



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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## Government Notice

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### OFFICE OF THE PRIME MINISTER

No. 260

2003

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 18 of 2003: Payment System Management Act, 2003.

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## ACT

To provide for the management, administration, operation, regulation, oversight and supervision of payment, clearing and settlement systems in Namibia; and to provide for incidental matters.

*(Signed by the President on 21 December 2003)*

### ARRANGEMENT OF SECTIONS

#### Section

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**BE IT ENACTED** by the Parliament of the Republic of Namibia as follows:

#### Definitions

1. In this Act, unless the context otherwise indicates -

“Bank” means the Bank of Namibia as referred to in section 2 of the Bank of Namibia Act;

“Bank of Namibia Act” means the Bank of Namibia Act, 1997 (Act No. 15 of 1997);

“banking institution”, as defined in section 1 of the Banking Institutions Act, means a public company authorized under that Act to conduct banking business, or deemed to be so authorized;

“Banking Institutions Act” means the Banking Institutions Act, 1998 (Act No. 2 of 1998);

“Board” means the Board of the Bank referred to in section 4 of the Bank of Namibia Act;

“Body” means the Payment System Management Body established in terms of section 3;

“business day” means any day other than a Saturday, Sunday or public holiday;

“clear” or “clearing” means the exchange of payment instructions between system participants with a view to reconciling and confirming payment instructions;

“clearing system” means a system whereby system participants can exchange data, documents and payment instruments and instructions relating to funds or securities transfers to other system participants;

“Companies Act” means the Companies Act, 1973 (Act No. 61 of 1973);

“holding company” means a holding company contemplated in section 1(4) of the Companies Act;

“Insolvency Act” means the Insolvency Act, 1946 (Act No. 24 of 1946);

“money” means notes and coins issued in terms of section 20 of the Bank of Namibia Act and any other currency being legal tender in Namibia;

“national payment system” means the payment system as a whole, and includes any payment system, settlement system, clearing system and payment system arrangement used in the process of effecting payment between payers and beneficiaries;

“netting” means the determination of the net payment obligations between two or more system participants within a payment clearing house or the determination of the net settlement obligations between two or more system participants within the payment system;

“payment clearing house” means an arrangement between two or more system participants governing the clearing of payment instructions between those system participants;

“payment instruction” means an instruction by a payer to transfer funds;

“payment instrument” means an instrument or a process enabling a payer to issue a payment instruction;

“payment obligation” means an indebtedness that is owed by one system participant to another system participant as a result of the clearing of one or more payment instructions in a payment system;

“payment system” means a system that enables payments to be effected between a payer and a beneficiary;

“payment system arrangement” means procedures and services for the processing of payment transactions;

“payment system services” means all services relating to payment systems, settlement system, clearing systems and payment system arrangements;

“service provider” means a person registered as contemplated in section 3(6)(a) as service provider;

“settlement” means payment or discharge of outstanding obligation that a system participant owes to another system participant;

“settlement instruction” means an instruction given to the settlement system by or on behalf of a system participant to effect settlement of a payment obligation or to discharge any other obligation of one system participant to another system participant;

“settlement obligation” means an indebtedness that is owed by a system participant to another system participant as a result of a settlement instruction;

“settlement system” means a system established and operated by the Bank to facilitate the transfer of funds for the discharge of payment and settlement obligations between system participants;

“subsidiary” means a subsidiary company as defined in section 1(3) of the Companies Act, and includes a subsidiary company of a subsidiary;

“system participant” means a person authorised by the Bank under section 2(2)(b) to participate in the clearing and settlement systems; and

“this Act” includes the determinations made under section 14.

### **Powers and functions of Bank**

2. (1) The Bank may exercise the powers and must perform the functions conferred and imposed on it by this Act to ensure the safe, secure, efficient and cost-effective operation of the national payment system.

(2) The functions of the Bank are -

- (a) to oversee, inspect and monitor the national payment system, the operation of the Body, system participants and service providers;
- (b) to establish and operate a settlement system, and to authorise persons to participate in the clearing and settlement systems and to withdraw such authorization; and
- (c) to authorise the operation of the Body by issuing to the Body a certificate of commencement of business, after having satisfied itself with the Body’s constitution, rules, competence and readiness to manage the payment system.

(3) The Board, in writing, may delegate any power or assign any function conferred or imposed on the Bank by or under this Act to the Governor, Deputy Governor or any officer of the Bank, or the Body subject to such conditions as the Board may determine.

