



*Tonga*

# **NATIONAL RETIREMENT BENEFITS SCHEME ACT 2010**

**Act No. 41 of 2010**





# NATIONAL RETIREMENT BENEFITS SCHEME ACT 2010

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# NATIONAL RETIREMENT BENEFITS SCHEME ACT 2010

Act No. 41 of 2010

## AN ACT TO PROVIDE FOR THE ESTABLISHMENT AND ADMINISTRATION OF THE NATIONAL RETIREMENT BENEFITS SCHEME AND RELATED MATTERS

I assent,  
GEORGE TUPOU V,  
1<sup>st</sup> October 2010.

**BE IT ENACTED** by the King and the Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

### PART I - PRELIMINARY

#### 1 Short title and commencement

- (1) This Act may be cited as the National Retirement Benefits Scheme Act 2010.
- (2) This Act shall come into force on a date to be declared by His Majesty's Cabinet and notified in the Gazette.

#### 2 Interpretation

In this Act, unless the contrary intention appears-

“Act” means the National Retirement Benefits Scheme Act 2010;

“**active member**” means a member in respect of whom a contribution in respect of insurance employment under the Act was paid during the last financial year;

“**amount of wages for the month**” means the amount of wages earned by an employee during a month of his employment;

“**account**” means the member’s account in respect of insurable employment or voluntary contribution under this Act maintained by the National Retirement Benefits Organisation;

“**Appeal Board**” means an ad hoc National Retirement Benefits Scheme Appeal Board established under section 48 of this Act;

“**balance**” means the amount standing to the credit of the member of the Scheme;

“**beneficiary**” means a person entitled to benefits under this Act;

“**Board**” means the National Retirement Benefits Scheme Board of Directors established under this Act;

“**Chief Executive Officer**” or “**CEO**” means the Chief Executive Officer of the Organisation appointed by the Board in accordance with section 7(1)(c);

“**certificate of exemption**” means the certificate issued by the Board to a complying scheme under Part V of this Act;

“**child**” means a legitimate biological child, stepchild, and a legally adopted child and shall include a posthumous child of a member;

“**complying scheme**” means a retirement benefits scheme in existence on the date of coming into force of this Act that is certified by the Board as complying with the conditions in sections 34 and 35;

“**contribution**” means the sum payable to the Organisation by way or contributions specified in section 20;

“**contribution schedule**” means the schedule provided by the Organisation for the purpose of the collection of contributions;

“**date of entitlement**” means the date on which a member of the Scheme qualifies for a benefit in accordance with the provision of this Act;

“**date of entry**” means in respect to any member of the Scheme the first day of the month in which the first contribution is payable to the Scheme on his behalf;

“**Director**” means any Board member;

“**domestic worker**” means a person employed in connection with the work of a private dwelling-house and not in connection with the trade, business or profession carried out by the employer in the dwelling-house such as cook, house-worker, child’s nurse, gardener, laundry worker, security officer, or a driver of a vehicle licensed for private use;

“**earnings**” means all emoluments due to an employee in respect of services performed under a contract of service whether paid daily, weekly, fortnightly, monthly or at any other intervals, and shall include any bonus, commission or allowance payable by the employer to the employee whether such bonus, commission or allowance is payable under his contract or service or otherwise, but does not include-

- (a) overtime payment;
- (b) gratuity;
- (c) retrenchment, redundancy or termination payment;
- (d) retirement benefits;
- (e) any sums payable by an employer, whether or not prescribed by legislation, in respect of sickness, maternity or work-related injury;
- (f) any travelling allowance or the value of any travel concession or benefit; and
- (g) any payments made by an employer to an employee for Reimbursement or expenses incurred for the purposes of his employment;

“**employee**” means any person aged 15 years or more and under age 65, not being a person of any of the description specified in the First Schedule, who works for an employer in Tonga under a contract of service or apprenticeship whether written or oral, expressed or implied, for remuneration, and includes a Tongan subject employed under a contract of service entered into in Tonga as a master or member of the crew of any vessel, or as captain or member of the crew of any aircraft, the owners of which have a place of business in Tonga;

“**employer**” means any person, partnership, enterprise, undertaking, organisation or body corporate employing an employee under a contract of service or apprenticeship, whether written or oral, expressed or implied for remuneration; and includes the owners of the vessel or aircraft referred to in the definition “**employee**”;

“**financial year**” means the period from 1 July in any year to 30 June in the following year;

“**Fund**” means the Fund established under section 9;

“**inactive member**” means a member in respect of whom no contribution was paid in the last financial year;

“**insurable earnings**” means the earnings on which liability arises for the payment of contributions under this Act;

“**insurable employment**” means employment in respect of which contributions are payable under this Act;

“**intermediate employer**” means a person who employs employees to work for another employer;

“**liquidator**” means a person appointed or assuming the position of liquidator, receiver, trustee-in-bankruptcy, mortgagee-in-possession, or executor of a deceased’s estate;

“**Medical Board**” means a medical board established in accordance with section 44 of this Act;

“**member**” means a person registered as a contributor to the Scheme;

“**member’s account**” means the account established for a member to receive all compulsory contributions and interests;

“**minimum sum**” means the sum declared by the Board under section 42;

“**Minister**” means the Minister of Finance;

“**Organisation**” means the National Retirement Benefits Organisation;

“**outworker**” means a person to whom articles are given to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person’s own home or on other premises not under the control or management of the person who gave out the materials or articles;

“**pension age**” means the age of 60;

“**pensioner**” means a person receiving a pension or installment under this Act;

“**permanent and total disablement**” means a condition as a result of which a member is medically certified to the satisfaction of the Board as permanently incapacitated to such an extent as to be unable to earn from his usual or any other suitable occupation more than one-third of the normal rate of earning in this occupation;

“**prescribed beneficiary**” means the person, at the date of death, is nominated by the member, or if no such person, then to –

