (a) Transnet; or
 (b) every SOE employer that is accepted as a principal employer for the purposes of this Act in terms of an agreement between Transnet and the Minister;”;
- (i) by the substitution for the definition of “**Rules**” the following definition:
 “**‘Rules’** means the Rules referred to in section 5 of this Act, comprising the general rules and all special rules;”;
- (j) by the deletion of the definition of “**Second Fund**”; and
- (k) by the insertion after the definition of “**Rules**” of the following definitions:
 “**‘SOE employer’** means the State or any of the following state-owned enterprise employers:
 (a) Any national public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), other than Transnet that is accepted as an employer for the purposes of this Act in terms of an agreement between Transnet and the Minister; or

- (b) any other company—
- (i) in which the State or a national public entity contemplated in paragraph (b) owns one or more shares;
 - (ii) that had in its employ on 11 November 2005 a person who was a member of any fund established in terms of this Act; and
 - (iii) that is accepted as an employer for the purposes of this Act in terms of an agreement between Transnet and the Minister;
- ‘SOE group of employers’** means an SOE employer that is a principal employer, and all SOE employers in which that principal employer owns shares: Provided that if more than one principal employer owns shares in an SOE employer, that SOE employer falls within the SOE group of employers of the principal employer that owns the most shares in that SOE employer;
- ‘special rules’**, in relation to the Transport Pension Fund, means those rules of that fund that apply to a subfund of that fund only;
- ‘subfund’**, in relation to the Transport Pension Fund, means that part of that fund—
- (a) to which members, pensioners, dependent pensioners, other beneficiaries, assets and liabilities are attributable in terms of section 4A(2); and
 - (b) which is governed by special rules and general rules;
- ‘subfund board’**, in relation to the Transport Pension Fund, means a board contemplated in section 4A(5);”;
- ‘subsidiary’** means a subsidiary contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);
- ‘Transnet’** means Transnet Limited, formed and incorporated in terms of section 2 of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989);
- ‘Transnet employer’** means Transnet or any other company contemplated in the definition of Transnet group of employers;
- ‘Transnet group of employers’** means—
- (a) Transnet;
 - (b) any company formed in terms of section 32 of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989), excluding any such company in which Transnet does not own shares; and
 - (c) any other company in which Transnet or any subsidiary of Transnet is a shareholder, excluding any company that falls within an SOE group of employers;
- ‘Transport Pension Fund’** means the fund referred to in section 2;
- ‘Transnet Retirement Fund’** means the Transnet Retirement Fund established by Transnet in terms of section 14A;
- ‘Transnet Second Defined Benefit Fund’** means the fund established by section 14B(1);
- ‘valuator’** means an actuary approved by the Registrar of Pension Funds contemplated in the Pension Funds Act, 1956 (Act No. 24 of 1956), as a valuator for the purposes of the valuation of retirement funds and appointed in terms of section 6(1).”.

Substitution of section 2 of Act 62 of 1990 50

2. The following section is hereby substituted for section 2 of the principal Act:

“Continued existence and change of name of Transnet Pension Fund

2. (1) The fund that immediately before the date of the commencement of the Transnet Pension Fund Amendment Act, 2006, existed as the Transnet Pension Fund shall continue to exist as a juristic person under the name of the Transport Pension Fund. 55

(2) Any reference to the Transnet Pension Fund in a law, the Rules or any other document shall be construed as a reference to the Transport Pension Fund.”.

Substitution of section 3 of Act 62 of 1990, as substituted by section 40 of Act 52 of 1991

3. The following section is hereby substituted for section 3 of the principal Act:

“Obligations payable from revenue

3. Obligations which, in terms of regulations promulgated in terms of the Railways and Harbours Pensions Act, 1971 (Act No. 35 of 1971), and the Railways and Harbours Pensions for Non-Whites Act, 1974 (Act No. 43 of 1974), read in conjunction with section 36[(7)] of, and item (10)(a) of Schedule 2, Part 7, to, the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989), are payable out of the revenue of [the employer,] Transnet shall continue to be payable, but shall be payable out of [such] the revenue of one or more employers in such proportions—

(a) as may be agreed between them; or

(b) failing an agreement contemplated in paragraph (a), as the Minister, acting with the concurrence of the Minister of Finance, deems equitable after taking into account—

(i) the history of occupational retirement funding arrangements for employees of Transnet and its predecessors;

(ii) the history of Transnet and in particular the restructuring of Transnet in the period 2005 to 2007 and the consequential changes in the employment of employees at that time;

(iii) the terms of any agreements between the employers; and

(iv) the nature and extent of the liabilities of the Transport Pension Fund and the categories of members, pensioners and beneficiaries to which they relate.”.