(4) The Bank is not divested or relieved of a power or function delegated or assigned under subsection (3).

(5) The Board may withdraw a power or function delegated or assigned under subsection (3) at any time.

### **Payment System Management Body**

3. (1) The Bank and banking institutions must cause to be established by a constitution a juristic person to be known as the Payment System Management Body with the object of managing the national payment system, and organizing, setting technical standards, regulating the participation of its members in the national payment system and all matters affecting payment obligations and the clearing and netting of payment obligations.

(2) Subject to subsection (3), membership of the Body is compulsory for the Bank and every banking institution.

(3) The constitution and rules of the Body which may not be inconsistent with this Act, the Bank of Namibia Act and the Banking Institutions Act, must be fair, equitable and transparent, and must, among others -

- (a) provide for the terms and conditions for admission as a member of the Body that must be complied with before admission is granted, and the circumstances under which such membership may be suspended or terminated;

- (b) provide for the terms and conditions for the establishment of any committee or working group of the Body to deal with various aspects of the national payment system;
  - (c) provide for the requirements and conditions for the registration of a person who is not a system participant as service provider to provide one or more payment system services;
  - (d) enable the Bank, when discharging its responsibilities regarding the monitoring, regulation and supervision of payment, clearing and settlement systems, to adequately oversee the affairs and operation of the Body and its members; and
  - (e) fairly represent and promote the technical and related interests of all banking institutions.
- (4) In realizing its objects referred to in subsection (1), the Body must -
- (a) determine and administer -
    - (i) operational and technical policies;
    - (ii) operational and technical criteria, conditions and standards;
    - (iii) payment instrument standards;
    - (iv) electronic notification and message standards; and
    - (v) formats for electronic files,pertaining to the national payment system;
  - (b) act as a forum for the consideration of matters of policy and mutual interest concerning its members, and deal with and promote any other matter of interest to its members and foster co-operation between them;
  - (c) from time to time, certify to the Bank that payment systems, clearing systems and payment system services, and their providers meet all the standards, criteria and conditions determined under paragraph (a); and
  - (d) perform such further functions relating to payment, clearing or settlement system as the Bank may assign to it.
- (5) The Body must ensure that the standards, criteria and conditions determined by it under subsection (4)(a) have the effect of -
- (a) encouraging appropriate payment system co-operation and competition in the provision of payment system services;
  - (b) ensuring fair access by system participants to payment system services; and
  - (c) facilitating oversight of the national payment system by the Bank.
- (6) The Body -
- (a) must register a person who is not a system participant as service provider, and authorise such person to provide one or more payment system services, if that person meets the requirements and conditions set out in the Body's rules;

- (b) may cancel the registration of a service provider if the service provider contravenes or fails to comply with any term or condition of its registration.
- (7) The Body may not -
  - (a) commence with its business operation before it is issued with the certificate referred to in section 2(2)(c);
  - (b) effect any amendment to its constitution or rules before such amendment is approved by the Bank; and
  - (c) dissolve without the approval of the Bank.

### Settlement provisions

4. (1) A person may not participate in the settlement system unless such person is the Bank or a system participant.

(2) A system participant must effect the discharge of any payment obligation or settlement obligation in money or by means of an entry passed through the settlement system to the credit of the settlement account of the beneficiary system participant which account is maintained at the Bank for settlement purposes.

(3) A discharge of payment obligation or settlement obligation that has been effected in terms of subsection (2) is final and irrevocable.

(4) Despite the provisions of the Insolvency Act, a settlement instruction that has been finally and irrevocably effected in terms of subsection (2) may not be revoked, reversed, netted, set-off or set aside.

- (5) When a system participant is wound up -
  - (a) the Registrar of the High Court must lodge with the Bank a copy of the application for winding-up, if it was made, and the winding-up order within 14 days of issuance of the order; and
  - (b) despite sections 341(2) and 348 of the Companies Act, the winding-up order does not affect any settlement that has become final and irrevocable prior to the lodgement of the copy of that order with the Bank in terms of paragraph (a).

(6) The Bank, after consultation with the Body, may determine such conditions, rules or procedures, as it considers necessary regarding the issuing of settlement instructions and discharging of settlement obligations.

(7) The conditions, rules or procedures determined in terms of subsection (6) must be incorporated in settlement contracts to be entered into between the Bank and system participants.