- (a) his spouse, if none;
- (b) his child or children, or if none;
- (c) his father or mother;

“**rate of interest**” means the rate declared by the Board as the interest rate to be credited to the accounts of each member;

“**Scheme**” means the national retirement Benefits Scheme;

“**statement of account**” means the statement of account issued by the Board to each member;

“**total balance**” means the accumulated total of –

- (a) all contributions paid by and on his behalf in respect of insurable employment and any interest added from time to time;
- (b) all contributions and interest in his voluntary account, if any;

- (c) any amounts transferred to his account in respect of periods of exempted employment in a complying scheme; and
  - (d) less any deductions due and outstanding under section 10(5);
- “**voluntary contribution**” means the contribution paid by voluntary contributors;
- “**voluntary contributor**” means a person who registers with the Scheme as a voluntary contributor; and
- “**wages**” has the same meaning as “earnings”.

## **PART II - ADMINISTRATION OF THE NATIONAL RETIREMENT BENEFITS SCHEME**

### **3 Administration of the Scheme**

- (1) There shall be a National Retirement Benefits Organisation to be in charge of the National Retirement Benefits Scheme in accordance with this Act.
- (2) The general direction and supervision of the Organisation shall vest in the Board.
- (3) The Board members shall act in good faith in the best interests of the Scheme and in accordance with the Act.

### **4 Status of the Organisation**

- (1) The Organisation shall be established as an autonomous body accountable to the Minister and with the responsibility of implementing this Act.
- (2) The Organisation shall be a body corporate with perpetual succession and a common seal and shall have all rights and duties of a body corporate.
- (3) The Organisation may sue and be sued in its corporate name and may enter into contracts and may acquire, purchase or lease property and may convey, assign, transfer, mortgage or otherwise dispose of any real or personal property or any interest vested in the Organisation upon such terms as the Board determines to be appropriate in the circumstances of each transaction.

### **5 Establishment and constitution of the Board**

- (1) The Board is hereby established.
- (2) The Board shall be appointed by the Minister and shall consist of-
  - (a) three persons representing employee members of the Scheme;
  - (b) three persons representing employer contributors to the Scheme; and

- (c) one person with relevant experience and qualifications who shall have no right to vote as a Board Member.
- (3) The employer and employee representatives shall be elected by the contributing employers and employees respectively and thereupon are appointed by the Minister.
- Provided that the first such election shall be held amongst the employers and employees eligible under this Act for compulsory participation in the Scheme.
- Provided further that employees of the Organisation shall be ineligible for election to the Board.
- (4) Members of the Board shall be appointed for a term of three years.
- (5) Directors may be re-appointed after expiry of their term of office for up to a maximum of two full terms whether or not these are consecutive terms.
- Provided that regulations shall prescribe the eligibility of a member of the first Board to participate in elections for the second Board.
- (6) The Board shall elect the Chairman.
- (7) Directors shall be paid such remuneration, travelling and subsistence allowances as the Minister may determine.
- (8) The CEO shall perform the function of Secretary of the Board.
- (9) Upon cessation of office of a Director, otherwise than on expiry of his term of office, the Minister at the earliest opportunity and, in any case, within thirty days, shall appoint a replacement Director who shall be the next eligible person under the last held election for employer or employee representatives, or a person appointed by the Minister under sub-section (2)(c), as the case may be, and the duration of the appointment shall be for the remaining part of the term of the former Director.

## **6 Resignation, disqualification and termination of office**

- (1) A Director shall hold office until the date-
- (a) of his resignation by notice in writing to the Chairman or, in the case of the resignation of the Chairman, by notice in writing to the Minister;
- (b) of his death;
- (c) on which he is declared bankrupt under any law relating to bankruptcy, or a court finds him guilty of a criminal offences;
- (d) on which he is certified as mentally or physically incapable of fulfilling the office of Director;
- (e) of his removal in accordance with any procedures adopted by the Board for the appointment or removal of Directors for persistent non-attendance at duly called meetings of the Board;

Provided that a Director shall be deemed to have vacated his office upon his failure to attend three consecutive duly called meetings of the Board without the prior permission of the Chairman; and

(f) of expiry of his term of office.

(2) No person shall be appointed or remain a Director-

(a) who has an undischarged bankrupt;

(b) who has been convicted of an offence;

(c) who is or becomes a member of the Legislative Assembly; or

(d) who has, in the case of a person having professional qualifications, been disqualified or suspended from practicing his profession by the order of any competent authority.

## **7 Rights and duties of the Board**

(1) The Board shall perform the following duties to-

(a) advise the Minister on appropriate plans for the implementation and development of the Scheme both on its own initiative and in response to specific requests from the Minister;

(b) manage the Fund as Trustee and approve the income and expenditure accounts,

Provided that the Board members shall not-

(i) make profit for themselves from the Fund;

(ii) put themselves in a position where there is a conflict between their duty to the members and their own personal interests; or

(iii) take advantage of information gained as a Trustee;

(c) appoint staff for the administration of the Scheme consisting of –

(i) a Chief Executive Officer with such duties as the Board may delegate; and

(ii) such other staff as are, in opinion of the board, necessary for the efficient and effective administration of the Scheme, including inspectors having the powers set out in section 26.