Substitution of section 4 of Act 62 of 1990

4. The following section is hereby substituted for section 4 of the principal Act:

“Determination of obligations and rights of certain members

4. The Rules must provide for recognition of the periods of membership of the New Fund or Pension Fund, as the case may be, of those members who were previously members of either of those funds for the purposes of determining their obligations to the Transport Pension Fund and the benefits and rights that would have been applicable had they, or the members through whose membership they became entitled to benefits, been contributors to the Transport Pension Fund from the date from which their contributions to the New Fund or the Pension Fund commenced.”.

Insertion of section 4A in Act 62 of 1990

5. The following section is hereby inserted in the principal Act after section 4:

“Division of Transport Pension Fund into subfunds

4A. (1) With effect from the date on which an employer, other than Transnet, becomes a principal employer, the Transport Pension Fund shall be divided and a subfund established in the name of that principal employer.

(2) The following persons shall be assigned to the subfund contemplated in subsection (1):

(a) Every person except a Pensioner who—

(i) was a member of the Transnet Pension Fund as at 11 November 2005;

(ii) has not ceased to be a member of the Transnet Pension Fund; and

(iii) is employed by that principal employer or an employer related to that principal employer as contemplated in the definition of SOE group of employers; and

- (b) every pensioner who immediately before his or her retirement was employed by—
- (i) that principal employer or an employer related to that principal employer as contemplated in the definition of Transnet group of employers or SOE group of employers, whichever is applicable; or 5
 - (ii) a principal employer other than the one in whose name that subfund is established or an employer related to that principal employer as contemplated in the definition of Transnet group of employers or SOE group of employers, whichever is applicable, if— 10
 - (aa) the business in which the pensioner was employed at the time of his or her retirement was subsequently transferred to that principal employer or such related employer; or
 - (bb) shares in the company by which the pensioner was employed at the time of his or her retirement were subsequently transferred to that principal employer or such related employer, 15
 and the parties to the transactions referred to in items (aa) and (bb) have agreed that the pensioner shall be assigned to that subfund; and 20
- (c) every dependent pensioner whose right to a pension is derived from the membership of—
- (i) a member who died while employed by that principal employer or an employer related to it as contemplated in the definition of Transnet group of employers or SOE group of employers, whichever is applicable; 25
 - (ii) a member who died while employed by a principal employer other than the one in whose name the subfund was established or an employer related to it as contemplated in the definition of Transnet group of employers or SOE group of employers, whichever is applicable, if— 30
 - (aa) the business in which the member was employed at the time of his or her death was subsequently transferred to that principal employer or such related employer; or 35
 - (bb) shares in the company by which the member was employed at the time of his or her death were subsequently transferred to that principal employer or such related employer, 40
 and the parties to the transactions referred to in items (aa) and (bb) have agreed that the dependent pensioner shall be assigned to that subfund;
 - (iii) a pensioner who dies while assigned to that subfund; or
 - (iv) a pensioner who dies while assigned to a subfund other than the one attributed to the principal employer, if the principal employers of both subfunds have agreed that the dependent pensioner be assigned to that subfund. 45
- (3) (a) The liabilities, assets, rights and obligations of the Transport Pension Fund in relation to the persons contemplated in subsection (2) as determined— 50
- (i) by the board of trustees of the Transport Pension Fund in consultation with the Transport Pension Fund's valuator; and
 - (ii) if required, by the principal employers of the subfund from which the persons were transferred and of the subfund to which they are now assigned, in consultation with an actuary or actuaries appointed by those principal employers, 55
- shall vest in and devolve upon the subfund to which the persons referred to in subsection (2) are assigned.
- (b) A person contemplated in subsection (2) shall have no claim to the assets of a subfund other than the one to which he or she has been assigned in terms of this section. 60

(c) Any claim against the Transport Pension Fund by a person contemplated in subsection (2) shall be satisfied out of the assets of the subfund to which he or she is now assigned.

(4) If a member ceases to be a member assigned to one subfund and becomes a member assigned to another subfund, the liabilities, assets, rights and obligations contemplated in subsection (3)(a) must be transferred from the member's former subfund to the member's new subfund. 5

(5) With effect from the date upon which an employer other than Transnet becomes a principal employer and a subfund is established in terms of subsection (1)— 10

(a) a subfund board is established, the composition, powers and duties of which must be provided for in the Rules;

(b) special rules must provide for, amongst other things—

(i) the rate at which members assigned to the subfund are required to contribute to the Transport Pension Fund; and 15

(ii) the rate at which employers of members assigned to the subfund are required to contribute to the Transport Pension Fund; and

(iii) the benefits payable by the Transport Pension Fund to the members transferred to the subfund and to the persons contemplated in subsection (2)(b) and (c); and 20

(iv) matters incidental to the matters referred to in subparagraphs (i) to (iii).

