



Conyers Dill & Pearman

Bermuda's National Pension Scheme

Foreword

This Memorandum has been prepared for the assistance of anyone who is considering issues relating to pensions in Bermuda. It deals in broad terms with the requirements of Bermuda law and, where applicable, the policy of the Bermuda Government. It is not intended to be exhaustive but merely to provide general information to our clients and their professional advisers.

We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking any steps to implement them.

This Memorandum has been prepared on the basis of the law and practice as at the date referred to below.

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1. INTRODUCTION

The National Pension Scheme (Occupational Pensions) Act 1998 as amended (the “Act”) became operative on 1st January 2000.

The Act imposes an obligation on employers of Bermudians (or husbands or wives of Bermudians) to establish and maintain pension plans for the benefit of such persons in their employment. An employer is defined to be a person in Bermuda who employs employees, and includes self-employed persons. An employee is defined to be a Bermudian or the husband or wife of a Bermudian who is employed by an employer. Prior to the Act, the provision of a pension plan was purely voluntary.

Whilst there is no substitute for reading the Act itself, the following may serve to highlight some of its more salient features.

2. ESTABLISHMENT MAINTENANCE AND REGISTRATION OF PENSION PLANS

Existing pension plans will need to continue and be maintained in accordance with the provisions of the Act. This necessitates a review of existing plans to ensure conformity. In cases where no existing employer pension plan exists, there is an obligation on an employer to establish and maintain a pension plan in accordance with the Act or participate in a financial institution pension plan. A financial institution for the purposes of the Act is defined to mean - (a) a bank licensed under the Banks Act 1969 or the Banks and Deposit Companies Act 1999; (b) an insurer registered under the Insurance Act 1978; (c) a local trust company licensed under the Trust Companies Act 1991; or (d) any other company which is approved by the Pension Commission for the purposes of the Act. A financial institution pension plan is defined to be a pension plan established by a financial institution and approved by the Pension Commission to offer a defined-contribution pension plan for individuals, whether employees or self-employed.

Each pension plan needs to be registered with the Pension Commission. In the case of plans established on or after 1st January 2000, registration must occur within 180 days after the establishment of the plan. In respect of a plan in existence immediately before 1st January 2000, registration had to have occurred within one year after such date.

3. PENSION PLAN ADMINISTRATOR

A pension plan will not be eligible for registration unless it is administered by an administrator. Such administrator shall be -

- (a) the employer, whether an individual or a body corporate or unincorporate;
- (b) a joint committee composed of one or more representatives of the employer or employers participating in the pension plan and one or more representatives of the members or former members of the pension plan;
- (c) a committee wholly consisting of members or former members of the pension plan;
- (d) a person or group of persons or entity which by virtue of the Act or any other law, is vested with responsibility for the administration of a pension plan or pension fund;
- (e) a financial institution; or
- (f) any other person approved by the Pension Commission.

The administrator is required to ensure that the pension plan and pension fund are at all times administered in accordance with the documents establishing the pension plan, the Act and the Regulations, and the best standards of management designed to protect and promote the interests of the members and of any other person eligible for or entitled to receive payments from the pension plan. The administrator is required within six months after the end of a fiscal year of the pension plan to submit to the Pension Commission an annual information report on the pension plan in the form prescribed by regulations. Within 6 months after the end of the fiscal year of the pension fund, the administrator must submit to the Pension Commission the financial statements of the pension fund as prescribed by regulations. In relation to a pension plan which provides defined benefits, the administrator will also be required within

six months after the expiration of every three fiscal years of the pension plan, to submit to the Pension Commission a report prepared by an actuary. In the case of a pension plan which provides defined contribution benefits, the administrator must, within six months after the expiration of every three fiscal years of the pension fund, submit to the Pension Commission a report prepared by an accountant, an actuary, or a person who is authorised by a financial institution and who is independent of the administrator.

An employer is required to provide the administrator of the pension plan with any information required by the administrator for the purpose of compliance with the terms of the pension plan or the Act or the regulations.