(d) adopt personnel and remuneration structures for the organisation that are not less favourable in their entirety than those applying to public servants;

Provided that the conditions of service for the Organisation shall be approved by the Minister;

Provided further that the Organisation shall be an employer within the meaning of this Act;

- (e) determine applications for exemption by retirement benefit schemes in existence at the date of introduction of this Act and to review the reports submitted by approved complying schemes;
  - (f) determine benchmarks for the Scheme's operation;
  - (g) maintain communications with registered employers and employees;
  - (h) consider and make recommendations to the Minister relating to changes in contributions or benefits under the Act;
  - (i) co-opt suitably qualified persons to advise the Board and sub-committees established by the Board and to incur expenditures for this purpose;
  - (j) determine the Organisation's administrative expenses on submissions by the CEO;
  - (k) consider and recommend draft Regulations and rules for approval;
  - (l) arrange for actuarial review of the Scheme as required and at intervals of not less than five years;
  - (m) submit to the Minister annual reports on the operation of the Scheme; and
  - (n) do any other act authorized under this Act.
- (2) In any instance of submitting proposals to the Minister for changes in contributions or benefits, or commenting on any such proposals referred to it, the Board shall attach an actuarial report, or its equivalent, on the financial implications of the proposals.

## **8 Procedures of the Board**

- (1) Subject to this Act and any Regulations made under it, the Board may regulate its own procedures and shall have the power to make rules for the conduct of its proceedings.
- (2) Board meetings shall be convened on a minimum of one meeting per month to consider the Organisation's performance and other matters within the responsibility of the Board.
- (3) The Chairman has the right to convene meetings at any time as required to carry out the Board's duties expeditiously.
- (4) Any four Directors present at a meeting shall constitute a quorum.
- (5) Resolutions of the Board shall be carried by majority voting and in the case of an equal number of votes; the Chairman shall have a deciding vote.
- (6) In the absence of the Chairman at a meeting of the Board, the members present shall appoint an Acting Chairman for that meeting.
- (7) A Director shall not communicate or reveal to any person or any organisation any facts or information of any kind acquired by him as a member of the

Board except as may be required for the due discharge of his duties as Director.

- (8) A Director having directly or indirectly by himself, his spouse or children, or any other person, any interest in agenda items or subjects to be discussed by the Board or in Committees of the Board of which he is member shall disclose to the Board or the Committee, as the case may be, the fact of his interest and the nature thereof as soon practicable after the relevant fact has come to his knowledge and shall absent himself with the permission of the Chairman when such agenda items come under consideration.

## **PART III - FINANCIAL PROVISIONS**

### **9 Establishment of the National Retirement Benefits Fund**

- (1) For the purpose of the Act, there shall be established the National Retirement Benefits Fund, into which shall be paid-
  - (a) all contributions required to be made under this Act;
  - (b) moneys earned or arising from any investment, property or other transactions, mortgages, charges or rents vested in the Organisation;
  - (c) any fines, surcharges, or other payments due to the Organisation under this Act;
  - (d) any sums paid by the Government, or other body or bodies, to finance the initial implementation of the Act or to enable it to meet all financial obligations specified in subsection (2); and
  - (e) any other income or payments due to the Fund.
- (2) The Fund shall be expended for the purpose of-
  - (a) meeting all payment required to be made under this Act;
  - (b) investments under this Act, including the expenses incurred in undertaking the investments;
  - (c) payment of life insurance benefit;
  - (d) meeting all expenses, costs and expenditures properly incurred or accepted by the Board in the execution of its powers and duties; and
  - (e) repayment of advances or loans obtained by the Board for the implementation of this Act.

### **10 Purpose of the Fund**

- (1) Subject to this Act, the Fund shall provide benefits in respect of the retirement, permanent total disablement or the death of a member of the Scheme, as specified in this Act and Regulations.

- (2) The Organisation shall maintain individual accounts for each member and shall credit all contributions paid by and on behalf of the member and any interest as specified in section 15 for the purpose of subsection (1).
- (3) The Fund shall pay benefits, other than life insurance, from individual accounts of a member in the form of instalments or a lump-sum or a combination of both.
- (4) Life insurance benefits shall be payable in lump-sums from the general revenues of the Fund.
- (5) The Organisation shall deduct from the account of each active member, other than a voluntary contributor, in respect of each financial year the premium for life insurance as may be prescribed by the Board and these premiums shall be credited to the general revenue of the Fund.

## **11 Bank accounts of the Organisation**

- (1) The Organisation shall establish and maintain such bank account or accounts, as determined by the Board, for the purpose of the financial management of the Scheme and its general revenue.
- (2) The bank account of the Organisation shall be maintained at the National Reserve Bank of Tonga, or other bank licensed by the National Reserve Bank of Tonga or other bank licensed to operate in the Kingdom, or in the case of overseas accounts, those banks approved by the National Reserve Bank of Tonga.
- (3) The Organisation's account or accounts signatories shall be such persons as may be authorised by the Board for that purpose.

## **12 Investment for the Fund**

- (1) The Board shall invest all monies available for investment as prescribed by Regulations.
- (2) The Board shall devise investment strategies for investments of the Fund, including investments in other countries that meet criteria for trustee management of retirement benefit funds.

Provided that the Board shall request approval for undertaking overseas investments from the National Reserve Bank of Tonga and that any such approval shall be given for periods of not less than one year.

## **13 Exemption from tax**

No tax, duty, levy, or any other Government impost shall be payable by the Organisation on Fund monies, including investment earnings.

**14 Administrative expenses**

- (1) All expenses properly incurred in the implementation of this Act and the administration of the Scheme shall be paid out of the Fund.
- (2) The costs incurred in implementing the Act and administering the Scheme shall be deducted from the income of the Scheme.
- (3) Notwithstanding subsection (1), expenditures may be incurred by the Organisation out of the Fund up to such amounts prescribed by Regulations.

**15 Declaration of the rate of interest**

- (1) Subject to this Act, at or before the end of each financial year, the Board shall, with the approval of the Minister, declare a rate of interest in respect of that year that shall be credited at such rates to the total amounts recorded as in each member's account, including voluntary accounts, at the commencement of the financial year, as prescribed by Regulations.

Provided that no rate on interest shall be declared if the repayment of any sums advanced by the Government under section 16 is not provided for to the satisfaction of the Minister.