(6) Notwithstanding anything to the contrary in the Rules, a subfund board shall— 25

(a) exercise control over and manage the subfund in the best interests of the Transport Pension Fund, with due regard for the interests of the employers in question and the members, pensioners and dependent pensioners assigned to the subfund;

(b) determine by agreement with the applicable principal employer and implement the investment policy and strategy to be applied to the assets assigned to the subfund; 30

(c) determine how benefits payable on the death of a member assigned to the subfund are to be allocated amongst his or her dependents and any other beneficiaries; 35

(d) determine whether a person who claims a benefit for which a subfund is alleged to be liable is entitled to that benefit;

(e) exercise such powers as the Minister may by regulation confer upon the subfund board; and

(f) exercise such powers as the board of trustees of the Transport Pension Fund may delegate to such committee. 40

(7) Any benefit, cost, loss sustained or liability due to or incurred by the Transport Pension Fund as a whole but which is attributable, in the opinion of the board of trustees, to a subfund shall be deemed to be a benefit, cost, loss sustained or liability due to or incurred by that subfund and may not be paid over to, recovered from or transferred to any other subfund. 45

(8) The general rules of the Transport Pension Fund shall provide for the allocation of all costs incurred by that fund and shall provide for the administration of the fund, for the valuation, the audit and the investment of the assets of the fund and for all other matters related to the governance and management of the fund. 50

(9) The administration of the Transport Pension Fund, in so far as it relates to the business of a subfund, may by agreement between the applicable principal employer and a subfund board be conducted separately from the administration of any other subfund. 55

(10) The initial special rules of a subfund must provide for benefits and rates of contribution applicable to its members, pensioners, dependent pensioners and other beneficiaries, which benefits and rates of contribution are the same as those which were applicable to them immediately before the establishment of the subfund. 60

(11) A principal employer is liable to the members, pensioners, dependent pensioners and other beneficiaries of a particular subfund for the payment of benefits due to them in terms of the applicable general rules and special rules in the event and to the extent that the assets assigned to the subfund are not sufficient to meet the benefits due.

(12) An employer's liabilities to the Transport Pension Fund are limited to those attributable to members, pensioners, dependents or other beneficiaries assigned to a subfund established in terms of subsection (1), in the name of the SOE group of employers of which that employer is a part.

(13) The Rules of the Transport Pension Fund may provide for the transfer to an insurer registered as such in terms of the Long-Term Insurance Act, 1998 (Act No. 52 of 1998), of the liability of that fund to pay a pension in terms of a retirement annuity policy issued in the name of a pensioner, dependent pensioner or other beneficiary.”

Amendment of section 5 of Act 62 of 1990, as amended by section 2 of Act 41 of 2000

6. Section 5 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“Rules of Transport Pension Fund”;

(b) by the substitution for subsection (1) of the following subsection:

“(1) The control and management of the Transport Pension Fund, admission to and termination of membership, the amount and nature of contributions by members and contributions and other payments by the **[employer]** employers, and the benefits due to pensioners and other beneficiaries, the terms and conditions under which members of the Transport Pension Fund may elect to have their rights ceded, and assets commensurate with such rights transferred from the Transport Pension Fund to a pension fund established by the Minister in terms of section 14A(2), and the manner in which the Rules of the Transport Pension Fund may be amended, shall be governed by the Rules of the Transport Pension Fund.”;

(c) by the deletion of subsection (2);

(d) by the substitution for subsection (3) of the following section:

“(3) **[Prior to the date of registration of the Fund in terms of section 13 of this Act, any amendment of the Rules shall be subject to the approval of the Minister, acting with the concurrence of the Minister of Finance]** Any amendment of—

(a) the general rules shall be made by the board of trustees of the Transport Pension Fund subject to the approval of at least one principal employer and of the Minister, acting with the concurrence of the Minister of Finance; and

(b) the special rules applicable to a subfund shall be made by the applicable subfund committee subject to the approval of the applicable principal employer and of the Minister, acting with the concurrence of the Minister of Finance.”; and

(e) by the substitution for subsection (4) of the following subsection:

“(4) The Rules of the Transport Pension Fund as amended from time to time shall be binding on **[the]** each employer, its members, pensioners, dependent pensioners, other beneficiaries and the Transport Pension Fund.”.

