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# Transformation in the Liquid Fuels Sector of South Africa

# Contents

# Foreword

This effort to record and contextualise the subject and development of transformation in the liquid fuels industry was expectedly challenging and I thank my co-contributors, Daniél Hofmeyr and Simla Ramdayal, for their diligent and fastidious efforts at producing this work. As one of South Africa's leading oil and gas specialist law firms, Dentons South Africa is well positioned and proud to submit this humble effort titled "Transformation in the Liquid Fuels Sector of South Africa".

This Guideline tracks the history and development of Black Economic Empowerment or the lack thereof within the liquid fuels industry in South Africa from 1940 to 2016. It aims to provide context and a historical and legal analysis of the role and significance of legislative measures introduced to transform the liquid fuels industry in South Africa. It is intended to serve as an aid in understanding the vexed issues which present themselves when considering the subject matter.

Working with government and industry to influence legal policy and change is a key part of our culture at Dentons South Africa. We have attempted to share our learnings here.

This Guideline is also meant to inspire consideration and analysis of the impact of such legislation within the liquid fuels industry in a non-prescriptive manner. As a young democracy, South Africa demands meaningful change and true empowerment to ensure its sustainability. Although the liquid fuels industry is highly regulated, Black entrepreneurs still face challenges such as access to infrastructure, finance and markets within the industry. It is important to shape this development in a holistic manner and to encourage greater market integration and orderly, but swift, removal of obstacles which retard competition and entry.

Ultimately, what would lead to greater economic equality depends on the ability and willingness of the key actors in the industry to interrogate their higher values that promote greater responsibility towards economic, political and social objectives which are driven by progressive, principled thought and positions.

The deep relationships that have developed between Dentons South Africa and the General Counsel and Legal Advisers at Total, Engen, World Fuel Services and Puma have been instrumental in allowing the contributors to produce this work. This work would not have been possible without the searching questions asked by legal professionals like Natachia Moorgas and Lee Young of Total, David Glauber and Alex Lake of World Fuel Services and Imraan Solomons of Engen. It is our hope that this Guideline will provide invaluable insight into the challenges facing the liquid fuels industry and shape and facilitate the questions which will transform it.

**M N Kapdi**
Dentons South Africa

Chapter 1

# Introduction

# Introduction

*"We are on a path of changing the mining and petroleum industry in South Africa, whether you like it or not. Change is painful, change is bitter, especially when you are stuck in the past. [The MPRDA Amendment Bill] is about the people of South Africa." – Susan Shabangu (Minister of Mineral Resources, 2009-2014)*

Apartheid and other discriminatory laws and practices in South Africa resulted in excessive concentrations of ownership and control within the economy and restrictions on full and free participation in the economy by all South Africans.

Following South Africa's first democratic elections in 1994, it has been the State's imperative to transform the South African economy to promote equal opportunity to participate fairly in the national economy.

The State has introduced a number of policy and legislative reforms in its efforts to effect this transformation. These include:

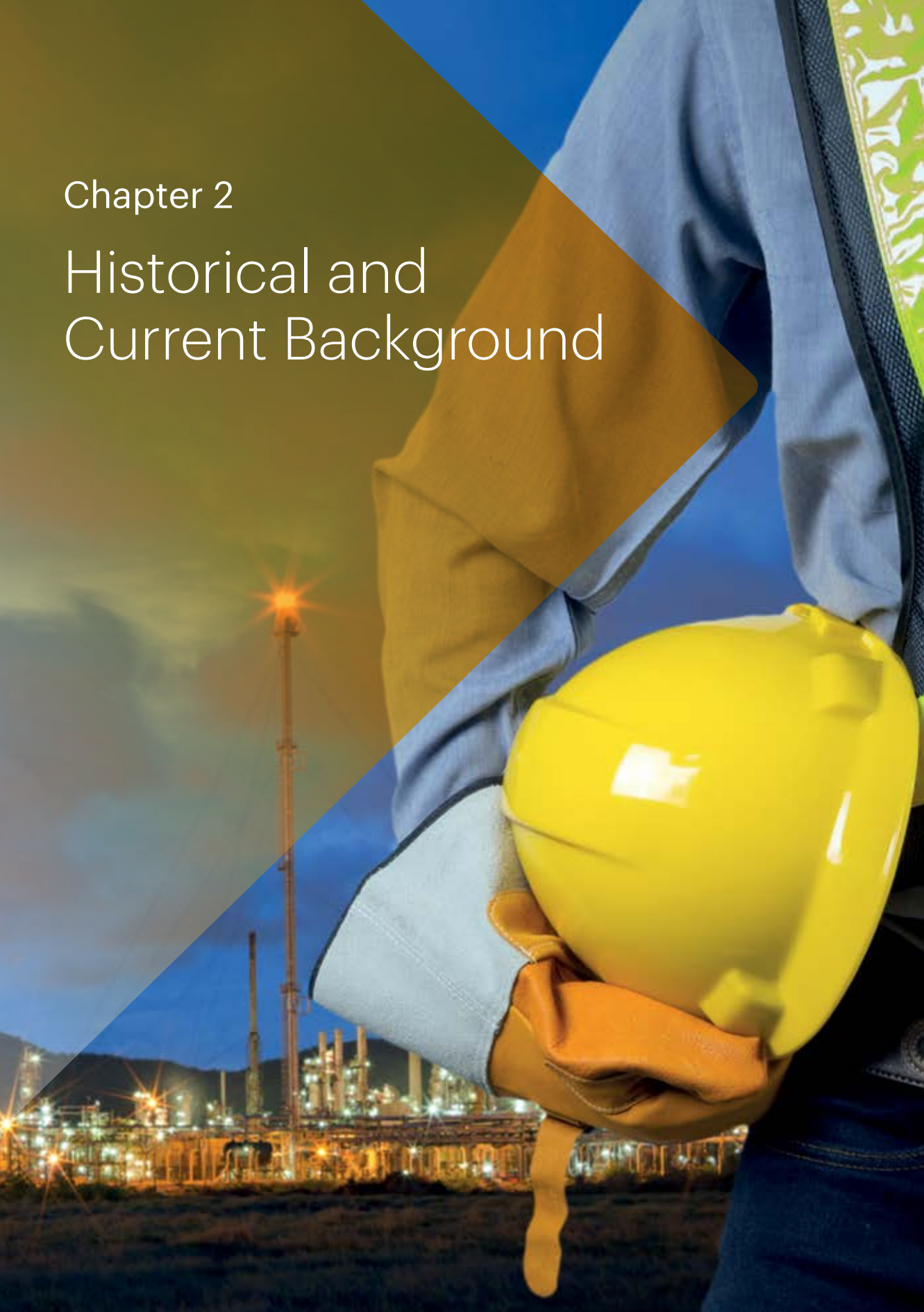
(i) the BEE Act and the Petroleum Products Act, which promote the participation of Black people in the South African economy; and

(ii) the Competition Act, which (amongst other things) promotes a greater spread of ownership, and particularly an increase in the ownership stakes of HDSAs. The State has also concluded agreements with certain industries and developed Charters in terms of which the industry participants and the State agree to certain transformation goals. It has also passed industry-specific legislation that promotes the transformation of that industry.

The liquid fuels sector is subject to a plethora of legislation, much of which has transformational aspects. In this Guideline, we consider the transformational aspects of this legislation, including the background, impact and significance of such requirements.

Chapter 2

# Historical and Current Background



# Historical and Current Background

The development of the petroleum industry in South Africa, like most other countries, is considered to be of particular strategic importance to the State for the purposes of ensuring energy security and economic growth.

In this Chapter, we provide a historic overview of the relationship between the State and the liquid fuels sector.

## 1940 – 1960

During the 1940s, the State identified the local refining industry as one that could ensure energy security and promote the development of entrepreneurs in South Africa.

To achieve the abovementioned political objectives and to encourage investment in South Africa's refining capacity, the State ensured that a regulatory environment was created which was relatively favourable to oil companies. In fact, during the early years, the petroleum industry was mostly left to its own devices and allowed to self-regulate.

In 1946, the State took responsibility for regulation of the liquid fuels sector. However, the regulatory systems and policy environment in the liquid fuels sector remained favourable to private oil companies during this time. By way of example, during this period:

- the price of petroleum products was regulated to ensure a guaranteed return on investment for the oil industry;
- the importation of refined petroleum products was regulated to protect and promote the development of local refineries; and
- local government zoning regulations limited investments in areas which were considered strategic links (including pipelines and storage facilities).

In 1954, South Africa's first refinery was established by Mobil (now Engen).

## 1960 – 1994

As more oil companies became established in South Africa, competition increased significantly. The increased competition threatened the continued profit margins of refining and marketing activities in South Africa. Accordingly, the oil companies approached the State to protect their investments in South Africa.

In 1960, the State considered concluding a convention, generally referred to as the Ratplan, with the oil companies and the Motor Industries Federation. The Ratplan was an example of State-sponsored collusive behaviour by the oil industry designed to, inter alia, promote the development of a class of downstream entrepreneurs while still protecting the major oil companies. The provisions of the Ratplan were in line with the State's plan to develop a downstream petroleum sector in South Africa that addresses the issue of White unemployment in urban areas and creates capital for White people. This was in line with the State's policy of volkskapitalisme (which can be translated as "peoples' capitalism").