- (2) Notwithstanding the provisions of subsection (1) where benefit entitlement arises under the provisions of this Act and is to be calculated, interest shall be first credited to the accounts in respect of the period from the beginning of the financial year to the end of the month preceding the date of entitlement in accordance with the rate of interest declared by the Board for the preceding financial year, regardless of the fact that the rate of interest subsequently declared by the Board in respect of that financial year may be greater or less than this rate.

**16 Advances by the Government**

- (1) If the Organisation is unable at any time to pay any sum that it is liable to pay under the provisions of this Act, the Board shall submit a request for assistance to the Minister with full information on the financial shortfall and proposals for the repayment of any future bridging loans from Government.
- (2) The Board shall enter into an agreement with the Government on a repayment schedule in respect of any sums of any sums so advanced by Government.

**17 Auditing of accounts**

- (1) The Board shall have accounts prepared, within two months of the end of the financial year, or within such further time of not more than one month as the Minister may approve, in such form and including additional information, statements and reports as required by the Minister in respect of that year.

Provided that the Minister may request the preparation of interim accounts for any period as he may determine.

- (2) The account shall be submitted to the Auditor-General or another approved auditor for an audit to be completed within six months of the end of the financial year or of the period covered by the accounts, if shorter.
- (3) The Minister shall within ten working days of completion of the audit cause the accounts to be submitted for tabling in the Legislative Assembly during its session on the first available sitting day.
- (4) The reports under subsection (1) shall include a report by the Board on the investments of the Fund.

## **18 Actuarial review**

- (1) At interval of five years, or such shorter periods as the Board may determine, an actuarial review shall be conducted into the operation of the Scheme.
- (2) The actual report shall be considered by the Board and forwarded to the Minister with the recommendations of the Board.
- (3) The Organisation shall provide members with information on the findings and recommendation of the actuarial review.

## **PART IV - CONTRIBUTIONS TO THE SCHEME**

### **19 Liability to contribute**

- (1) Subject to this Act, every employer having one or more employees, other than those in respect of whom the Board has issued a certificate of exemption, and his employees shall be liable to contribute to the Scheme.
- (2) Every employer and to whom this Act applies shall register with the Organisation within such time and in such manner as in prescribed by the Regulations.
- (3) Where any person registered as an employer intends to cease being an employer he shall notify the Organisation as soon as practicable.
- (4) Where employees are employed through a sub-contractor, the following shall apply-
  - (a) the contract between the principal employer and the sub-contractor shall included the name and address of the employer who is responsible under the Act for the registration of employees who are assigned for work under the contract and the payment of contributions;
  - (b) the responsibility of the principal employer may be transferred to the sub contractor or another person through specific provisions of the

relevant contract, but, in the event of a default on the part of the sub-contractor or other person, as determined by the Organisation, the principal employer shall be liable in all respects in respect of the employees concerned; and

- (c) the relevant contract shall be made available for inspection whenever requested by an inspector appointed under section 26 of this Act or other competent official and a copy shall be lodged with the Organisation if requested in writing by the CEO.

## **20 Payment of contributions**

- (1) A contribution consisting of both the employer's contribution and the employee's contribution shall be payable by the employer for each month in respect of the whole or part of which wages are payable to the employee and not otherwise.
- (2) The contribution shall be calculated on the amount of wages payable to such employee by such employer at the rates specified in the Second Schedule.
- (3) Subjects to this Act, all contributions shall be payable monthly unless otherwise prescribed by Regulations.
- (4) All monthly contributions shall be payable in the end of every month, but where the employment is for a period of less than a month, on the last day of the employment.
- (5) Where two or more contributions are paid in respect of the employment of one insured person for the same month they shall be counted as single monthly contribution.

## **21 Payment of contributions**

- (1) Subject to this Act, the employer shall be entitled to deduct the employee's contribution from the employee's wages for payment to the Fund and notice of such deduction shall be furnished to the employee in writing.

Provided that-

- (a) no such deduction shall be made from any wages other than that which related to the period or part of the period in respect of which the contribution is payable; and
  - (b) where the employer has failed to deduct and pay the employee's contribution under this section, the employer shall be responsible for paying the employee's outstanding contribution with no right of recovery from the employee.
- (2) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

- (3) Any sum deducted by the employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

## **22 Recovery of contributions from an intermediate employer**

- (1) An employer, who has paid a contribution in respect of an employee employed by or through an intermediate employer or sub-contractor, shall be entitled to recover the amount of the contribution so paid (that is to say the employer's contribution as well as the employee's contribution, if any) from the intermediate employer or sub-contractor, as the case may be, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the intermediate employer or sub-contractor.
- (2) The intermediate employer or sub-contractor shall be entitled to recover the employee's contribution from the employee employed by or through him by deduction from wages and not otherwise.

## **23 Late paid contributions**

Contributions shall be payable in respect of an employee from the month the employee enters into insurable employment and such contributions are payable as arrears even though the employment to which this Act applies or the employees have not been registered with the Organisation.

Provided that-

- (a) An employer who has paid arrears of contributions in respect of an employee will only be entitled to recovered from the wages payable, notwithstanding the proviso to section 21(1), the employee's share of the contributions due within a maximum of the last proceeding six months prior to the date of payment; and
- (b) The Organisation shall arrange for the deduction of such arrears of the employee's share by the employer over a period for the purpose of avoiding financial hardship to the employee.

## **24 Method of payment of contributions**

The Minister may prescribe method of payment of contributions by Regulations.

## **25 Employers to furnish returns**

- (1) Every employer shall submit to the Organisation, such schedules returns relating to persons employed by him as required by Regulations.

- (2) The Organisation may require an employer or any other person where it has reason to believe that a return should have been submitted, to furnish such particulars as it may consider necessary to determine the extent, if any, of liability to contribute to the Fund on behalf of the employees.
- (3) Every employer shall maintain such registers and records in registers and records in respect of employment as may be prescribed by Regulations.