4. DOCUMENTATION

The documents establishing a pension plan and its related pension fund are required to set out the following information -

- (a) the objects for which the pension plan is established, and the rules governing the administration of the pension plan and the pension fund;
- (b) the method by which the documents establishing the pension plan and pension fund may be amended;
- (c) the method of appointment and removal of the administrator and the holder of the pension fund;
- (d) the powers and duties of the administrator, including the power to delegate the administration of the pension plan to another person;
- (e) the conditions for membership in the pension plan;
- (f) the benefits and rights that are to accrue upon disability, termination of employment, termination of membership, retirement or death;
- (g) the normal retirement age under the pension plan;
- (h) the requirements for entitlement under the pension plan to any pension benefit and ancillary benefit including the vesting schedule for the pension plan;
- (i) the contributions or the method of calculating contributions under the pension plan;

- (j) the method of determining benefits payable under the pension plan;
- (k) the method of calculating interest or earnings to be credited to contributions or benefits payable under the pension plan;
- (l) the mechanism for payment of the cost of administration of the pension plan and the pension fund;
- (m) the mechanism for establishing and maintaining the pension fund;
- (n) the circumstances in which the pension plan may be wound up and the method by which the assets of the pension fund are to be allocated consequent on such winding up;
- (o) the method for allocation of gains and losses in a defined contribution plan;
- (p) the types of investments to be made and the allocation of investment income;
- (q) the obligation of the administrator to provide members with information, and documents required by or under the Act, to be disclosed;
- (r) the method of receiving or transferring a member's accrued pension benefit from or to other pension plans;
- (s) the treatment of surplus during the existence of the pension plan and on the winding up of the pension plan;
- (t) particulars of any predecessor pension plan under which members of the pension plan may be entitled to benefits; and
- (u) such other information as may be prescribed by regulations or required by the Pension Commission.

5. FUNDING

The Pension Commission will not register a pension plan where the pension plan does not provide for the accrual of pension benefits in a gradual and uniform manner or the formula for computation of the employer's contributions to the pension fund or, in the case of a defined benefit pension plan, the benefits provided under the pension plan, are variable at the discretion of the employer.

6. AMENDMENTS

Amendments to a pension plan will need to be registered by the administrator within 90 days after the date on which the pension plan was amended.

An amendment to a pension plan is void if the amendment purports to reduce the amount or the commuted value of a pension benefit accrued under a pension plan with respect to employment before the effective date of the amendment, the amount or commuted value of a pension or deferred pension accrued under a pension plan, or the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

The Pension Commission may refuse to register a pension plan that does not comply with the Act and the regulations made thereunder; cancel registration of a pension plan if, at any time after registration, the plan does not comply, or is not administered in accordance with, the Act and regulations; or refuse to register an amendment to a pension plan if the amendment or the pension plan, as ought to be amended, would result in the pension plan ceasing to comply with the Act and regulations.

7. INFORMATION FOR MEMBERS

An administrator is required to provide to each person eligible or required to become a member of a pension plan an explanation in writing of the provisions of the pension plan that apply to that person, an explanation of the person's rights and obligations in respect of the pension plan and any other information prescribed by regulations. Furthermore the administrator shall provide annually or at such shorter periods as specified in a pension plan, to each member, a written statement containing the prescribed information in respect of the pension plan, the member's pension benefits or account balance and any ancillary benefits.

8. TERMINATION OF EMPLOYMENT

Where a member of a pension plan terminates employment with his employer or otherwise ceases to be a member, the administrator is required to provide the member with a written statement setting out the prescribed information in respect of the pension plan including any ancillary benefits. In the case of a defined benefit plan, the administrator must also set out in the statement the member's expected benefits at his normal retirement date and the commuted value of the expected benefits as determined by an actuary. In the case of a defined contribution plan, the statement must also include disclosure of the amount of money standing to the member's account.

9. ELIGIBILITY

Every employee of a category of employees for whom a pension plan is established shall be eligible to be a member of a pension plan and, with certain provisos, in order to be eligible, shall be 23 years old or more and have completed 720 or more hours of employment with the employer to whom the pension relates in any given calendar year prior to membership in the pension plan.

10. HOLDING OF PENSION ASSETS

All assets of a pension plan are required to be received and held in a distinct fund, separate from the assets of the employer by:-

- (a) a financial institution; or
- (b) a trust in Bermuda governed by a written trust agreement under which the trustees are –
 - (i) a financial institution; or
 - (ii) three or more individuals approved by the Pension Commission to be trustees, such persons in the opinion of the Pension Commission to have the necessary experience and expertise to be pension fund trustees;

- (c) a person, or group of persons, or an entity, which under or by virtue of any other law is made responsible for holding the assets of a pension fund; or
- (d) any two or more of the institution, trustees, persons or entity, as the case may be, referred to in paragraphs (a) to (c).

Directors and officers of any company obliged to make pension remittances may be held personally liable for sums that were due to be remitted during their term of office. Proceedings may be taken against persons who were directors or officers at the time of a failure to remit, even if they are no longer in office. The legislation imposing this liability is retroactive, and its reach goes back 20 years. The liability created by the legislation is "strict liability," meaning that a director or officer may be found liable even if he had no intent to breach the law, or even any knowledge (or the means to have the knowledge) that the law was breached. It is therefore crucial that companies make their remittances properly and in a timely fashion.