The Ratplan provided for a limitation to the number of retail stations that each of the oil companies could develop within certain geographical areas and prohibited:

(i) vertical integration;

(ii) selling petroleum products on credit; and

(iii) prohibiting self-service facilities at retail stations.

The Ratplan was never formally signed by respective parties and never enjoyed the force of law. However, it remained an effective regulatory guide to industry and to the State. The Ratplan was generally regarded as a "gentlemen's agreement" between oil companies and the State.

The regulatory environment was successful in facilitating the creation of a new class of entrepreneurs. However, as indicated above, this class of entrepreneurs consisted mostly of White men and control of the industry was largely concentrated in the hands of a few oil companies which enjoyed State protection.

As a result of the restriction of vertical integration, the following business models developed in the downstream petroleum sector:

- DODO – the land is owned by the dealer, the oil company leases the land from the dealer, the oil company sublets the land back to the dealer and the site is operated by the dealer;
- CODO – the land is owned by the oil company, the oil company lets the land to the dealer and the site is operated by the dealer;
- COCO – the land is owned by the oil company and the site is operated by the oil company (this business model is restricted to sites utilised for training purposes); and
- TODO – the land is owned by a third party, the oil company leases the land from the third party, the oil company sublets the land to the dealer, and the site is operated by the dealer.

The vast majority of retail sites followed the CODO or DODO model.

## 1994

In 1994, South Africa held its first democratic elections. The new State's objectives included greater participation by all races in the South African economy. As a part of this greater objective, the State intended to transform the liquid fuels sector to be more competitive, to remove barriers to entry and to benefit HDSAs.

The oil majors who had previously worked closely with the Apartheid State found it challenging to develop close relationships with the new State. The oil companies were viewed as reluctant to transform by the new State, resulting in a generally adversarial relationship between the new State and the oil companies.

Chapter 3

# Regulatory Reforms

# Regulatory Reforms

In this Chapter, we provide an overview of the regulatory reforms introduced by the State since 1994.

## Energy White Paper

In December 1998, the State published the Energy White Paper, which sets out South Africa's energy policy. The Energy White Paper deals with the exploration and production of oil and gas and the liquid fuels sector separately.

The Energy White Paper does not set out any specific transformation objectives in respect of the exploration and production of oil and gas. The reason for this is that, at this point, South Africa's upstream activity was relatively undeveloped, with the only player of significance being Soekor (a State-owned entity).

The policy challenges set out in the Energy White Paper insofar as it relates to the liquid fuels sector include the need to achieve:

(i) an equitable balance between the interests of industry participants and consumers;

(ii) an industry supportive of the State's broader social and economic goals;

(iii) the meaningful inclusion of those interests which have been historically disadvantaged; and

(iv) an efficient network of pipeline and storage infrastructure whilst protecting against the abuse of market power and restrictive practices in these natural monopolies.

The Energy White Paper's vision for the future includes a liquid fuel sector;

(a) with limited government intervention and continued investment in new refining, wholesaling and retailing facilities;

(b) which ends natural monopolies in pipelines and storage facilities by regulating it with a view to optimising investment and lower cost; and

(c) where South African Black interests will assume their rightful place in the affairs of the industry. The Energy White Paper sets out a number of policy principles to achieve its vision for the future, the details of which will not be set out in this Guideline.

Of significance are the phases and milestones set out in the Energy White Paper for deregulating the petroleum industry. The Energy White Paper indicates that the State will introduce a deregulated petroleum industry as predetermined milestones are achieved. The key milestones for the first phase include a sustainable presence, ownership or control by HDSAs of approximately one quarter of all facets of the liquid fuels industry or plans to achieve this.

## Liquid Fuels Charter

Despite the generally adversarial relationship which had developed between the democratic State and the oil industry, the parties negotiated the LFC in 2000. The LFC was the first charter concluded between the State and industry. Since concluding the LFC, the State has concluded similar charters with the mining sector and financial services sector, amongst others. The LFC was negotiated with the express hope that it would foster better relationships between the oil industry and the State.

The purpose of the LFC is to provide a framework for progressing the empowerment of HDSAs in the liquid fuels industry. The LFC indicates (with reference to the Energy White Paper) that the signatories are seeking to bring about, over a 10-year period, HDSAs owning in total not less than 25% of the aggregate value of the equity of the various entities that hold the operating assets of the South African oil industry. This excludes licensees for offshore exploration and production, which aspired to have at least 9% owned and controlled by HDSAs. The LFC also included provisions in terms of which the signatories undertook various actions relating to building a supportive culture, building capacity, promoting employment equity, procurement, access and ownership of joint facilities, refining capacity, retailing and wholesaling, and financing (amongst other things).

At first, the LFC did not have force of law and it was no more than an aspirational convention based on the notions of "collective bargaining" and reliance on good faith. For a couple of years, the LFC existed without any notable adherence or compliance by the oil industry to its aspirational provisions.

Accordingly, in 2003, the State passed the Petroleum Products Amendment Act, which required the DOE to give effect to the LFC when considering licence applications submitted under the PPA.

## Petroleum Products Act Amendments

In 2003, the State passed the Petroleum Products Amendment Act, which introduced a licensing framework in the liquid fuels industry supply chain. As a result of this Amendment Act:

- a manufacturing licence was required to manufacture petroleum products;
- a wholesale licence was required to wholesale prescribed petroleum products;
- a retail licence was required to retail prescribed petroleum products; and
- the vertical integration of oil companies was restricted as licensed wholesalers may not hold retail licences.

This Amendment Act also required the Controller to:

(i) promote the advancement of HDSAs; and

(ii) give effect to the LFC, when considering licence applications.

This Amendment Act was considered a significant intervention by the State to transform the industry. By introducing a licensing system, the State ascribed to itself the right to intervene in the development of the liquid fuels sector. The State could now:

(i) promote HDSA entrepreneurs in the liquid fuels sector;

(ii) control where liquid fuels infrastructure is developed; and

(iii) control at what rate liquid fuels manufacturing infrastructure is developed.

In March 2006, the Minister of Minerals and Energy issued regulations regarding petroleum products

manufacturing, wholesale, site and retail licences. These regulations reiterated the requirement that the Controller must promote the advancement of HDSAs and give effect to the LFC when considering licence applications.

## Price Control

The wholesale and retail price of petrol is determined by taking into account the following factors:

- the basic fuel price;
- transport and delivery costs;
- taxes and levies, which are listed in paragraph 15; and
- wholesale and retail margins.

The following taxes and levies are imposed by the State:

- customs and excise duties (collected in terms of an agreement by the Southern African Customs Union);
- fuel levy (determined by the Minister of Finance);
- equalisation fund levy;
- road accident fund levy;
- illuminating paraffin marker levy;
- petroleum pipelines levy; and
- demand side management levy (applicable on "95 unleaded petrol" consumed in the inland area.

There are a number of methodologies that have been or are utilised by the State for the purposes

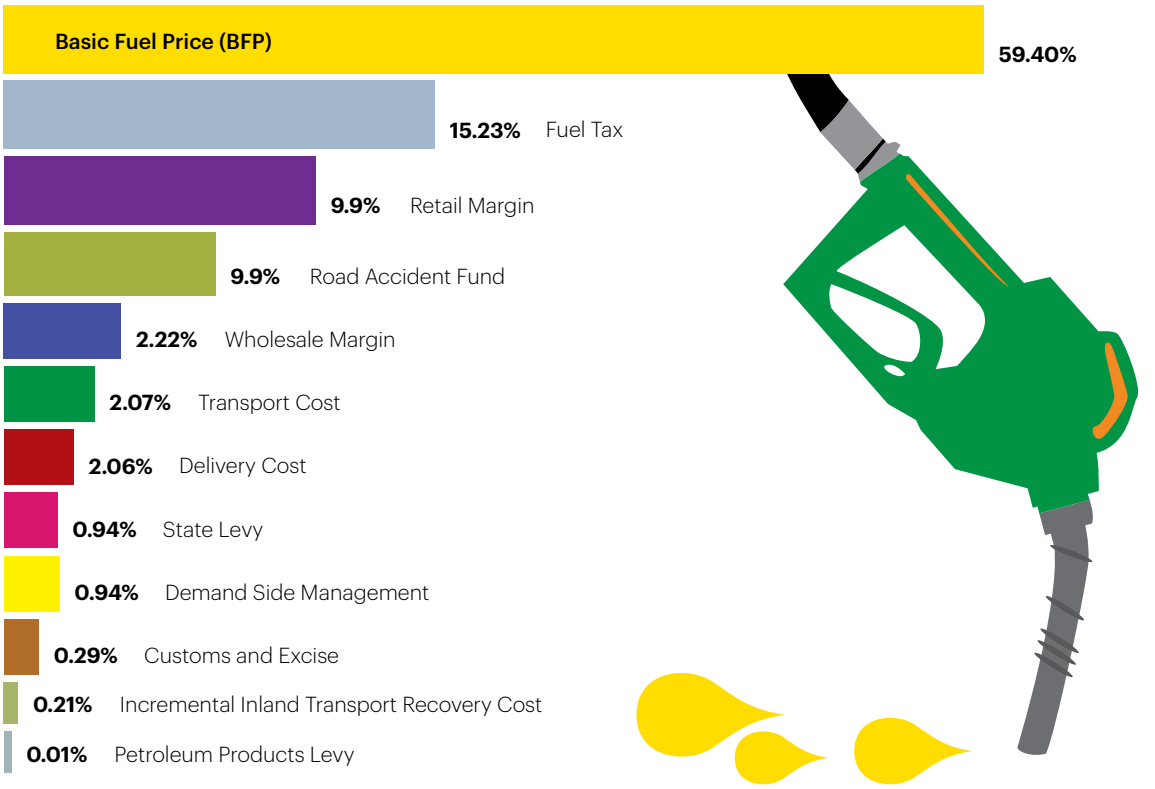



Diagram: autotrader.co.za

of determining the wholesale and retail margins of petrol. These methodologies are merely guidelines and have not been enacted as law. However, they directly impact the profitability of oil companies, wholesalers and retailers. Accordingly, a change in the methodology utilised by the State to determine the wholesale and retail margins may affect the profitability of the business. These methodologies are discussed below.