## **26 Appointment and powers of inspectors**

- (1) The Board shall appointed inspectors and issue them with identification.
- (2) Inspectors shall have the power to –
  - (a) enter at reasonable times, all premises where a person or persons are believed to be engaged as employees, and any other place only with a court order;
  - (b) examine all documents relevant to participation in the Scheme and if necessary to remove such documents as are essential to the investigations;
  - (c) question and take statements in writing from persons, including employer, employees and their staff;
  - (d) give official warnings to persons who are in breach; and
  - (e) compile official reports and statements of their investigations.
- (3) An employer, within normal working hours shall produce for inspection the records and copies of contribution schedules or any other documents relating to liability to contribute, for inspection if requested by an inspector.

## **27 Determination of contribution liability in certain cases**

- (1) The Organisation may determine on the basis of information available to it, the amount of contributions payable in respect of the employees of an employer where-
  - (a) the employer has defaulted under this Act; and
  - (b) the Organisation has been obstructed in the exercise of its functions.
- (2) The determination made by the Organisation under subsection (1) shall be sufficient proof of a debt for recovery under section 28.

## **28 Recovery of contributions**

- (1) Any contribution or other amount payable under this Act may be recovered as a debt due to the Organisation.
- (2) A liquidator shall be required to inform the Organisation in writing within fourteen days of his appointment or assumption of this responsibility and shall

not, without leave of the CEO, make any distribution of such property, business or estate until receipt of a claim by the Organisation.

- (3) The CEO shall notify the liquidator in writing of the amount of any unpaid contributions and payable from the assets in the possession or control of the liquidator and such notice shall be served by the Organisation within two months of being served with a notice under subsection (2).
- (4) Subject to subsection (5) a liquidator shall set aside out of the assets and the proceeds of sale of any asset (s) of the employer the amount notified by the CEO under subsection (3) to the extent that such assets are available for this purpose, and shall be liable to the extent of the amount set aside for the contribution due by the disposal of the employer's asset(s).
- (5) Nothing in subsection (4) shall prevent the liquidator from paying any debt that has a legal priority over the contributions referred to in that subsection.
- (6) The liquidator shall before distributing any assets under his control, obtain from the CEO a certificate to the effect that the contributions payable under the provisions of this Act by such person out of any estate under his control have been paid to the satisfaction of the Board.
- (7) If any distribution is made by the liquidator without first obtaining a certificate under the provisions of subsection (3), then such person shall be personally liable for any unpaid contributions together with any surcharge payable under the provisions of section 29.
- (8) Where two or more persons are liquidators in respect of a defaulting employer or deceased the obligations and liabilities under this section shall apply to all the liquidators but may be discharged by any of them.

## **29 Surcharge on late paid contributions**

An employer shall be liable to pay a surcharge on the total amount of all contributions not so paid by him at the rate of 2 per cent in respect of each month or part of each month after expiration of the period of 15 days following the month concerned.

Provided that –

- (a) in any case where the surcharge is calculated at less than \$5, the surcharge payable shall be \$5; and
- (b) the Organisation may remit in whole or part the amount of the surcharge where the employer shows good cause for the delay in remitting contributions to the Organisation.

## **30 Unpaid contributions deemed to be paid**

- (1) Where any employer fails to pay any contribution required under this Act, the Board may credit to the employees' account the amounts payable by the

employer to the Organisation and shall charge such amounts to the general revenues of the Organisation if-

- (a) such failure was not due to the consent of the employee concerned;
  - (b) deduction were made from insurable earnings of the employee; or
  - (c) there is no prospect of recovery of the amount unpaid within a reasonable time.
- (2) The amount so credited to a member account shall be deemed to have been paid in respect of him on the date of which such credit is made unless otherwise determined by the Board.
- (3) Nothing in this section prejudice the right of the Organisation to recover the amount of such contributions together with any surcharge due under this Act from the employer and to credit the amounts recovered to the general revenues of the Fund.

### **31 Voluntary contributors**

- (1) Subject to this Act, any person, or any category of persons as may be prescribed, including citizens of Tonga living overseas, may apply to the Organisation to contribute to the Scheme on their own behalf or on behalf on another person.
- (2) Voluntary contributors shall comply with the prescribed levels and methods of payment of contributions to the Scheme.
- (3) Persons exempted under paragraph 5 of the First Schedule shall not be entitled to become voluntary contributors.

### **32 Statement of account**

The Organisation shall issue statement of account to members and voluntary contributors at annual intervals and when requested to do so in writing by members and voluntary contributors.

## **PART V - EXEMPTION OF COMPLYING SCHEMES**

### **33 Entitlement to exemption**

- (1) The Retirement Fund established under the Retirement Fund Act 1998 shall be exempted from the provisions of this Act.
- (2) The Board may issue a certificate of exemption from liability to contribute to the Fund to an employer and employee if satisfied that-

- (a) the employer has before the effective date of this Act established a retirement benefits scheme which, provides benefits equivalent to or better than those provided under this Act; and
  - (b) the employer and trustees of that retirement fund concerned undertake to make the necessary changes in the rules of that scheme within a timescale set by the Board, in the order to conform to this Act on the exemption of retirement benefit schemes.
- (3) The Board shall give the employer of a retirement which is not exempted under this section, notice that it is not so exempted whereupon-
- (a) the provisions of this Act shall apply to him and his employees from a date specified by the Board;
  - (b) no contribution shall be payable to the Fund in the month in which the Board so informs the employer; and
  - (c) there shall be no liability for contributions to the Fund whilst an appeal of the decision of the Board is under consideration.
- (4) An exempted retirement benefit scheme have legal entitlements that are equal to or better than those specified in this Act, excluding life insurance, and without rights to withdraw any part or the whole prior to the date of entitlement to benefit.