11. CONTRIBUTIONS

The first schedule to the Act sets out mandatory contribution rates which apply to the employer and employee. In the case of a defined contribution pension plan these are based upon an employee's pensionable earnings (as defined in the Act) of 1% for each of the employer and employee in the year commencing 1 January 2000, rising by 1% each year to a maximum of 5% in the year commencing 1 January 2004. In the case of a defined benefit pension plan these are based upon an employee's final average earnings (as defined in the Act) of 0.25% for each of the employer and employee in the year commencing 1st January 2000 rising by 0.25% each year to a maximum of 1.25% in the year commencing 1st January 2004. Notwithstanding the encouragement for contributions to be made both by employers and employees, it is open to an employer to contribute to a pension fund amounts representing both the amount required to be contributed by the employer and a part or the whole of the amount required to be contributed by the employee. A member and an employer may also make additional voluntary contributions to a pension fund over and above those set out in the schedule to the Act.

12. RETIREMENT DATE

The normal retirement date under a pension plan registered under the Act shall be not later than one year after a member of the pension plan has attained the age of 65 years unless the pension plan specifies an earlier normal retirement date. If a member of a pension plan elects to continue in employment after his normal retirement date, he or she may elect to continue accruing benefits under the pension plan after the date of his or her retirement. A member may elect to receive an early retirement pension if he or she is within 10 years of attaining the normal retirement date.

13. VESTING

Every pension plan registered under the Act is required to provide for full vesting of accrued benefits in each of its members within a period which does not exceed two years after commencement of membership. Notwithstanding this general position, the accrued benefits of a member of a pension plan in existence prior to 1st January 2000 shall be fully vested on the date determined in accordance with the provisions of the plan or by 1st January 2002, whichever is earlier.

14. PORTABILITY

A member of a pension plan who terminates employment shall be entitled to require the administrator to pay an amount equal to the commuted value (in the case of a defined benefit pension plan) or the account balance (in the case of a defined contribution pension plan) -

- (a) to the pension fund of a new employer;
- (b) to a prescribed retirement product;
- (c) for the purchase for the member of a life annuity that will commence on a date not earlier than the earliest date on which the member would have been entitled to receive payment of pension benefits under the pension plan; or
- (d) to a financial institution pension plan.

A member of a pension plan will not be entitled to a refund from the pension fund of contributions made or any interest on such contributions, but this will not prohibit the refund of any additional voluntary contributions and interest thereon in accordance with the provisions of a pension plan.

15. PROTECTION OF PENSION FUNDS

Any transaction which purports to convey, assign, charge, anticipate or give as security (a) a right to receive money payable under a pension plan; or (b) assets being transferred from a pension fund shall be void.

The Act provides that money payable under a pension plan is exempt from execution, seizure or attachment or any other process taken by a creditor. Similarly money transferred from a pension fund to a prescribed retirement product or for the purchase of a life annuity is stated to be exempt from execution, seizure or attachment or any other process taken by a creditor and money payable from a prescribed retirement product or from a life annuity purchased with monies transferred from a pension fund is stated to be exempt from execution, seizure, attachment or any other process taken by a creditor.

16. ANCILLARY BENEFITS

A pension plan may provide ancillary benefits such as

- (a) disability benefits;
- (b) survivor benefits;
- (c) supplemental benefits payable for a temporary period of time;
- (d) early retirement options and benefits in excess of those provided by the Act;
- (e) benefits arising from additional voluntary contributions; or
- (f) any other ancillary benefits prescribed by regulations.

The Act makes provision for survivor benefits on the death of a member. If a former member dies after payment of his pension benefit is due to commence the benefit shall be paid to his beneficiary appointed in writing by the member for the purposes of the pension plan. Where no beneficiary has been appointed or where the beneficiary predeceases the member, the benefit shall be paid to the estate of the member. Provision is also made for survivor benefits on death before a pension commences. In this case the beneficiary is entitled to a lump sum payment unless the beneficiary elects to receive a pension. Where no beneficiary has been appointed the benefit shall be paid to the estate of the member.