Under the PAR methodology introduced in 1984, the wholesale margin was calculated to ensure that the oil companies have a 15% return on all assets that they managed.

Under the MPAR methodology introduced in 1990, the wholesale margin was calculated to ensure that oil companies have an average of 15% return on all marketing assets. The MPAR methodology was based on the CODO business model and the underlying reason for this methodology was to incentivise oil companies to establish petrol stations and the development of the downstream petroleum industry.

The RAS methodology was introduced in 2010, is currently utilised to determine the relevant margins and is designed to incentivise the DODO business model. The reason for this is because the operational expenditure, capital expenditure and return on investment under the cost accounting for RAS may be allocated to the retailer.

The aim of RAS is to create greater transparency and to eliminate cross-subsidisation and uncontrolled costs.

The introduction of the RAS methodology represents the first major reform in the manner in which the retail and wholesale margins are calculated by the State. This methodology determines that the wholesale and retail margins are calculated in accordance with cost accounting. The wholesale margin is based on the costs incurred by the oil company instead of the value of the marketable assets in the industry and capital expenses are recovered under the retail margin. Therefore, the wholesale margin has decreased significantly under RAS. The capital asset pricing model is used to calculate the RAS.

## Mineral and Petroleum Resources Development Act Amendments

Extractive industries in South Africa, like the extractive industries in many other African countries, are associated with colonialism and exploitation. Generally, these industries are regarded as having been or being unsuccessful in distributing the wealth generated from South Africa's vast mineral resources to the general population. As part of its transformation agenda, it is an imperative for the State to be seen to be transforming the historically exploitative extractive industries.

In 2002, the State enacted the MPRDA. The enactment of the MPRDA constitutes a major reform of mineral and petroleum rights as it provides that mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

Unlike the mining industry, the upstream petroleum industry in South Africa is still at a relatively early stage in its development and most projects have not yet reached the production phase. The interest by investors in South Africa's oil and gas reserves has recently grown, particularly, in respect of offshore and shale gas reserves. This is mainly due to the technological developments that made it possible to drill in deeper water with stronger currents and to extract shale gas by means of hydraulic fracturing.

Many individuals believe that South Africa is presented with the opportunity to shape the upstream petroleum industry with the benefit of hindsight in regard to its historical experiences in the mining industry. Accordingly, there is a lot of pressure on the State to amend the MPRDA to ensure that the upstream petroleum industry does not follow the historic path of the mining industry.

However, the development of a prosperous upstream petroleum industry is reliant on the experience, expertise, efficiency and capital resources of actors from the private sector. Accordingly, any amendments to the MPRDA will have to strike a balance between national and private interests.

In 2013, the South African parliament passed a Bill that proposed a number of amendments to the MPRDA, such as requiring State participation in the petroleum industry. This Bill was subsequently withdrawn and, at the time of publication of this Guideline, the State is developing an amendment to the legislative regime regulating the upstream petroleum sector.

## Petroleum Pipelines Act

Prior to 2003, the State managed the operation of most of South Africa's pipeline networks. As it became possible for other parties to be active in the ownership and operation of petroleum pipelines, the Pipelines Act was passed to ensure the efficient operation of the pipelines network and the orderly development of the network in future.

The objects of the Pipelines Act are in line with the transformation imperatives set out in the Energy White Paper and include:

(i) to promoting competition in the construction and operation of petroleum pipelines, loading facilities and storage facilities;

(ii) promoting fair and equitable access to petroleum pipelines, loading facilities and storage facilities;

(iii) promoting companies in the petroleum pipeline industry that are owned or controlled by HDSAs by means of licence conditions that enable them to become competitive; and

(iv) promoting the development of competitive markets for petroleum products.

NERSA is obliged to monitor and take appropriate action, if necessary, to ensure that access to petroleum pipelines, loading facilities and storage facilities is provided in a non-discriminatory, fair and transparent manner.

NERSA regulates tariffs to liquid fuels infrastructure, including pipelines and storage facilities.

Chapter 4

# Current Regulatory Requirements

# Current Regulatory Requirements

## Petroleum Products Act

The transformation requirements under the PPA are listed below, according to the context to which the requirement applies.

### Vertical Integration

The Petroleum Products Act restricts the vertical integration of petroleum companies by prohibiting wholesalers from holding retail licences for commercial purposes (excluding wholesalers and retailers of liquefied petroleum gas and paraffin). Wholesalers may therefore generally only hold retail licences for training purposes.

### Licensing

The PPA requires compliance with the LFC to be taken into account by the Controller when considering and granting manufacturing, wholesale, site or retail licences.

Licences include conditions that relate to transformation. In particular, in terms of regulations published under the PPA, licensed retailers, wholesalers and manufacturers must:

(i) comply with the LFC; and

(ii) submit to the Controller information in respect of its progress in complying with the LFC, when instructed to do so by the Controller.

### Reporting

In terms of the regulations published under the PPA, licensed manufacturers, wholesalers and retailers are required to submit certain information to the Controller on an annual basis. This includes information regarding transformation, such as:

(i) the number of employees distinguished by race, gender and disability; and

(ii) progress and updated plans regarding compliance with the objectives of the LFC.

### Biofuels

The Biofuels Regulations provide for the mandatory blending of bio-ethanol or biodiesel with petroleum petrol or petroleum diesel, respectively.

Significantly, the Biofuels Regulations include the following provisions:

- a licensed petroleum manufacturer must only purchase biofuels from a licensed biofuels manufacturer; and

- a licensed petroleum manufacturer must purchase all bio-ethanol or biodiesel offered for sale by a licensed biofuel manufacturer (provided that the volume of the biofuel can be blended with the volumes of petroleum petrol or petroleum diesel available from the licensed petroleum manufacturer).

The provisions referred to above effectively prohibit petroleum manufacturers from manufacturing biofuels and open the biofuels manufacturing sector to new entrants. Accordingly, the Biofuels Regulations contribute to the transformation of the petroleum sector.

## Liquid Fuels Charter

The LFC applies to all parts of the value chain, including inter alia:

(i) exploration and production of oil,

(ii) liquid fuels pipelines,

(iii) single buoy mooring's,

(iv) depots and storage tanks,

(v) oil refining and synthetic fuel manufacturing plants, and

(vi) transport and trading (including imports and exports and wholesale and retail).

In the table on the right we set out a summary of the goals set out in the LFC.

As indicated in paragraph 1 in Chapter 4 above, the PPA requires compliance with the LFC to be taken into account by the Controller when considering manufacturing, wholesale, site or retail licence applications. The interpretation of the ownership element of the LFC has recently been questioned in a declaratory order being sought by the Chamber of Mines and the DMR. Clarity is being sought in regard to the "once empowered, always empowered principle". The DMR indicated its intention to exclude empowerment ownership transactions post-2004, where historically disadvantaged South Africans sold their participation. This matter is still being considered by the High Court.

| Element | Goal |
|---|---|
| Ownership | 25% ownership and control of entity that holds the SA operating assets of the oil company. |
| Management Control | Control of the entity through majority shareholding, effective controlling shareholding, or majority of board of directors or shareholders agreement. |
| Supportive Culture | Appointment of managers to create a supportive culture and enable an environment for business success. |
| Capacity Building | Training of HDSA employees on core, priority and scarce skills, overseas training programmes, identifying a talent pool and fast tracking it, mentorship programmes, learnership programmes, annual progress reports. |
| Employment Equity | Publishing of equity stretch targets and achievements. |
| Private Sector Procurement | Supportive procurement policies to facilitate and leverage the growth of HDSA companies. |
| Access to joint facilities | Fair ownership opportunities for HDSA companies, non-discriminatory access to uncommitted capacity for the movement and storage of crude oil and petroleum products. |
| Refining Capacity | Oil refiners and synthetic fuel manufacturers to consider selling shares to HDSAs, making refinery capacity available to HDSA companies, providing JV opportunities by including HDSAs in expansion. |
| Retailing | Creating fair opportunities for entry to the retail network and commercial sectors by HDSAs. |
| Wholesaling | Creating fair opportunities for entry by HDSA companies into wholesale/ commercial sectors. |

| Element | Goal |
|---|---|
| Financing | Investigation and implementation of internal and external financing mechanisms for giving HDSAs access to equity ownership and entry into viable strategic partnerships. |
| Terms of Credit | Providing terms of credit to HDSA customers (e.g. retailers and client wholesalers). |
| Synfuels Supply | Parties to accommodate HDSAs which lack the facilities to comply fully, in the fairest way possible. |

## Pipelines Act

The key tools under the Pipelines Act to effect transformation are:

(i) licence conditions, and

(ii) tariffs.