Amendment of section 6 of Act 62 of 1990, as amended by section 3 of Act 41 of 2000

7. Section 6 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“Actuarial evaluation of [the] Transport Pension Fund”;

(b) by the substitution for subsection (1) of the following subsection:

“(1) The Transport Pension Fund shall be valued by **[an actuary]** a valuator, appointed by the Minister, within three years from the operative date of this Act and thereafter by a valuator appointed by the board of trustees of the Transport Pension Fund at intervals, **in the discretion of the Minister,**] of not more than three years.”;

- (c) by the insertion of the following subsection after subsection (1):
 “(1A) With effect from the date of commencement of the Transnet Pension Fund Amendment Act, 2006, and for the purposes of an actuarial valuation, each subfund shall be subject to actuarial valuation as if it were a separate legal entity.”;
- (d) by the substitution for subsection (2) of the following subsection:
 “(2) The report of the **[actuary]** valuator shall comply with the requirements **[set out in section 16 (7) of the Pension Funds Act, 1956]** applicable to the valuation of retirement funds in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), and shall be submitted by the **[actuary]** valuator to—
 (a) the Minister **[and]**;
 (b) the Minister of Finance; and
 (c) the Registrar of Pension Funds contemplated in section 3 of the Pension Funds Act, 1956.”;
- (e) by the substitution for subsection (3) of the following subsection:
 “(3) A copy of the report shall be submitted by the **[actuary]** valuator to **[the]** each principal employer.”; and
- (f) by the deletion of subsections (4) and (5).

Substitution of section 7 of Act 62 of 1990

8. The following section is hereby substituted for section 7 of the principal Act:

“Benefits from [the] Transport Pension Fund not assignable or executable

7. No pension or lump sum from the Transport Pension Fund, or right to such a benefit, or right in respect of contributions made by a member or on his or her behalf, shall be capable of being assigned or transferred or otherwise ceded, or of being pledged or hypothecated, or be liable, subject to **[the provisions of]** section 7 of the Divorce Act, 1979 (Act No. 70 of 1979), and the Maintenance Act, 1998 (Act No. 99 of 1998), to be attached or subjected to any form of execution under a judgment or order of a court of law, and in the event of the beneficiary attempting to assign, transfer or otherwise cede or to pledge or hypothecate a benefit or right, payment thereof may be withheld, suspended or entirely discontinued, if the Transport Pension Fund so determines, provided that the Transport Pension Fund may make payment of such benefit or of any benefit in pursuance of such contributions or part thereof to one or more of the dependents of the beneficiary or to a trustee for such dependent or dependents during such period as it may direct.”.

Amendment of section 8 of Act 62 of 1990

9. Section 8 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading:
“How pensions from [the] Transport Pension Fund are affected by insolvency”; and
- (b) by the substitution for subsection (1) of the following subsection:
 “(1) If the estate of any person **[in receipt of a pension from the Fund]** entitled to a benefit in terms of the Rules (including the estate of a member entitled to an annuity purchased by the Transport Pension Fund from an insurer for that member) is sequestrated or surrendered or assigned for the benefit of his or her creditors, any benefit payable to the person shall not form part of the assets in the insolvent estate of that person and payment of the pension or other benefit shall forthwith be discontinued, provided that in any such case all or any part of the pension or other benefit shall be paid to or for the benefit of all or any of the following persons, namely, the pensioner, his **[wife]** or her spouse or minor child or, failing a **[wife]** spouse or minor child, to the mother of an illegitimate child or any child, whether legitimate or adopted or illegitimate, or other relative dependent on him or her, provided further

that, if the payment is made to the pensioner, it shall be for his or her own personal use and may not in any way be attached or appropriated by the trustee of his or her insolvent estate or by his or her creditors, notwithstanding anything to the contrary in any law relating to insolvency.”.

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Substitution of section 9 of Act 62 of 1990

10. The following section is hereby substituted for section 9 of the principal Act:

“Recovery of certain debts due to employer from benefits payable to members on their dismissal or retirement

9. If a member of the Transport Pension Fund— 10

(a) is dismissed on account of fraud or dishonesty;

(b) resigns or absconds in order to avoid dismissal on account of fraud or dishonesty, or in anticipation of a disciplinary or a criminal charge involving fraud or dishonesty being laid against him or her; or

(c) leaves the employ of **[the] an** employer for any reason, or dies, before 15
any loan or advance (other than a loan referred to in section 10 of this Act) made to him or her at his or her specific written request by **[the] an** employer or from the Benevolent Fund referred to in section 23 of the South African Transport Services Conditions of Service Act, 1988 (Act No. 41 of 1988), has been repaid in full, 20

the Transport Pension Fund shall have the right to recover on behalf of the employer from any benefit payable from the Transport Pension Fund to such former member or his or her estate or to some other person in respect of his or her death, the amount of any loss, as determined by the employer, which the latter may have sustained by reason of such fraud or dishonesty 25
on the part of the member, or the unpaid balance of such loan or advance, as the case may be, provided that the onus of proving that a member resigned or absconded for any reason mentioned in paragraph (b) shall be on the employer.”.