17. WINDING-UP

An administrator may wind up a pension plan in whole or in part and shall give written notice of such a proposal to the Pension Commission, each member of the pension plan, each former member of the pension plan, each trade union that represents members of the pension plan and any other person entitled to a payment from the pension fund. The Pension Commission may also order the winding up of a pension plan in whole or in part:

- (a) if all or a significant part of the business of the employer is discontinued;
- (b) if the employer becomes insolvent;
- (c) if an application for its registration is not granted, or if the registration of the pension plan is revoked;
- (d) if the employer becomes bankrupt within the meaning of the Bankruptcy Act 1989;
- (e) if there has been a cessation or suspension of the employer's or employees' contributions or accrual of benefits to the pension fund;
- (f) if the employer fails to make contributions to the pension fund as required by the Act or the regulations;
- (g) if a significant number of members of a pension plan cease to be employed by the employer as a result of the discontinuance of all or part of, or the reorganisation of, the employer's business; or
- (h) if any other event or circumstance, as may be prescribed occurs.

Where the Pension Commission orders the winding up of a pension plan it may appoint a person for this purpose. Such person is required to submit a report to the Pension Commission upon the conclusion of the winding up. On the winding up, the person appointed to wind up the pension plan is required to give to each person entitled to a benefit in respect of the pension plan a statement setting out the person's entitlement under the pension plan and the options available to the person regarding the immediate payment of a pension benefit if he is eligible therefor or, if not so eligible, for the payment of a pension commencing on such future date and on such terms as may be prescribed and any other information prescribed by regulations.

Where a pension plan is wound up, the employer is required to pay into the pension fund an amount equal to the total of all payments that under the Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund.

18. BUSINESS REORGANISATION

Where an employer who contributes to a pension disposes of all or part of his business, or all or part of the assets of his business, and a member of the pension plan as a result becomes an employee of the successor employer and becomes a member of the pension plan provided by the successor employer, that member continues to be entitled to the benefits provided under the employer's pension plan in respect of his employment up to the effective date of disposition, without further accrual, and is entitled to credit in the pension plan of the successor employer for the period of membership in the employer's pension plan for the purpose of determining eligibility for membership in, or entitlement to, benefits under the pension plan of the successor employer. The member is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original pension plan, the original pension plan shall be deemed not to be wound up and the new pension plan shall be deemed to be a continuation of the original pension plan.

19. PENSION COMMISSION

The Pension Commission is a body corporate with perpetual succession with power to acquire, hold and dispose of moveable and immovable property, enter into contracts, sue and be sued in its own name and do and suffer all such acts and things as bodies corporate may lawfully do or suffer.

19.1 Functions

The functions of the Pension Commission are -

- (a) to administer the Act and the regulations;
- (b) to consider and determine applications for the registration of pension plans;
- (c) to promote and ensure compliance, by pension plans, with the provisions of the Act and the regulations;
- (d) to monitor the administration, and funding, of pension plans and to enforce the provisions of the Act and the regulations in respect of such administration and funding;
- (e) to verify the payment of benefits under pension plans;
- (f) to promote public education on pension plans and their benefits;
- (g) to advise the Minister of Finance on any matter relating to pensions, including the development of laws relating to pension plans;
- (h) to provide such information relating to its functions as the Minister of Finance may require;
- (i) to investigate complaints relating to a pension plan and a pension fund; and
- (j) to perform any other functions provided for, in or under the Act.

19.2 Ancillary Powers

The Act provides for certain powers of entry, search, etc. with respect to documentation and investigations concerning pension plans and provides for offences, penalties and orders for payment with respect to persons contravening provisions of the Act.

20. REGULATIONS

The Minister of Finance may, after consultation with the Pension Commission, make regulations with respect to numerous issues pertaining to pension plans such as the administration thereof, calculation of commuted value of pensions, requirements for life annuity contracts, investment of money from pension funds, investments or categories of investment in which such money may be invested, forms and records required to be prescribed under the Act, time limits for retention of such records etc. There have been three regulations to date:

- National Pension Scheme (General) Regulations 1999 (Registration and Administration and Winding Up of pension plans)
- National Pension Scheme (General) Amendment Regulations 2000 (Self-employed persons)
- National Pension Scheme (General) Amendment Regulations (No.2) 2000 (pension fund investments).

21. PENSION TRUST FUNDS ACT 1966

The Pension Trust Funds Act, 1966 shall cease to apply to any pension fund which relates to a pension plan registered under the Act as from the date of registration of the plan, and the registration of the fund under the 1966 Act shall be cancelled as from that date.

This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

About Conyers Dill & Pearman

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

Conyers' sophisticated client base includes FTSE 100 and Fortune 500 companies. Working with leading local and international firms, Conyers advises on highly complex multi-jurisdictional projects.

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Founded in 1928, Conyers has 600 staff, including more than 150 lawyers.

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