### Objects

The objects of the Pipelines Act include the following:

- promoting competition in the construction and operation of petroleum pipelines;
- promoting the efficient, effective, sustainable and orderly development of petroleum pipelines;
- promoting equitable access to petroleum pipelines;
- promoting companies in the petroleum pipeline industry that are owned or controlled by HDSAs, by means of licence conditions to enable them to become competitive;
- promoting the development of competitive markets for petroleum products; and
- promoting access to affordable petroleum products.

### Conditions of Licence

NERSA may impose various licence conditions under the Petroleum Pipelines Act. These conditions:

- promote the participation of HDSAs in the petroleum pipelines industry, such as conditions requiring the licensee to:

(i) promote HDSAs in the manner prescribed, and

(ii) provide certain prescribed information to NERSA regarding its commercial arrangements relating to the participation of HDSAs in the licensees' activities.

- promote competition and attempts to remove barriers to entry, such as conditions that require the licensee to:

(i) separately manage vertically integrated companies;

(ii) allow interested parties to negotiate changes with the licensee in the routing, size and capacity of proposed petroleum pipelines;

(iii) allow interconnections with the facilities of other licensees (as long as the interconnection is technically feasible and the person requesting the interconnection bears the increased costs occasioned thereby); and

(iv) provide third parties with access to loading facilities with the capacity being shared among all users (including prospective users) in proportion to their needs and subject to an appropriate payment to reserve the required capacity as a condition of service.

### Tariffs

In terms of the Pipelines Act, NERSA is also authorised to set tariffs for petroleum pipelines and approve tariffs for loading facilities and storage facilities. The purpose of this tariff system is to ensure that there is a transparent pricing system, which should facilitate the entry of new players into the sector.

## International Trade and Administration Act

An import permit is required for the purposes of importing petroleum products into South Africa. This import permit is issued by the ITAC based on the recommendation of the DMR.

In November 2006, the DOE and the DMR issued the Recommendations Guideline, which governs its recommendations to the ITAC for import permits.

In terms of the Recommendations Guideline, only licensed manufacturers and licensed HDSA wholesalers may apply to the Department for a recommendation to import petroleum products, blending components, or jet fuel, subject to certain exceptions. The Recommendations Guideline further provides that a licensed manufacturer may be permitted to import blending components and only the types of petroleum products specified in its manufacturing licence.

An HDSA wholesaler is defined in the Recommendations Guideline as being a wholesaler that is owned and controlled by HDSAs, which operates on a basis to meet all aspects of the LFC and is licensed as a wholesaler under the PPA. For the purposes of this definition, the Recommendations Guideline specifies that:

(i) "own" means a majority shareholding position (that is 50% plus one share); and

(ii) "control" means the right to make unilateral and binding decisions.

The abovementioned provisions promote the participation of new entrants into the liquid fuels sector by limiting the products that can be imported by manufacturers and ensures that HDSAs are a part of such new entrants.

## Mineral and Petroleum Resources Development Act

### Objects

The objects of the MPRDA include the following, to:

- promote equitable access to the nation's petroleum resources to all the people of South Africa;
- substantially and meaningfully expand opportunities for HDSAs, including women and communities, to enter into and actively participate in the petroleum industries and to benefit from the exploitation of the nation's petroleum resources; and
- promote employment and advance the social and economic welfare of all South Africans.

### Transformation requirements

The transformation requirements under the MPRDA for the upstream petroleum sector become stricter the closer the applicant gets to production. The transformation requirements are set out below (according to the relevant permit or right to which they pertain). We provide an overview of these requirements below.

**Reconnaissance permits** have no transformation requirements.

**Technical co-operation permits** have no transformation requirements.

**Exploration rights** do have transformation requirements. The MPRDA provides that the granting of an exploration right must:

- substantially and meaningfully expand opportunities for HDSAs (including women and communities) to enter into and actively participate in the petroleum industry and to benefit from the exploitation of the nation's petroleum resources (the Minister of Petroleum Resources may request that the applicant give effect to this requirement); and
- promote economic growth and petroleum resources in South Africa, particularly the development of petroleum inputs industries.

**Production rights** do have transformation requirements. The MPRDA provides that the granting of a production right must:

- substantially and meaningfully expand opportunities for HDSAs (including women and communities) to enter into and actively participate in the petroleum industry and to benefit from the exploitation of the nation's petroleum resources;
- promote economic growth and petroleum resources in South Africa, particularly the development of petroleum inputs industries;
- be in compliance with the Mining Charter; and
- be in compliance with the prescribed social and labour plan.

The undertakings set out in the Mining Charter relate to human resource development, employment equity, migrant labour, mine community and rural development, housing and living conditions, procurement, ownership, beneficiation, exploration and prospecting, licensing and financing.

The Mining Charter is in the process of being amended. At the time of publication of this Guideline, a draft revised Mining Charter has been published for comment.

## Competition in the Liquid Fuels Sector

The purpose of the Competition Act is to promote and maintain competition by regulating the anti-competitive conduct of companies, in order to advance a greater spread of ownership and in particular to increase the ownership stakes of HDSAs.

The preamble to the Competition Act specifically acknowledges that "the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans."

In order to achieve its purpose of ensuring that businesses compete fairly, the Competition Act sets out rules which govern the relationships and behaviour between competitors (horizontal practices) and between suppliers, retailers and customers (vertical practices). It also prevents a dominant firm from abusing its position in the markets.

The Competition Act is overseen by three independent statutory bodies: the Competition Commission which performs an investigatory and reporting function, the Competition Tribunal which adjudicates on matters regulated by the Competition Act and the Competition Appeal Court which reviews decisions and adjudicates appeals from the Competition Tribunal. Each of these bodies aims to stimulate competition and market efficiency and yet also addresses broad-based economic growth.

The Competition Act may grant exemptions to compliance with the Competition Act. Of particular importance for the purposes of this Guideline is that the Competition Commission may grant this exemption if the agreement or practice concerned (or category of agreements or practices) contributes to the promotion of the ability of

small businesses or firms, which are controlled or owned by HDSAs, to become competitive. The Competition Commission could also grant this exemption if it contributes to the maintenance or promotion of exports or change in productive capacity necessary to stop decline in an industry.

An example of such an exemption is the exemption granted in April 2010 to the petroleum and refinery industry following an application by the SAPIA. The application (requesting for exemption until December 2015) was granted on a short-term basis and covered a wide range of agreements and practices in the petroleum and refinery industry. The exemption enabled the participants in the various stages of the supply chain to enter into the collaborative exchange of information necessary to ensure the stability of supply as well as efficient use of the supply chain facilities. The exemption did not extend to the wholesale, commercial and retail trade of liquid fuels supply, but rather to the arrangements to ensure logistics and bulk supply. This exemption expired on 31 December 2015.

## The BEE Act

The BEE Act is part of the State's pragmatic growth strategy to realise the country's full economic potential while helping to bring the Black majority into the economic mainstream.

It is not unlawful to trade as non-compliant or non-adherent to the BEE Act. However, State and public entities (as well as entities doing business with the State and public entities) take into account an entity's BEE accreditation in determining whom they do business, and to whom they issue licences and concessions with. By way of example, the PPPFA provides that an organ of state (which includes national and provincial departments, municipalities, constitutional institutions, parliament and the provincial legislature) must determine its preferential procurement policy that provides for a preferential point system to be followed where certain points are awarded for certain goals, such as contracting with HDSAs.

Section 10(1) of the BEE Act contains a trumping provision, which provides that every organ of the State and public entities must apply any relevant BEE Code issued under the BEE Act when entering into decisions on procurement, licensing and concessions, public-private partnerships and sale of state-owned assets or business. The DMR was exempt from applying this provision of the BEE Act to the upstream petroleum industry and mining and minerals industry administered in terms of the MPRDA for a period of 12 months, pending the finalisation of these sector charters. This exemption expires on 30 October 2016.