### **34 Conditions for complying schemes**

- (1) An employer who provides a retirement benefit scheme for his employees may submit an application for exemption from contributing to the Scheme in the prescribed form within one month of the effective date of this Act, or such longer period as the Board may determine.
- (2) The Board may on an application for exemption-
- (a) issue an employer with an interim certificate of exemption with required modifications; and
  - (b) issue a final decision on the application for exemption as soon as practicable.

### **35 Employee's credit on leaving a complying scheme**

- (1) Where an employer who is a member of a complying scheme ceases to participate in such a scheme or an employee leaves an employment or ceases to contribute to a complying scheme without being entitled to a pension benefit, the amount of the employee's credit in such scheme that represents contributions to such retirement benefit scheme both by the employer and the employee since the date of coming into force of this Act, together with any interest thereon, shall be transferred to the Fund, within one month or such further period as the Board may specify.

Provided that the employer and employee concerned may, by mutual agreement, elect to transfer to the Fund additional amounts or all such amounts standing to the credit of the employee in the retirement benefit scheme as represents the contributions paid to such scheme before the date of coming into force of this Act.

- (2) Notwithstanding the provisions in this section and section 36, where credit is transferred to the Fund; the Board, may, upon receipt of a written request by a member, or in the case of his death, his prescribed beneficiary:
  - (a) transfer amounts from a complying scheme; and
  - (b) if the transfer has been completed, determine that the various accounts held in the name of the member or the prescribed beneficiary may be combined in either the Scheme or a complying scheme for the purpose of providing the best possible benefit.

### **36 Transfer within same group of complying scheme**

- (1) Where an employee-
  - (a) transfers from employment, that is certified as a complying scheme, to employment under another employer of the same, group and where such transfer is permitted by the rules of such a scheme, continues to contribute thereto on the same terms and conditions, such employee, shall not be deemed to have left an employment; and
  - (b) in accordance with the rules of such a scheme, the amount standing to the credit of any employee consists in whole or in part of a policy of life insurance such policy shall not transferred to the Fund, but shall be dealt with in accordance with such rules.
- (2) Subject to the rules of a complying scheme, an employee who takes up employment with an employer with a complying scheme may choose to continue with or join the Scheme instead of the complying scheme, within one month of commencing employment.
- (3) If an employee chooses to leave the Scheme and join a complying scheme, contributions in respect of the employee shall not become payable to the Fund but any amount standing to the credit of such employee shall remain in the Fund.
- (4) Where a complying scheme is wound up the amount standing to an employee's credit in such a scheme that represents contributions to such retirement benefit scheme both by the employer and the employee since the date of coming into force of this Act, together with any interest thereon shall, be transferred to the Fund, and which amount the Board shall cause to be credited to the employee.
- (5) Where the assets of such a scheme are not sufficient to meet its liabilities, the amount to be credited to the employee under subsection (4) shall be reduced in such proportion as the Board may determine.

Provided that where the amount standing to the credit of any employee consists of a policy of life insurance, such policy shall not be transferred to the Fund.

- (6) Where under sub-section (4) any amount of contributions paid after this Act came into force is transferred to the Fund, the employer and employee concerned may, by mutual agreement, elect to transfer to the Fund additional amounts or all such amounts standing to the credit of the employee in the scheme, and if the Board approves such transfer, the employee shall be credited with amount so transferred to the Fund.

### **37 Obligation of exempted employer**

- (1) An employer who has received a certificate of exemption in respect of this Scheme-
- (a) shall furnish the Organisation with such audited accounts as the Board may require in respect of the complying scheme;
  - (b) may amend the rules of the complying scheme with the written approval of the Board;
  - (c) furnish the Organisation with such particulars of those employees contribution to this complying scheme as may be prescribed by the Board; and
  - (d) provide such information specified by the Organisation in respect of persons entitled to benefits under the rules of the complying scheme.
- (2) An employer of any complying scheme shall be subject to the same offences and penalties in respect of deductions or contributions made under this Act.
- (3) Any expenses incurred by the Organisation in enforcing the obligations of complying schemes under this Act shall be reimbursed to the Organisation from the funds of such complying schemes on the basis of such membership.

### **38 Revocation of a certificate of exemption**

- (1) The Board shall revoke an employer's certificate of exemption where the conditions for the certificate of exemption are not or are no longer met by the employer unless the employer provides the Board with satisfactory explanations or information in writing.
- (2) Where the Board makes a revocation decision under subsection (1) it shall-
- (a) inform the employer of its decision in writing;
  - (b) make the decision effective from the date on which it considers entitlement to the complying scheme status has ceased; and
  - (c) apply the provisions of sections 36(4) and (5) as if such funds were wound up from that date.

- (3) The employer and employees concerned shall be liable to contribute to the Scheme from the date on which the certificate of exemption was revoked.

### **39 Probation**

Where an employee is precluded by the rules of this employment's complying scheme from contribution thereto during a specified period of probation or other periods of non-qualifying service under the rules of the scheme, any sum standing to such employee's credit in the Fund which represents contributions to the Fund both by the employer and employee since the date on which such employment commenced, together with any interest thereon, shall remain in the members account in the Fund.

## **PART VI - BENEFITS**

### **40 Benefit entitlement**

- (1) Subject to this Act, the Scheme shall provide benefits to a member in the following events –
  - (a) attainment of pension age, or any age between age 60 and age 65, in a lump-sum or installments;
  - (b) permanent and total disablement before pension age, by payment of the total balances held in the name of the member or in a lump-sum of up to one third of the total balance and the remainder in installments;
  - (c) death before pension age, by payment of the total balance held in the name of the member or payment in a lump-sum unless the beneficiary requests in writing that the benefit due to him should be paid by a lump-sum of up to one third of the total balance and the remainder in instalments; and
  - (d) in the case of death before pension age of active members other than voluntary contributors, a life insurance benefit equal to the average insurable earnings of all members in the last financial year, provided that the amount of life insurance benefit shall be the amount declare by the Board and in force at the date of death.
- (2) Any member of the Scheme may nominate one or more beneficiaries.
- (3) The Court upon application shall appoint a person to represent the beneficiary if he is under 18 years of age at the date of entitlement.