Substitution of section 10 of Act 62 of 1990

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11. The following section is hereby substituted for section 10 of the principal Act:

“Application of benefits in liquidation of debts in respect of dwelling-houses

10. If in any agreement between **[the] an** employer or another entity, approved by the board of trustees of the Transport Pension Fund which provides housing finance, and a member of the Transport Pension Fund in terms of which the member purchases from the employer any dwelling-house or in terms of which the member is to receive any loan from the employer or the aforementioned entity in order to acquire land for the purpose of erecting a dwelling-house thereon or to acquire or erect a dwelling-house or to discharge any bond over any land or dwelling-house owned by the member, it is provided that— 35

(a) if for any reason the member retires **[or is dismissed or retired]** on a pension, **[the employer or]** the Transport Pension Fund may, at the discretion of the employer and upon the member so retiring, commute 40
in a cash sum such portion of the pension as may be necessary to liquidate any amount payable—

(i) under such agreement; or

(ii) in pursuance of any insurance entered into by the employer in connection with the repayment of any amount under such 50
agreement,

which remains unpaid at the date of his or her retirement **[or dismissal]**, the Transport Pension Fund may, upon the member so retiring **[or being dismissed or retired]**, effect such commutation with a consequent reduction in pension benefits and, on behalf of the 55

- employer or entity, apply such first-mentioned amount towards the liquidation of the amount so remaining unpaid; or
- (b) if for any reason the member **[resigns voluntarily or is dismissed or retired otherwise than on pension]** ceases to be employed by an employer and is not immediately thereafter employed by another employer, or if the member dies before retirement, the employer or the Transport Pension Fund may apply any money due under this Act to him or her or his or her successor in title in respect of such property or of his or her interest in such property, towards the liquidation of any amount payable—
- (i) under such agreement; or
 - (ii) in pursuance of any insurance entered into by the employer in connection with the repayment of any amount under such agreement,
- which remains unpaid at the date of **[his voluntary resignation, dismissal, retirement]** termination of employment or death, the Transport Pension Fund may on behalf of the employer or entity, upon the **[member so voluntarily resigning or being dismissed or retired]** member's termination of employment or upon his or her death, as the case may be, so apply the said money with a consequent reduction in pension benefits, provided that the Transport Pension Fund shall not so apply out of money so due to any such successor an amount in excess of the amount which bears to the total amount so remaining unpaid the same proportion as the value of such successor's share or interest in property bears, in the opinion of the Transport Pension Fund, to the value of the whole thereof, provided further that no benefit payable to a widow or widower shall be so applied.”.

Substitution of section 11 of Act 62 of 1990, as substituted by section 4 of Act 41 of 2000

12. The following section is hereby substituted for section 11 of the principal Act: 30

“Recovery of amounts in respect of medical scheme

11. The Transport Pension Fund and the Transnet Second Defined Benefit Fund are hereby empowered to recover money due by a pensioner to Transmed (the medical scheme referred to in section 10 (2) of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989)), in terms of the Transmed Rules and to pay such money to Transmed.”.

Substitution of section 12 of Act 62 of 1990, as substituted by section 5 of Act 41 of 2000

13. The following section is hereby substituted for section 12 of the principal Act: 40

“Guarantee

12. (1) The obligations of **[the Company]** Transnet and the State in respect of the New Fund and the Pension Fund in terms of section 3(2) and section 16 of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989), shall be deemed to be obligations towards the Transport Pension Fund and the Transnet Second Defined Benefit Fund in such proportions as determined by **[the State Actuary]** a valuator appointed by the Minister in consultation with the **[actuary]** valuator appointed by the Transport Pension Fund and the **[actuary]** valuator appointed by **[the Company]** Transnet.

(2) Transnet guarantees the financial obligations of the Transnet Second Defined Benefit Fund.”.