Under the BEE Codes, entities are given a BEE rating based on a BEE scorecard. The BEE Codes provide the structure of the BEE scorecards and the means by which BEE points are determined. The scorecard elements and points allocated to each element in terms of the revised BEE Codes are as follows:

| Element | Weighting | Compliance targets |
|---|---|---|
| ownership | **25 points** | 25% + 1 vote |
| management control | **15 points** (actual scorecard out of 19 points, i.e. 4 bonus points to be gained) | 50% to 88% |
| skills development | **20 points** (actual scorecard out of 25 points, i.e. 5 bonus points to be gained) | 6% of payroll |
| enterprise and supplier development | **40 points** (actual scorecard out of 44 points, i.e. 4 bonus points to be gained) | 12% to 80% on preferential procurement, 1% of NPAT on enterprise development and 2% of NPAT on supplier development |
| socio-economic development | **5 points** | 1% of NPAT |
| Total | **105 points** (actual scorecard is out of 118, there are 13 "bonus" points which can be achieved) | |

The BEE Act was amended in 2014 to:

(i) criminalise fronting practices; and

(ii) establish the BEE Commission to oversee compliance with the BEE Act and investigate fronting practices.

A fronting practice is defined as a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives or the implementation of any of the provisions of the BEE Act.

The BEE Act sets out a non-exhaustive list of practices that will be regarded as fronting practices. These are as follows:

- Window-Dressing–practices

(i) in terms of which Black people who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise; or

(ii) involving the conclusion of a legal relationship with a Black person for the purpose of that enterprise achieving a certain level of BEE compliance without granting that Black person the economic benefits that would reasonably be expected to be associated with the status or position held by that Black person;

- Benefit Diversion–practices in terms of which the economic benefits received as a result of the BEE status of an enterprise do not flow to Black people in the ratio specified in the relevant legal documentation; or

- Opportunistic Intermediaries–practices involving the conclusion of an agreement with another enterprise in order to achieve or enhance its BEE status in circumstances in which:

(i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;

(ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; and

(iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.

It is an offence to knowingly engage in a fronting practice and any person convicted may be liable to a fine and/or imprisonment for a period not exceeding 10 years. If the convicted person is not a natural person, the fine will not exceed 10% of its annual turnover.

Further, any person that has been convicted of engaging in a fronting practice may not, for a period of 10 years from the date of conviction, contract or transact any business with any organ of state or public entity. If a company is convicted for engaging in a fronting practice, the court may order that only those members, directors or shareholders who engaged in the fronting practice be prohibited from doing business with organs of State and public entities.

## Employment Equity Act

The Employment Equity Act provides for certain employers that employ more than 50 employees and have an annual turnover that exceeds the prescribed threshold to implement affirmative action measures and an employment equity plan. The employment equity plan must set out, inter alia, how the designated employer intends to progress towards employment equity.

Affirmative action measures are designed to promote Black people, women and people with disabilities who are citizens of South Africa. The Employment Equity Act does not require employers to implement quotas, but rather to implement preferential treatment and goals. The employer is required to, inter alia:

- eliminate employment barriers that may adversely affect the abovementioned people;
- ensure equitable representation of suitably qualified people from the abovementioned groups in all levels of the workforce; and
- retain and develop people from the abovementioned groups and implement appropriate training measures.

Chapter 5

# Relevant Industry Considerations

# Relevant Industry Considerations

## Exploration and Production

The DMR is exempt from the requirement to take an entity's BEE rating into account for the purposes of issuing licences and authorisations. Accordingly, we do not deal with this requirement in the table below.

The requirements which must be complied with for the purposes of obtaining a production licence from the DMR are set out in the table below.

| Elements | Mining Charter requirements (required for the purposes of obtaining a production right) | Liquid Fuels Charter requirements (applies to all parts of the liquid fuels industry, including exploration and production) |
|---|---|---|
| **HDSA / Black Ownership** | 26% ownership and control by HDSAs | 9% ownership and control by HDSAs |
| **Procurement and Enterprise Development** | 40% of capital goods from BEE entities<br>70% of services from BEE entities<br>50% consumer goods from BEE entities<br>Multinational suppliers of capital goods contribute 0.5% of annual income generated from mining companies to social development fund | Procurement policies to include criteria favouring HDSA companies, all else being equal |
| **Employment Equity** | 40% HDSA demographic at executive management, senior management, core and critical skills, middle management and junior management | Publish employment equity targets and achievements |
| **Training and Development** | 5% of annual payroll invested in essential skills development activities | Build the skills of employees and report on progress annually |

## Manufacturing

| Elements | BEE Act | LFC | Other |
|---|---|---|---|
| **Minimum Black Ownership** | 25%+1 | 25% | None |
| **Management** | 50% | 50%+1 | None |
| **Skills Development** | 6% of payroll invested in skills development | Train HDSA employees on core, priority and scarce skills, mentorship programmes, overseas training programmes, etc. | None |
| **Supplier Development / Procurement** | 12% to 80% of procurement spend on BEE entities, 1% of NPAT on enterprise development and 2% of NPAT on supplier development | Procurement policies that facilitate growth of HDSA companies | None |
| **Socio-economic Development** | 1% of NPAT | N/A | None |
| **Employment Equity** | N/A | Publish EE targets and achievements | If employs more than 50 employees or exceeds annual turnover threshold, will be required to implement affirmative action measures (Employment Equity Act) |
| **Access to Facilities / Opportunities** | N/A | Oil refiners to consider selling shares to HDSAs, making refinery capacity available to HDSA companies, providing JV opportunities by including HDSAs in expansion. | Manufacturer may not refuse to purchase biofuel from independent biofuel manufacturer unless it can show that it does not have sufficient volumes of petrol or diesel for the biofuel(Biofuel Regulations) |
| **Restrictions to Vertical Integration** | N/A | N/A | Mandatory blending of biofuels. May only purchase biofuels from independent biofuel manufacturer (Biofuel Regulations) |
| **Price Control** | N/A | N/A | Wholesale prices are regulated (Petroleum Products Act) |

## Trading

| Elements | BEE Act | LFC | Other |
|---|---|---|---|
| **Minimum Black Ownership** | 25%+1 | 25% | 50%+1 for import permit (Guidelines Governing Recommendations by the Department of Minerals and Energy to ITAC) |
| **Management** | 50% | 50%+1 | None |
| **Skills Development** | 6% of payroll | Training HDSA employees on core, priority and scarce skills, mentorship programmes, overseas training programmes, etc. | None |
| **Supplier Development / Procurement** | 12% to 80% of procurement spend on preferential procurement, 1% of NPAT on enterprise development and 2% of NPAT on supplier development | Procurement policies that facilitate growth of HDSA companies | None |
| **Socio-economic Development** | 1% of NPAT | N/A | None |
| **Employment Equity** | N/A | Publish EE targets and achievements | If employs more than 50 employees or exceeds annual turnover threshold, will be required to implement affirmative action measures |
| **Price Control** | N/A | N/A | Wholesale and retail prices of petroleum products are regulated (Petroleum Products Act) |

## Storage and Pipelines

| Elements | BEE Act | LFC | Other |
|---|---|---|---|
| **Minimum Black Ownership** | 25%+1 | 25% | None |
| **Management** | 50% | 50%+1 | None |
| **Skills Development** | 6% of payroll | Training HDSA employees on core, priority and scarce skills, mentorship programmes, overseas training programmes, etc. | None |
| **Supplier Development/ Procurement** | 12% to 80% of procurement spend on preferential procurement, 1% of NPAT on enterprise development and 2% of NPAT on supplier development | Procurement policies that facilitate growth of HDSA companies | None |
| **Socio-economic Development** | 1% of NPAT | N/A | None |
| **Employment Equity** | N/A | Publish EE targets and achievements | If employs more than 50 employees or exceeds annual turnover threshold, will be required to implement affirmative action measures (Employment Equity Act) |