### **41 Applications for benefits**

Applications for benefits shall be submitted to the Organisation in the prescribed form with all documents and other information prescribed by Regulations.

**42 Entitlement to benefits**

- (1) Subject to this Act a member shall be entitled at age 60 or at any age up to age 65 to claim a retirement pension if his total balance is equal to or greater than the minimum sum in force at the date of entitlement as prescribed by Regulations.
- (2) Where the total balance standing to the credit of a member is less than the minimum sum, he shall be entitled only to the payment of this amount as a lump-sum.
- (3) If the total balance standing to the credit of a member is equal to or greater than the minimum sum, he shall be entitled only to the lump-sum of one third of the total balance and a monthly pension during his lifetime and in no event to be less than a period of five years.
- (4) The rate of the retirement pension shall be calculated by multiplying the total balance, less than amount if any, to be paid as a lump-sum at the request of the member, in accordance with subsection (5) with the prescribed annuity factor.
- (5) The member may elect to take up to one-third of the total balance as lump-sum.

**43 Payment of retirement pension**

- (1) Subject to this Act, retirement pension is payable from the months following the month-
  - (a) in which the member attains age 60; or
  - (b) in which the member attains age 65; or
  - (c) between (a) and (b) during which the last contribution is paid.
- (2) Payment shall continue up to the months in which the pension dies or to the expiry of five years of payment, whichever is the later.
- (3) Where a pensioner dies before expiration of five years of payment, the balance of the pension shall be paid in a lump-sum unless the prescribed beneficiary elects to receive payments for the remainder of term of five years.
- (4)
  - (a) If there are more than one beneficiary they can agree to nominate a person to receive the payment and any one of them can request termination of that agreement at any time without cause being given.
  - (b) Pension benefits shall be paid in equal portions to children entitled under this Act.

**44 Permanent and total disablement**

- (1) Subject to this Act, the total balance of an account of a member who is under pension age shall be payable to him if he is certified by a Medical Board as

suffering from permanent and total disablement for the type of employment he has undertaken .

Provided that the Organisation may dispense with a certificate of a Medical Board in any case where, due to the serious physical or mental condition of the member, as certified by a senior hospital physician it deems this unnecessary.

- (2) The Organisation may pay the pension in a lump-sum of up to one-third of the total balance and the remainder in instalments.
- (3) The Organisation shall establish Medical Boards for the purpose of establishing entitlement under the Act and shall defray all expenses as part of the Scheme's administrative expenditure.

#### **45 Death benefit**

- (1) The prescribed beneficiary may claim the total balance in the member's account and life insurance benefit, if any on the death of a member before he has been awarded a pension.
- (2) Where there are two or more children eligible for benefits they shall be paid in equal portions.
- (3) The Organisation may pay the balance in the form of a lump-sum of up to one-third of the total balance and the remainder in instalments, if requested by the beneficiary.
- (4) The Organisation shall pay the total entitlement into the estate of the deceased in the absence of a prescribed beneficiary.

## **PART VII - DETERMINATION OF CLAIMS AND QUESTION**

#### **46 Determination of claims**

- (1) The Board shall determine, within one month of receiving, questions on liability to contribute, right to benefit and any other question arising under the Act, and such decision shall be in writing with reasons.
- (2) The Board may, on new facts coming to its notice, or if it is satisfied that the decision was given in ignorance of, or was based on a mistake as to some material fact, review and revise its decision.

#### **47 Right of appeal**

- (1) There shall be a right of appeal from the decision of the Board under section 46.

- (2) (a) Appeals against a decision of the Board shall be filed with the office of the Organisation within 21 days of the days of such decision.
- (b) The notice of such appeal shall be in writing and shall contain statement of the grounds of appeal.

#### **48 Establishment of Appeal Board**

- (1) There shall be an Appeal Board established under this Act.
- (2) The Minister shall appoint members of the Appeal Board which shall consist of a Chairman and two assessors to hear appeals under this Act.
- (3) The decisions made by the Appeal Board shall be final.

#### **49 Membership of Appeal Board.**

- (1) The Minister shall appoint the two assessors from nominations received from organisations representing employers and employees.
- (2) The Chairman shall be a person who has for 10 years been a law practitioner in the Kingdom.

#### **50 Powers of the Appeal Board**

- (1) The Appeal Board shall have the powers to issue summons, call for the production of documents, examine witnesses, and administer oaths and record evidence.
- (2) An order of the Appeal Board shall be enforceable as if it were a judgment of the Supreme Court.

## **PART VIII - OFFENCES AND PENALTIES**

#### **51 Offences and Penalties**

- (1) Any person who fails to-
  - (a) pay to the Fund in any month any amount required under section 20(1);
  - (b) submit returns under section 25(2);
  - (c) produce at the time specified, any document required to be produced by notice in writing under section 26(3);
  - (d) pay any contribution or other amount which he is require to pay under section 28;
  - (e) pay the Fund, within such period as may be prescribed, any surcharge which he is liable to pay under the provisions of section 29; or

- (f) transfer to the Fund within the prescribed time any sum which he is required to transfer to it under section 35;

commits an offence and shall be liable upon conviction to a fine not exceeding \$2,500.

- (2) Notwithstanding the provisions of any other Act, proceedings may be taken for any offence under this Act within three years of the date of commission of such offences

## 52 Offences relating to officers

- (1) Any person who-

- (a) obstructs any officer or servant of the Organisation in the exercise of his duties; or
- (b) procures any member, officer, servant or agent of the Organisation to communicate any such matter which is not permitted by the Board;

commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding three years or both.