Substitution of section 13 of Act 62 of 1990

14. The following section is hereby substituted for section 13 of the principal Act:

“Registration and application of Pension Funds Act, 1956

13. (1) The Registrar of Pension Funds may, on request by the Transport Pension Fund, register the Transport Pension Fund in terms of section 4 of the Pension Funds Act, 1956, and may, for the purposes of such request, regard the Transport Pension Fund as a ‘pension fund organization’ as defined in section 1(1) of that Act. 5

(2) Upon such registration—

- (a) the whole of the Pension Funds Act, 1956, shall become applicable to the Transport Pension Fund; and 10
- (b) the provisions of sections [5] 7 to 11 of this Act shall cease to be applicable; and
- (c) **the Fund shall, for the purposes of the application of the Income Tax Act, 1962, no longer be regarded as a pension fund as defined in paragraph (a) of the definition of “pension fund” in section 1 of that Act.**” 15

Amendment of section 14 of Act 62 of 1990, as substituted by section 41 of Act 52 of 1991

15. Section 14 of the principal Act is hereby amended— 20

(a) by the substitution for the heading of the following heading:

“Employees of companies forming part of [group] employer groups of companies”;

(b) by the substitution for subsections (1) and (2) of the following subsections, respectively: 25

“(1) Any employee of [**any of the companies which form part of the group of companies and**] an employer who is a member of the [**Fund**] Transport Pension Fund or the Transnet Retirement Fund, may, subject to the [**Rules**] rules applicable to that fund, continue to enjoy membership of [**the Fund**] that fund if [**he is transferred or seconded from one company which forms part of the group of companies to another company which forms part of the group of companies**]— 30

(a) he or she continues to be employed by the employer; or

(b) he or she becomes employed by another employer as a consequence of a transfer of business as contemplated in section 197 of the Labour Relations Act, 1995, (Act No. 66 of 1995). 35

(2) [**Any**] With effect from the date of commencement of the Transnet Pension Fund Amendment Act, 2006, no employee of [**any of the companies which form part of the group of companies, may, subject to the Rules,**] an employer who is not already a member of the Transport Pension Fund or the Transnet Retirement Fund (as at the date on which the transaction contemplated in subsection (1)(a) or (b) to which he or she is subject becomes effective) may become a member of the Transport Pension Fund or the Transnet Retirement Fund, but any person employed by an employer in the Transnet group of employers after that date may become a member of the Transnet Retirement Fund if the rules of that fund so allow.”; 40

(c) by the insertion after subsection (2) of the following subsections:

“(2A) If an employer ceases to be an employer its employees who are members of the Transport Pension Fund or the Transnet Retirement Fund cease to be members of that fund. 50

(2B) If an employee who is a member of the Transport Pension Fund or the Transnet Retirement Fund ceases to be employed by an employer, other than—

- (a) in the circumstances contemplated in subsection (1); or 55
- (b) as a consequence of retirement, he or she shall cease to be a member of that fund.”; and

- (d) by the deletion of subsections (3) and (4).

Amendment of section 14A of Act 62 of 1990, as inserted by section 7 of Act 41 of 2000

16. Section 14A of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading: 5
“Powers of [Company] Transnet to establish pension [fund] funds”;
- (b) by the substitution for subsections (1), (2), (3) and (4) of the following subsections, respectively:
- “(1) In this section, **“pension fund”** means **[the]** a pension fund contemplated in subsection (2). 10
- (2) Notwithstanding the establishment of the **[Transnet] Transport Pension Fund** in terms of section 2(1), **[the Company] Transnet** may, subject to the approval of the Minister, acting with the concurrence of the Minister of Finance, by notice in the *Gazette* establish **[a] one or more pension [fund] funds.** 15
- (3) **[The] A** pension fund established in terms of subsection (2) shall be vested with legal personality and shall be capable of owning assets, incurring liabilities, suing or being sued in its own name and of doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its particular rules. 20
- (4) The control and management of the pension fund, admission to and termination of membership, the amount and nature of contributions by members and contributions and other payments by the employer and the benefits due to pensioners and beneficiaries as well as the manner in which the rules of such pension fund may be amended, shall be governed 25
 by the particular rules of such pension fund.”; and
- (c) by the substitution for subsections (6), (7) and (8) of the following subsections, respectively:
- “(6) The rules of the pension fund, as amended from time to time, shall bind **[the employer] each employer which employs members of the pension fund or which employed persons who were members of the pension fund immediately before their retirement or disablement, members, pensioners, [and] beneficiaries of such pension fund and the pension fund.** 30
- (7) **[The] A** pension fund is deemed to be a pension fund as defined in paragraph (a) of the definition of “pension fund” in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962). 35
- (8) **[All the provisions of this Act, except section 12] Sections 5, 6, 7, 8, 9, 10, 11, 13 and 14** apply with the changes required by the context to **[the] a** pension fund.”. 40

Amendment of section 14B of Act 62 of 1990, as inserted by section 7 of Act 41 of 2000