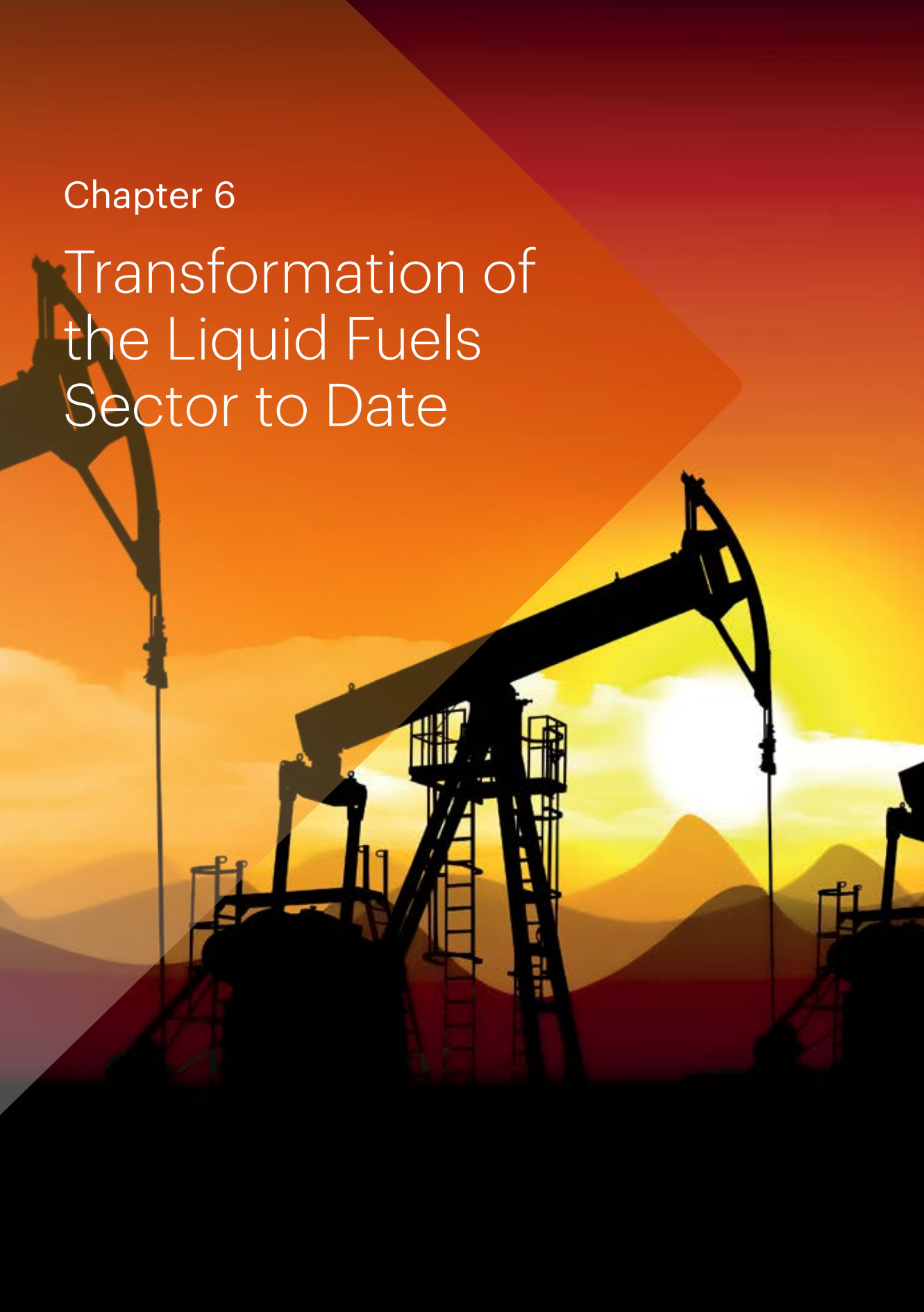
| Elements | BEE Act | LFC | Other |
|---|---|---|---|
| **Access to Facilities / Opportunities** | N/A | N/A | Licence condition may include requirement that third parties must be allowed to negotiate changes to the routing, size and capacity of pipeline with licensees<br>Licence conditions may include requirement that licensees must allow interconnections<br>Third parties must have access to loading facilities with the capacity being shared among all users in proportion to their needs<br>(Petroleum Products Act) |
| **Restrictions to Vertical Integration** | N/A | N/A | Licence condition may include separate management of pipelines for vertically integrated companies<br>(Petroleum Pipelines Act) |
| **Price Control** | N/A | N/A | Tariffs set or approved by NERSA<br>(Petroleum Pipelines Act) |

## Retailing and Wholesaling

| Elements | BEE Act | LFC | Other |
|---|---|---|---|
| **Minimum Black Ownership** | 25%+1 | 25% | 50%+1 if wholesaler wishes to import petroleum products (Guidelines Governing Recommendations by the Department of Minerals and Energy to ITAC) |
| **Management** | 50% | 50%+1 | None |
| **Skills Development** | 6% of payroll | Training HDSA employees on core, priority and scarce skills, mentorship programmes, overseas training programmes, etc. | None |
| **Supplier Development / Procurement** | 12% to 80% of procurement spend on preferential procurement, 1% of NPAT on enterprise development and 2% of NPAT on supplier development | Procurement policies that facilitate growth of HDSA companies | None |
| **Socio-economic Development** | 1% of NPAT | N/A | None |
| **Employment Equity** | N/A | Publish EE targets and achievements | If employs more than 50 employees or exceeds annual turnover threshold, will be required to implement affirmative action measures |
| **Access to Facilities / Opportunities** | N/A | Create fair opportunities for entry into the retail network, commercial sectors and wholesale sectors by HDSAs | |
| | None | | |
| **Restrictions to Vertical Integration** | N/A | N/A | Wholesalers are prohibited from holding retail licences for commercial purposes (Petroleum Products Act) |
| **Price Control** | N/A | N/A | Wholesale and retail prices are regulated (Petroleum Products Act) |

Chapter 6

# Transformation of the Liquid Fuels Sector to Date



# Transformation of the Liquid Fuels Sector to Date

## Moloto Report

10 years after the signing of the LFC by the seven major oil companies in South Africa, an audit was conducted by Moloto Solutions (mandated by the DOE) to determine the levels of compliance with the LFC within the liquid fuels industry. The result of the audit was published in 2011 and is known as the Moloto Report. The Moloto Report conducted an analysis to test the compliance of each element of the LFC, and reached the following notable conclusions:

- the two top performing elements in the LFC were management control and ownership;
- the worst performing elements in the LFC were enterprise development, skills development, employment equity and preferential procurement;
- some key LFC requirements, such as crude oil purchases, are ignored by the BBBEE Codes and treated as exclusions. Furthermore, no incentives are provided in the BEE Codes for some key LFC requirements such as procurement from HDSA wholesalers;
- a compliance assessment mechanism must be implemented by the DOE to monitor and measure compliance by the oil companies;
- insufficient training resulting in technical skills transfer to HDSAs remains a challenge and a barrier to entry with respect to certain positions in oil companies; and
- a sector-specific code is required for the liquid fuels industry "to ensure that all ideals of the Charter are accommodated within a measurable consistent framework".

## Challenges

Since the publication of the Moloto Report, the DOE has recognised the need to align the LFC and the BEE Codes. The Minister of Energy stated during her budget vote in May 2015 that the DOE is working with the DTI and industry stakeholders to identify those areas that require a sector-specific dispensation (once the BEE Codes have been allowed at least 12 months of implementation). The Minister indicated in her budget vote speech that "there is no need to have duplicated regulatory dispensations addressing the same goal".

Currently, oil companies are obliged to comply with the BEE Codes as well as the requirements of the LFC. The resultant lack of certainty and clarity coupled with reluctance has retarded compliance by the oil companies even further. SAPIA has indicated that the following issues need to be addressed:

- alignment of the BEE Codes and the LFC;
- establishment of a framework for skills development;
- access and licences to logistics infrastructure; and
- transformation in the retail sector.

Other challenges identified throughout the industry in the implementation of BEE have been the following:

- crude procurement was mentioned as a challenge due to limited crude supplies in the international market (however, this position has since changed as there is an over-supply of crude oil);

- cost of skills development and low retention of employees;

the cost of BBBEE compliance for wholesalers and retailers is not justified by their operation sizes; and

access to affordable and practical financing mechanisms available to wholesalers and retailers.

Chapter 7

# The Way Forward

# The Way Forward

The impact of transformation within the liquid fuels industry has been slow. This is evident in the fact that there are still very few HDSA entrants into the industry who still struggle to increase their market share. Furthermore, there are limited measures imposed by the State to ensure compliance with its key policy considerations and to enforce compliance within the industry of the relevant BEE requirements.

Transformation is an ongoing process. The challenge of implementing transformation within the liquid fuels sector will have to be continually managed in order to ensure the development of a robust and economically sustainable liquid fuels sector. Thus far, it is clear that the level and extent of transformation within the liquid fuels industry has been slow.

Solutions to the pace of transformation should be provided to assist companies to implement transformation policies effectively through appropriate strategies, programmes and actions. Communication and consultation with all relevant stakeholders will foster a supportive culture of co-operation and understanding. The Moloto Report suggested the establishment of a platform to share information and strategies on the empowerment framework.

Instead of viewing BEE compliance as an additional expense or burden, companies should be encouraged to adopt the Global Sullivan Principles ("Principles"). The Principles were developed by Reverend Leon Sullivan, in conjunction with the United Nations, to promote the adoption by companies of values to support economic, political and social objectives. It is stated in these Principles that companies that adopt them "will respect the law, and as a responsible member of society, [...] will apply these Principles with integrity consistent with the legitimate role of business. We will develop and implement company policies, procedures, training and internal reporting structures to ensure commitment to these principles throughout our organization. We believe the application of these Principles will achieve greater tolerance and better understanding among peoples, and advance the culture of peace."

Some of the relevant Principles include the following:

- expressing support for universal human rights and, particularly, those of employees, the communities, and parties with whom business is conducted; and

- working with government and communities to improve the quality of life in those communities (their educational, cultural, economic and social well-being) and seek to provide training and opportunities for workers from disadvantaged backgrounds.

As alluded to throughout this Guideline, in implementing BEE policies and strategies, companies should bear in mind the rationale and importance of BEE transformation in South Africa, which is, according to the BEE Commission, to restore economic equality amongst all South Africans through a common commitment of all relevant stakeholders to "an integrated strategy aimed at substantially increasing Black participation at all levels of the population".

Important to the future application of the BEE Act, is the fact that the BEE Act now recognises a broader definition of "fronting practices" (as discussed more fully in Chapter 4).