- (2) Any Board member, officer, servant or agent of the Organisation who communicates to any person any information which is not permitted by the Board commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000 or to imprisonment of a term not exceeding three years or both.
- (3) Any Board member, officer, servant or agent of the Organisation unlawfully using inside information for his own benefit or the benefit of another person commits an offence and shall be liable upon conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 5 years or both.

## 53 Offences relating to contributions

Any person who-

- (a) makes any deductions or calculations of contributions at a time other than the time at which such contributions are payable;
- (b) deducts from the wages of the employee any sum greater than that permitted under this Act; or
- (c) having made any deductions, fails to pay to the Fund in the months in which they are due;

commits an offence and shall be liable upon conviction to a fine not exceeding \$2,500.

**54 Liability of officers of Corporation**

- (1) Where an offence under this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager or secretary shall be personally liable for that offence.
- (2) It shall be a defence for any person named in subsection (1) to prove that the offence was committed without his consent and that he exercised due diligence to prevent the commission of the offence.

**55 Civil Proceedings**

- (1) For the purposes of this section the word “contribution” shall be deemed to include any surcharge under the provisions of section 29.
- (2) All contributions payable under the provisions of this Act may be recoverable by the Organisation as a debt due.
- (3) Notwithstanding any other Act, proceedings for the recovery of debts relating to contributions may be brought within five years from the date the contribution becomes due.
- (4) Proceedings for the recovery of debts may be instituted by the Organisation or its nominee authorised in writing.

**56 Loss of benefit through default or employer**

- (1) Any employer who fails to pay any contribution when due and by reason thereof any person or persons fails to qualify for benefit under this Act or become entitled to benefit at a lower rate, the Organisation may pay benefit at the rate to which he or they would have been entitled if the failure to pay contributions had not occurred, and the Organisation shall be entitled to recover from the employer the contributions due and the expenditures on benefits otherwise not due save for the provisions of this sub-section.
- (2) Any sum which an employer is liable to pay under subsection (1) may be recoverable by the Organisation as a debt due.

**PART IX - MISCELLANEOUS****57 Power of Minister on exemptions**

- (1) Any person listed in the First Schedule is exempted from the provisions of this Act.
- (2) The Minister may, on the recommendations of the Board exempt any other person or category of person from the provisions of this Act.

**58 Power to Minister to make Regulations**

The Minister may, with the consent of Cabinet, make regulations for giving effect to any purposes of this Act including, but not limited to the following-

- (a) the registration of employers and employees;
- (b) the payment and collection of contributions;
- (c) the submission and adjudication of claims to benefits;
- (d) the exemption of existing retirement benefit schemes as complying schemes under this Act;
- (e) the investment of the Fund including the appointment of fund management institutions;
- (f) the manner and time of payment of contributions and the supply of information to the Organisation; and
- (g) the proper and effective administration of this Act.

**59 Exemption from tax**

- (1) There shall be no tax liability in respect of benefits paid under this Scheme.
- (2) The contributions paid by employers shall be deductible as an expense for the assessment of taxes.

**60 Overpayment of benefits**

- (1) Any person who has received any benefit or payment or payment under this Act to which he is not entitled, shall be liable to refund the overpayment to the Organisation.
- (2) An overpayment is a debt due to the Organisation.

**61 Limitations on contributions and benefits**

Notwithstanding any other law -

- (a) no sum deducted from the wages of a member of the Scheme under section 19;
- (b) no amount payable by the employer as his contribution;
- (c) no amount standing to the credit of a member of the Fund; and
- (d) no pension or other benefit under the Act;

shall be assignable, transferable, liable to be attached, sequestered, for, or in respect of, any debt or claim whatsoever.

**62 Insured person working abroad**

- (1) An employer who assigns a member to undertake duties under his contract of service outside Tonga for a period not exceeding twelve months shall-
  - (a) notify the Organisation of the date the employee leaves and when he returns; and
  - (b) be liable to contribute to the Scheme as if the employee is in Tonga.
- (2) Employees working outside Tonga on assignment shall be included in the contribution schedule with information on the remuneration in Tongan currency.

**63 Beneficiary abroad**

- (1) Subject to this Act, a person shall not be disqualified from receiving any benefit for any period during which that person absent from Tonga.
- (2) Benefit or person abroad may be payable in Tonga in Tongan currency to a person appointed to act for and on behalf of the beneficiary, or to the bank account of the beneficiary in Tonga as may be approved by the Organisation.

**64 Confirmation of Entitlement**

The Organisation shall contact every pensioner at least once every year to confirm continued eligibility to receive pension payments.

Passed by the Legislative Assembly this 21<sup>st</sup> day of September 2010.

**FIRST SCHEDULE**

(Section 57)

**EXEMPTIONS**

- 1 Any domestic employee or out-worker.
- 2 Any person who is a daily paid labourer in any Government employment.
- 3 Any person who is a member of a complying scheme.
- 4 Any person who is detained in a prison or mental hospital.
- 5 Any person who is not a Tongan subject and has diplomatic privileges and immunities extended to him by the Kingdom of Tonga.
- 6 Any person who is not a Tongan subject employed in Tonga who provides proof satisfactory to the Board that either he or she is-
  - (a) contributing to a national superannuation scheme in another country established under legislation, which provides equivalent or better benefits than those prescribed under this Act; or
  - (b) employed under a contract or contracts the duration of which when combined does not exceed 5 years, and calculation of the total period shall exclude any gaps between such contracts of not more than 24 months.

**SECOND SCHEDULE**

(Section 20)

**RATES OF CONTRIBUTION**

Contribution rates payable by employers and employees shall be the following percentages of each complete pa'anga of insurable earnings:

	<b>Employers</b>	<b>Employees</b>
1. For the first five years of Implementation of this Act	5 per cent	5 per cent
2. After the first five years of this Act	7.5 per cent	5 per cent