17. Section 14B of the principal Act is hereby amended by the substitution for subsections (2), (3), (4) and (5) of the following subsections, respectively:
- “(2) Pensioner members of the Transport Pension Fund as at the date of commencement of the Transnet Pension Fund Amendment Act, 2000 (Act No. 41 of 2000), are hereby transferred from the Transport Pension Fund to the Transnet Second Defined Benefit Fund. 45
- (3) All the assets, liabilities, rights and obligations pertaining to the members referred to in subsection (2), as determined by **[the State Actuary] a valuator appointed by the Minister** in consultation with an actuary appointed by the Transport Pension Fund and an actuary appointed by **[the Company] Transnet**, shall vest in and devolve upon the Transnet Second Defined Benefit Fund without any formal transfer or cession with effect from the date of publication of such determination in the *Gazette* by the Minister. 50 55
- (4) The Transnet Second Defined Benefit Fund shall be vested with legal personality and shall be capable of suing or being sued in its own name and of doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules.

(5) The control and management of the Transnet Second Defined Benefit Fund, the benefits due to pensioners and the beneficiaries shall be governed by the rules of the Transnet Second Defined Benefit Fund set out in the Schedule to **[this Act]** the Transnet Pension Fund Amendment Act, 2000 (Act No. 41 of 2000).”.

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Insertion of section 15A in Act 62 of 1990

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

“Minister’s powers to make regulations

15A. (1) The Minister may make regulations regarding—

<p>(a) anything that must or may be prescribed in terms of this Act; and</p> <p>(b) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.”.</p>	} 10
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Short title and commencement

19. This Act is called the Transnet Pension Fund Amendment Act, 2006, and is deemed to have come into operation on 11 November 2005.

MEMORANDUM ON THE OBJECTS OF THE TRANSNET PENSION FUND AMENDMENT BILL, 2006

1. BACKGROUND

- 1.1 In 1990 the Transnet Pension Fund, a defined benefit pension fund, was established in terms of the Transnet Pension Fund Act, 1990 (Act No. 62 of 1990) (“the Act”). It assumed the liabilities of the disestablished New Railways and Harbours Superannuation Fund and the Railways and Harbours Pension Fund for Non-White Employees. All employees of Transnet were obliged to belong to the Transnet Pension Fund.
- 1.2 In 2000 the Act was amended to establish the Transnet Second Defined Benefit Fund to which the liabilities of the Transnet Pension Fund in regard to its pensioners were transferred. The amendments also empowered Transnet to establish new funds for its employees. Transnet established the Transnet Retirement Fund, a defined contribution pension fund. Most employees of Transnet voluntarily transferred from the Transnet Pension Fund to the Transnet Retirement Fund (effective 1 November 2000) and the Transnet Pension Fund has been closed to new members since then. It now has about 12 000 members, including pensioners who retired after the establishment of the Transnet Second Defined Benefit Fund.
- 1.3 The Transnet funds are pension funds as contemplated in paragraph (a) of the definition of “pension fund” in the Income Tax Act, 1962 (Act No. 58 of 1962), because they were established in terms of specific statutes other than the Pension Funds Act, 1956 (Act No. 24 of 1956). This means that when a member leaves employment, he or she is entitled to have his or her lump sum benefits taxed on the basis that that portion of the benefit attributable to membership prior to 1 March 1998 will not be subject to tax. The special tax status of the benefits of members with pre-March 1998 service cannot be protected in a fund other than a “paragraph (a)” fund.
- 1.4 Transnet is in the process of disposing of its non-core assets. This entails the transfer of shares in some of its companies (including SAA) to the State or to private sector entities. It also entails the transfer of some of its businesses, either to national government business enterprises (such as the transfer of the Metrorail business to the South African Rail Commuter Corporation) or to private sector entities (such as the transfer of the internal audit business of Transnet to Ernst & Young).
- 1.5 Unions representing employees affected by these disposals have urged Transnet and the Department of Public Enterprises to take measures to minimise as far as possible any adverse impact that the disposals may have in relation to the retirement savings of those employees. Transnet and the Department of Public Enterprises have agreed, subject to the condition that such measures do not fundamentally impact upon the efficacy of its restructuring exercise, to allow transferring employees and pensioners the option of retaining membership in the Transnet funds. The Transnet Pension Fund Act requires amendments to support these provisions.