The BEE Act also provides for the establishment of a regulator for BEE, to be known as the BEE Commission. The Commission will be tasked with overseeing and promoting compliance with the BEE Act and receiving and investigating complaints in regard to BEE (including fronting practices), either at its own initiative or in response to complaints received.

# Bibliography

Mondliwa, P. & Roberts, S. (2014) Fuelling the Economy: A Critical Review of Liquid Fuels Regulation in South Africa. Journal of Economic and Financial Sciences. September 2014 7(S). p547-568.

Matsho, J. (2010) The Retail Petrol Industry in South Africa. M.Com in Economics. University of Zululand. Print.

# List of Legislation

| | |
|---|---|
| BEE Codes | Codes of Good Practice on Black Economic Empowerment published in GB 112 of 9 February 2007 (GG 29617) |
| BEE Act | Broad-Based Black Economic Empowerment Act 53 of 2003 |
| Biofuels Regulations | Regulations regarding the Mandatory Blending of Biofuels with Petrol and Diesel published under GN R671 in Government Gazette 35623 of 23 August 2012 |
| Competition Act | Competition Act 89 of 1998 |
| Constitution | Constitution of the Republic of South Africa Act 108 of 1996 |
| Employment Equity Act | Employment Equity Act 55 of 1998 |
| ITAC Act | International Trade Administration Act 71 of 2002 |
| MPRDA | Mineral and Petroleum Resources Development Act 28 of 2002 |
| Petroleum Products Act | Petroleum Products Act 120 of 1977 |
| Petroleum Products Amendment Act | Petroleum Products Amendment Act 58 of 2003 |
| Pipelines Act | Petroleum Pipelines Act 60 of 2003 |
| PPPFA | Preferential Procurement Policy Framework Act 5 of 2000 |

# Definitions and Abbreviations

| | |
|---|---|
| CODO | Company owned, dealer operated |
| Controller | Controller of Petroleum Products |
| DMR | Department of Mineral Resources |
| DODO | Dealer owned, dealer operated |
| DOE | Department of Energy |
| DTI | Department of Trade and Industry |
| Energy White Paper | White Paper on the Energy Policy of the Republic of South Africa, December 1998 |
| Guideline | This guideline on the Transformation in the Liquid Fuels Sector of South Africa |
| HDSAs | Historically disadvantaged South Africans |
| ITAC | International Trade and Administration Commission |
| LFC | Charter for the South African Petroleum and Liquid Fuels Industry |
| MPAR | Marketing of Petroleum Activities Return |
| NERSA | National Energy Regulator of South Africa |
| PAR | Petroleum Activities Return |
| RAS | Regulatory Accounting System |
| Ratplan | Service Station Rationalisation Plan |
| Recommendations Guideline | Governing recommendations for the ITAC import permits |
| SAPIA | South African Petroleum Industry Association |
| State | South African Government |

# Glossary

| | |
|---|---|
| SOEKOR | Soekor (Pty) Ltd was formed by the State in 1965 for the purposes of hydrocarbon exploration. Soekor searches onshore areas like the Karoo, Algoa and Zululand Basins as well as certain limited offshore searches.<br><br>From the mid-1970s to the late 1980s, Soekor was the sole explorer operating the entire offshore area of South Africa.<br><br>Soekor merged with Mossgas in 2001 to form PetroSA. |
| Ratplan | The rationalisation plan that was negotiated between the State, oil companies and the Motor Industries Federation. Though it was never signed, the Ratplan was implemented by the parties thereto. |
| HDSAs | Generally, HDSAs refers to all persons and groups who have been discriminated against on the basis of race, gender and disability. |
| Black people | Generally, black people refers to black Africans, coloureds and Indians who<br>(i) are citizens of South Africa by birth or descent, or<br>(ii) became citizens of South Africa by naturalisation before 27 April 1994 or, if thereafter, would have been entitled to acquire citizenship by naturalisation prior to that date. |

# Annexure: Petroleum and Liquid Fuels Sector Legislation

## Contents

# 1 Petroleum and Liquid Fuels Sector Legislation

## 1.1 Central Energy Fund Act, 1977 (Act No. 38 of 1977) ("CEF Act")

The CEF Act sets out the management structure and accounting procedures of CEF (Pty) Ltd. It provides further for the funding of CEF (Pty) Ltd and prescribes how its funds are to be utilised.

In particular, provision is made for the imposition of a levy

(i) for the benefit of the Equalization Fund controlled by CEF (Pty) Ltd on every litre of petrol, aviation spirit, kerosene, distillate fuel, residual fuel oil, naphtha, base oil, products of base oil or every kilogram of grease or liquefied petroleum gas which is manufactured, distributed or sold by an undertaking at any point in South Africa, or imported by any person into South Africa and

(ii) for the benefit of the Central Energy Fund on every litre of petrol, distillate fuel or residual fuel oil. Additionally, CEF (Pty) Ltd is funded by way of moneys accruing to the Central Energy Fund by virtue of section 11 of the Petroleum Products Act, 1977. Moneys obtained by CEF (Pty) Ltd or the SFF Association from the sale of crude oil, petroleum products and certain other products must also be paid into the Equalization Fund.

Moneys paid into the Central Energy Fund in terms of section 1(1) of the CEF Act must be utilised for the financing or promotion of

(i) the acquisition of coal, the exploitation of coal deposits, the manufacture of liquid fuel, oil and other products from coal, the marketing of the said products and any matter connected with the said acquisition, exploitation, manufacture and marketing,

(ii) the acquisition, generation, manufacture, marketing or distribution of any other form of energy, and research connected therewith, and

(iii) any other designated or approved object. Funds not required for the aforementioned purposes are to be paid into the State Revenue Fund.

The Equalization Fund must be used

(i) for the financing of any increase in the cost of purchasing crude oil or petroleum products,

(ii) for or in connection with the purchase, acquisition, conservation, storage, manufacture or utilization of crude oil or petroleum products, or research in connection with petroleum products, as determined by the Minister of Mineral and Energy Affairs in consultation with the Minister of Finance,

(iii) for the acquisition, generation, manufacture, marketing or distribution of any other form of energy, and research connected therewith, and

(iv) for any other designated and approved object relating to energy. Moneys not immediately required for the aforementioned purposes must be invested in such manner as may be prescribed.

The CEF Act also deals with the shareholding of CEF (Pty) Ltd and the SFF Association. Both entities are companies under the Companies Act. The share capital of CEF (Pty) Ltd is held by the state and that of the SFF Association is held in turn by CEF (Pty) Ltd.

Provision is made for various criminal offences. These include failure to comply with requests for information by certain authorised persons, obstructing such authorised persons in the

performance of their duties, and disclosure of certain categories of information to unauthorised persons.

## 1.2 Gas Act, 2001 (Act No. 48 of 2001) ("Gas Act")

The objects of the Gas Act include:

(i) Promotion of the efficient, effective, sustainable and orderly development and operation of gas transmission, storage, distribution, liquefaction and re-gasification facilities and the provision of efficient, effective and sustainable gas transmission, storage, distribution, liquefaction, re-gasification and trading services;

(ii) Facilitation of investment in the gas industry;

(iii) Ensuring the safe, efficient, economic and environmentally sound distribution, storage, liquefaction and re-gasification of gas;

(iv) Promotion of companies in the gas industry that are owned or controlled by historically disadvantaged South Africans by means of licence conditions so as to enable them to become competitive; and

(v) Promotion of access to gas in an affordable and safe manner.

The term "gas" is defined as "all hydrocarbon gases transported by pipeline, including natural gas, artificial gas, hydrogen rich gas, methane rich gas, synthetic gas, coal bed methane gas, liquefied natural gas, compressed natural gas, re-gasified liquefied natural gas, liquefied petroleum gas or any combination thereof".

The Gas Regulator is defined as the National Energy Regulator established in terms of the National Energy Regulator Act, 2004. The Gas Act sets out the functions of the Gas Regulator. Broad powers are granted to the Gas Regulator. These include inspection and information gathering, conducting investigations, resolution of disputes, enforcement, imposition of penalties, and expropriation of land.

Subject to certain qualifications, the following activities require a licence issued by the Gas Regulator:

(i) Construction of gas transmission, storage, distribution, liquefaction and re-gasification facilities or converting infrastructure into such facilities;

(ii) Operation of gas transmission, storage, distribution, liquefaction or re- gasification facilities; and

(iii) Trade in gas.

Instead of licensing, the Gas Act provides for registration with the Gas Regulator in certain cases. Separate licences must be issued for each of the above-mentioned activities, and conditions may be attached to licences. In particular, the Gas Regulator may prescribe maximum prices where there is inadequate competition. Licences are valid for at least 25 years and must be renewed on application. Renewals are subject to such new or different licence conditions as the Gas Regulator may prescribe. Transfer of licences is prohibited.

The licence application procedure includes advertisement of the application in two newspapers circulating in the area of the proposed licensed activity. Provision is made for objections to be lodged against the application.

The decision of the Gas Regulator must be accompanied by a list of the factors on which its decision was based.