### Payment provisions

- 5. (1) A person may not issue a payment instrument unless such -
  - (a) instrument is registered with the Bank upon application made to it by such person in writing;
  - (b) person is a system participant; or
  - (c) person is exempted by the Minister under subsection (2), or is one of a category of persons so exempted.

(2) The Minister, after consultation with the Bank, by notice in the *Gazette* and subject to such conditions as the Minister may determine, may exempt any person or category of persons from the provisions of subsection (1), if the Minister is satisfied that such exemption is in the public interest and will not cause undue risk to the national payment system.

(3) A person who is not a system participant may not provide any of the payment system services, unless such person -

- (a) is registered as service provider; or
- (b) is authorised by the Bank under subsection (4).

(4) The Bank, after consultation with the Body, and upon such conditions as it may determine, may authorise a person referred to in subsection (3) to provide any of the payment system services without being registered with the Body as service provider.

(5) A person who contravenes subsection (1) or (3) commits an offence.

#### **Clearing provisions**

6. (1) A person may not clear payment instructions unless such person is a system participant or its agent.

(2) A person who contravenes subsection (1) commits an offence.

#### **Payment intermediation**

7. (1) A person may not accept money or payment instructions, as a regular feature of such person's business, from any other person for purposes of making payment on behalf of that other person to a third person to whom that payment is due, unless the person so accepting money or payment instructions -

- (a) is a system participant or its agent;
- (b) is the Namibia Post Limited established by section 2(1)(a) of the Posts and Telecommunications Companies Establishment Act, 1992 (Act No. 17 of 1992), or the Post Office Savings Bank referred to in section 1 of that Act, or its agent; or
- (c) is a person or one of a category of persons exempted by the Minister under subsection (3).

(2) Subsection (1) may not be construed as prohibiting the acceptance of money or payment instructions -

- (a) by a holding company from its subsidiary, or by a subsidiary from its holding company, or by a subsidiary from another subsidiary of the same holding company; or
- (b) by an agent of the holding company or subsidiary referred to in paragraph (a).

(3) The Minister, by notice in the *Gazette*, after consultation with the Bank and the Body, and subject to such conditions as the Minister may determine, may exempt any person or category of persons from subsection (1), if the Minister is satisfied that such exemption is in the public interest and will not cause undue risk to the national payment system.

- (4) A person who contravenes subsection (1) commits an offence.

#### **Netting agreements and netting rules**

8. Despite anything to the contrary in the Insolvency Act or the Banking Institutions Act, if a system participant is wound up or placed under judicial management, or a curator is appointed to a system participant, any provision contained in a written netting agreement to which the system participant is a party, or any netting rule or practice applicable to the system participant, is binding upon the liquidator, judicial manager or curator, in respect of -

- (a) any payment or settlement instruction which has been delivered to another system participant, a service provider or to the Bank prior to the winding-up order, judicial management order or appointment of the curator, and which instruction -
- (i) is subject to calculation and determination through clearing or netting; or
  - (ii) may result in a payment or settlement obligation, which obligation is to be discharged on or after the date of the winding-up order, judicial management order or appointment of the curator, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator, as the case may be; or
- (b) any payment or settlement obligation -
- (i) which has been determined through netting prior to the issue of the winding-up order or judicial management order or appointment of the curator; or
  - (ii) which is to be discharged on or after the date of the winding-up order, judicial management order or the appointment of the curator, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator.

#### **Utilisation of assets provided as security**

9. Despite anything to the contrary in the Insolvency Act, any asset of a system participant which the system participant, prior to the issue of its winding-up order, has provided -

- (a) to the Bank as security for a loan in respect of its settlement obligation, may be utilised by the Bank to the extent required for the discharge of that settlement obligation; or
- (b) in terms of a written agreement with a service provider, to the service provider as security in respect of its payment obligation, may be utilised by the service provider to the extent required for the discharge of that payment obligation.

#### **Information**

10. (1) The Bank has access to any information relating to -
- (a) a payment system, clearing system and settlement system; and
  - (b) the Body, a system participant and service provider in respect of any matter regulated by or under this Act.

(2) Any person in possession of information referred to in subsection (1) must provide such information to the Bank at any time and in such form as the Bank may require from such person in writing.