2. OBJECTS

- 2.1 The Bill seeks to—
 - (a) amend the definitions of “employer”, “Minister” and “Rules”, to omit the definitions of “Company”, “Fund” and “Second Fund” and to define “actuary”, “dependent pensioner”, “general rules”, “pensioner”, “principal employer”, “SOE employer”, “SOE group of employers”, “special rules”, “subfund”, “subfund board”, “subsidiary”, “Transnet”, “Transnet employer”, “Transnet group of employers”, “Transport Pension Fund”, “Transnet Retirement Fund”, “Transnet Second Defined Benefit Fund” and “valuator”;

- (b) provide that the “Transnet Pension Fund” shall continue to exist under the name of “Transport Pension Fund”;
- (c) amend the Act with retrospective effect to 11 November 2005 (the date being proposed for consistency purposes as it is the date used to amend the Transnet Retirement Fund rules and it will be the date from which the Transnet Pension Fund rules will be amended);
- (d) transform the Transnet Pension Fund into a “multi-employer” (*umbrella*) pension fund for employees of Transnet and for employees of only those State or national government business enterprises (“SOE employers”) to which the shares of the companies in which those employees were employed or to which businesses in which those employees were employed by Transnet, were transferred;
- (e) allow the continued membership in Transport Pension Fund or the Transnet Retirement Fund of persons who were members of that fund immediately prior to the sale of the respective shares or businesses to an SOE employer and who are still employees or retired employees of that SOE employer, and to exclude from continued membership the employees of companies or employees employed in businesses transferred entirely to private sector entities;
- (f) provide that only new employees of Transnet may join the Transnet Retirement Fund and to exclude from membership of that fund new employees of the SOE employer that participates in the fund;
- (g) to provide that the Transport Pension Fund will be governed in terms of general rules applicable to the fund as a whole and in terms of special rules which will make specific provision—
 - for the contributions payable by and on behalf of employees of specific employers or groups of employers;
 - for the benefits payable to those employees and their dependants and other beneficiaries; and
 - for other matters specific to subfunds to be established in respect of the employees, such as the investment of the assets attributable to subfunds;
- (h) provide that the general rules may be amended with the consent of all principal employers or, failing such consent, by the Minister of Public Enterprises (“the Minister”), and that special rules may be amended with the consent of applicable principal employers;
- (i) to provide that amendments to the general rules and the special rules which may have a financial impact upon the Transport Pension Fund require the approval of the Minister, acting with the concurrence of the Minister of Finance;
- (j) remove the burden on Transnet of funding and guaranteeing benefits in favour of persons no longer related to it by ring-fencing, subject to actuarial valuation, and assigning liabilities in relation to benefits payable by the Transnet Pension Fund to employees and retired employees who are members of the Transport Pension Fund, retired employees, their dependants and other beneficiaries, as well as guarantees in favour of those persons, to each employer or group of employers;
- (k) provide for the establishment of subfund boards to govern subfunds and to exercise powers in relation to the rights and obligations of the subfunds in terms of their special rules that would otherwise have been the responsibility of the Transport Pension Fund’s board of trustees;
- (l) allow the Transport Pension Fund to purchase annuities in the names of its pensioners, thereby allowing it to transfer its liabilities in respect of those pensioners to insurers;
- (m) allow housing finance providers, including employers, to recover out of benefits payable to employees, on termination of employment, by the Transport Pension Fund or the Transnet Retirement Fund amounts due to them by the employees;
- (n) provide that the funds will not lose their special tax status if they become registered in terms of the Pension Funds Act, 1956;

- (o) provide that only those amendments to the rules which may have a financial effect on the Transnet Second Defined Benefit Fund require the approval of the Minister, acting with the concurrence of the Minister of Finance;
- (p) provide for the payment of pensions by the Transnet Second Defined Benefit Fund to persons to whom pensions have been paid by Transnet and who are not members of any fund established in terms of this Act; and
- (q) empower the Minister to make regulations.

3. CONSULTATION

The Department of Public Enterprises has consulted the board of directors of Transnet and Transnet in turn has consulted and received input from the boards of trustees of the Transnet Pension Fund, the Transnet Second Defined Benefit Fund and the Transnet Retirement Fund, legal advisers, the actuaries of the Transnet funds and various union representatives.

4. FINANCIAL IMPLICATIONS FOR STATE

- 4.1 The financial implications for the State of the proposed amendments will be apportioned amongst the entities in which the State holds an interest, such as Transnet and the South African Airways, as well as other companies which may participate in the funds, in which the State is a shareholder although it may not be the sole shareholder. In addition, the South African Rail Commuter Corporation as an agent of the State (to which the Metrorail and Shosholoza Meyl businesses have been transferred) will experience similar financial implications as those described above.
- 4.2 No liabilities in excess of those currently borne by Transnet are expected to be borne by Transnet and the new participating employers together. These exposure levels could vary from the current levels over the ensuing period and will depend on the individual employer appetite for benefits payable, risk profile of the subfund and investment strategy.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department of Public Enterprises are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.