### **Confidentiality**

11. (1) A person may not directly or indirectly disclose to another person any confidential information that he or she has obtained in the performance of his or her functions for or on behalf of the Bank, except -

- (a) for the purposes of the performance of his or her functions in terms of this Act, the Bank of Namibia Act or the Banking Institutions Act;
- (b) when the disclosure of such information is necessary to protect the integrity, effectiveness and security of the national payment system; or
- (c) when required to do so on authority of the Board or under any law or by a court of law.

(2) A person who contravenes subsection (1) commits an offence.

### **Indemnity**

12. The Governor, Deputy Governor, a member of the Board or an employee of the Bank or the Body is not personally liable for any loss or damage arising out of any act done or omitted to be done in good faith under this Act, unless such damage or loss is due to the Governor's, Deputy Governor's, member's or employee's negligence or failure to comply with this Act.

### **Directives by Bank**

13. (1) If the Bank knows or reasonably believes that any person participating in the national payment system engages in or is about to engage in any act, omission or course of conduct, that results or is likely to result in systemic risk, or is detrimental to or may be detrimental to, or is or will be contrary to the public interest in, the integrity, effectiveness or security of the national payment system, the Bank may issue a directive in writing requiring the person, within the period specified in the directive -

- (a) to cease or refrain from engaging in the act, omission or course of conduct, or to perform such acts specified in the directive as are necessary to remedy the situation;
- (b) to provide the Bank with such information and documents relating to the matter as specified in the directive; and
- (c) to conform to the requirements set out in the directive.

(2) Any person who neglects, refuses or fails to comply with a directive issued under subsection (1) commits an offence.

(3) Irrespective of whether criminal proceedings have been or may be instituted against a person in respect of an offence referred to in subsection (2), the Bank may apply to the High Court for an order directing such person to comply with a directive issued under subsection (1).

### **Determinations**

14. (1) The Bank, by notice in the *Gazette*, may make determinations not inconsistent with this Act relating to -

- (a) any matter which is required or permitted by this Act to be determined by the Bank; and
- (b) all other matters which the Bank considers necessary or expedient to determine for the efficient functioning of the national payment system.

(2) A person who contravenes a determination made under subsection (1) commits an offence.

### Settlement of disputes

15. (1) If the Body or system participant considers itself aggrieved by a decision taken by the Bank under this Act and a dispute arises between them, it must be settled as provided in this section.

(2) If the Body or system participant desires to settle the dispute, it must furnish the Bank with full particulars of its grievance in writing, and thereafter the parties must attempt to settle the dispute by agreement within seven business days of receipt of particulars by the Bank.

(3) If the parties do not succeed in settling the dispute as contemplated in subsection (2), they may agree to attempt to settle the dispute by mediation within a further period of 10 business days.

(4) "Mediation" as contemplated in subsection (3) means a process whereby -

- (a) the parties agree on a mediator;
- (b) a mediator familiarises himself or herself with the position held by each party;
- (c) a mediator and the parties discuss the dispute at their meeting convened for that purpose;
- (d) the parties at or following their meeting with a mediator attempt to settle the dispute by agreement; and
- (e) the parties share the mediator's costs equally.

(5) If the parties are unable to settle a dispute by agreement through mediation in accordance with subsection (3), the dispute, if it is to continue, must be referred to -

- (a) a single arbitrator appointed by both parties; or
- (b) an arbitrator or arbitrators appointed, at the request of both parties, by a credible body whose business is the facilitation and promotion of disputes resolution by means of mediation or arbitration.

(6) The arbitrator referred to in subsection (5) must as far as possible be a person appointed on account of his or her knowledge of the law and the national payment system.

(7) The Arbitration Act, 1965 (Act No. 42 of 1965) applies with the necessary changes to an arbitration contemplated in this section.

(8) The decision of the arbitrator is final and binding on both parties.

**Retention of records**

16. Despite anything to the contrary in any law relating to the retention of records, the Bank, system participants and service providers must retain all records obtained by them during the course of the operation and administration of the payment, clearing and settlement systems for a period of five years as from the date of a record.

**Penalties**

17. A person convicted of an offence under -
- (a) section 5(5), 6(2), 7(4) or 13(2) is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment; or
  - (b) section 11(2) or 14(2) is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

**Short title and commencement**

18. This Act -
- (a) is called the Payment System Management Act, 2003; and
  - (b) commences on a date to be determined by the Minister by notice in the *Gazette*.
-