Subject to meeting the prescribed requirements, licensees are entitled to lay, construct, repair and remove pipes over or under any street (and, in certain cases, land belonging to third parties).

Any disposal of gas assets controlled by the state must be in terms of an open and transparent bidding process.

Licensees are prohibited from discriminating between customers or classes of customers regarding access, tariffs, prices, conditions or service except for objectively justifiable and identifiable differences regarding such matters as quantity, transmission distance, length of contract, load profile, interruptible supply or other distinguishing feature approved by the Gas Regulator.

The Gas Act contains provisions regulating the Mozambique Gas Pipeline Agreement. It provides, inter alia, that the Mozambique Gas Pipeline Agreement binds the Gas Regulator for a period of ten years from the date on which natural gas is first received from Mozambique, despite anything to the contrary in the Gas Act.

## 1.3 Piped Gas Regulations, GNR.321 of 20 April 2007, promulgated under the Gas Act 2001 ("PG Regulations")

Section 4 of the PG Regulations deals with price regulation principles and provides that pricing must be in accordance with the PG regulations, to the extent not governed by the Mozambique Gas Pipeline Agreement. It obliges gas traders whose maximum gas prices are calculated by market value pricing in terms of the Mozambique Gas Pipeline Agreement to inform their customers of the elements used to calculate their maximum gas price, in addition to certain other prescribed matters.

The Gas Regulator must approve maximum prices for gas for each distribution area or group of distribution areas for residential, commercial and industrial customers, and must be objective, fair, non-discriminatory, transparent and predictable when approving maximum prices. In addition, efficiency incentives must be included.

Certain prescribed requirements are set out for invoices.

Licensees must provide to the Gas Regulator certain prescribed information regarding involvement of historically disadvantaged South Africans. The Gas Regulator is in turn obliged to use the information to facilitate the addressing of historical inequalities and to broaden the country's economic base and accelerate growth, job creation and poverty alleviation.

Provision is made for

(i) third party access to gas transmission pipelines, to the extent not governed by the Mozambique Gas Pipeline Agreement,

(ii) an allocation mechanism to ensure third party access to uncommitted capacity in storage facilities,

(iii) expropriation and the requirements for expropriation,

(iv) rehabilitation of land,

(v) determination of gas specifications, and

(vi) dispute resolution.

## 1.4 Gas Regulator Levies Act, 2002 (No. 75 of 2002) ("GRL Act")

This Act provides for the imposition of levies by the Gas Regulator, subject to notice of such levies being published and due consideration of any representations made to the Gas Regulator. Levies must be

(i) based on the amount of gas, measured in gigajoules, delivered by importers and producers to inlet flanges of transmission or distribution pipelines and

(ii) paid by the person holding title to the gas at the inlet flange.

International Trade Administration Act, 2002 (Act No. 71 of 2002) ("the ITA Act")

The object of the ITA Act is to provide for the implementation of certain aspects of the Southern

African Customs Union ("SACU") Agreement in South Africa and to provide for the control of import and export of goods and amendment of customs duties.

In particular, the ITA Act establishes the International Trade Administration Commission ("ITAC") and regulates the functions, management and funding of ITAC.

Chapter 2 of the ITA Act deals with trade policy. Section 4(7) stipulates that the Minister must, by notice in the Government Gazette, publish

(i) for information any recommendation of the Tariff Board and

(ii) any decision by the SACU Council of Ministers that directly affects the import of goods into, or export of goods from, South Africa.

In terms of section 6(1), the Minister may, inter alia, by notice in the Government Gazette, prohibit goods of a specific kind or class from being imported or exported and may stipulate which goods may be imported or exported.

Chapter 3 establishes ITAC and deals with its functions, management procedures, administration and funding.

Chapter 4 deals with the investigation, evaluation and adjudication powers of ITAC. Section 26 stipulates that:

"(1) A person may, in the prescribed manner and form, apply to the Commission for-

(a) an import or export control permit, or an amendment of such a permit, in terms of Part B of this Chapter and the regulations;

(b) a rebate permit or certificate in terms of the Customs and Excise Act;

(c) the amendment of customs duties, including an amendment in respect of goods imported into the Common Customs Area from a country that is not a Member State, with regard to-

(i) anti-dumping duties;

(ii) countervailing duties; or

(iii) safeguard duties; or

(d) the imposition of safeguard measures other than a customs duty amendment."

With regard to section 26(1) (a) or (b), the Minister may refuse or approve the application. An application received in terms of section 26(1) (c) or (d) is dealt with differently. Once the Commission receives an application, it is required to notify the SACU and to determine whether a similar application is before a SACU institution or was decided upon in the previous six months. If a substantially similar application has been before a SACU institution or decided upon in the last six months, the Commission need not consider the application or may recommend that the application be rejected or approved to the SACU Tariff Board. If the application deals with a substantially different matter, the Commission may recommend that the application be rejected or approved to the SACU Tariff Board.

ITAC enjoys extensive investigative powers and is entitled to appoint investigating officers, issue summons, call witnesses, conduct inspections and enter and search (without warrant in certain cases).

In 2006, the Minister of Minerals and Energy published Guidelines Governing the Recommendations by the Department of Minerals and Energy to the International Trade Administration Commission in respect of the Importation and Exportation of Crude Oil, Petroleum Products and Blending Components. These guidelines are dealt with below in the regulations promulgated under the Petroleum Products Act, 1977.

## 1.5 Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981) ("MPCCL Act")

The MPCCL Act provides for the protection of the marine environment from pollution by oil and other harmful substances by providing for the prevention and combating of pollution of the sea by oil and other harmful substances and determining liability in respect of loss or damage caused by the discharge of oil from ships, tankers and offshore installations.

Both the master and the owner of a ship, tanker or offshore installation are criminally liable if oil is discharged, except in certain circumstances specified in the MPCCL Act. The responsibility rests on the master and the owner to prove that one of these circumstances was applicable.

Provision is made for discharge of oil, damage caused by such discharge and the likelihood of any discharge to be reported to the South African Maritime Safety Authority ("SAMSA").

SAMSA is empowered to take steps to prevent pollution and may require the master or owner of the vessel in question to take such steps as may be determined by SAMSA in respect of such pollution or potential pollution. Provision is also made for inspection of vessels and the right to enter land for the purposes of monitoring compliance with the MPCCL Act or pursuing an investigation.

Subject to certain qualifications, the owner of a ship, tanker or offshore installation is liable for loss or damage anywhere in South Africa arising from the discharge of oil from such ship, tanker or offshore installation. Compulsory insurance against liability for loss, damage or costs is required for tankers carrying more than 2,000 long tons of oil in bulk as cargo. Legal action may be instituted directly against insurers. Insurers will not be liable if it is proven that the incident in question was caused by the wilful act or omission of the owner.

Ships may be detained pending payment of costs.

Disabling of ships carrying oil is prohibited outside a prescribed harbour unless authorised by SAMSA. Similarly, SAMSA's permission is required to transfer oil between vessels.

A valid pollution safety certificate is required for the operation of offshore installations. The regulations provide that only approved oil dispersants may be used. In addition, use must be specifically authorised by the Department of Environmental Affairs and Tourism.

## 1.6 Marine Pollution (Intervention) Act, 1987 (Act No. 64 of 1987) ("MPI Act")

The MPI Act was promulgated to incorporate into local law the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, and to the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil 1973.

These instruments of international law accordingly have force of law in South Africa, subject to the provisions of the MPI Act. More detail concerning these instruments is set out in Section Five of this workbook, which deals with international law.

## 1.7 Marine Pollution (Prevention of Pollution from Ships) Act, 1986 (Act No. 2 of 1986) (''MPPPS Act'')

The MPPPS Act deals with pollution from ships and gives effect to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978.

More detail concerning these instruments is set out in Section Five of this workbook, which deals with international law.

## 1.8 Marine Traffic Act, 1981 (Act No. 2 of 1981) ("MT Act")

The MT Act seeks to regulate marine traffic in South Africa. Importantly, the MT Act begins by stating that all ships shall "enjoy innocent passage through the territorial waters". This is however subject to the provisions of the MT Act. One of the obvious exceptions is that of a ship carrying cargo which threatens the "territorial integrity" of South Africa.

In terms of regulating passage, certain procedures prescribed by the MT Act must be followed. For example, a foreign ship or submarine is not permitted to navigate other than on the surface and must display its flag. A ship can neither enter nor leave internal waters through any route other than "a harbour or fishing harbour".

Of particular relevance are offences in respect of offshore installations. If the master or any person navigating a ship causes damage to an offshore installation, or drops anchor or trawls nearer than 500 metres to a pipeline or telecommunications line, that person will be guilty of an offence.

## 1.9 Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) ("MPRD Act")

The MPRD Act regulates access to South Africa's mineral and petroleum resources.

The objects of the MPRD Act include the following:

(i) Recognition of the right of the state to exercise sovereignty over all the mineral and petroleum resources within South Africa;

(ii) Promoting equitable access to South Africa's mineral and petroleum resources to all the people of South Africa;

(iii) Expanding opportunities for historically disadvantaged persons to enter the mineral and petroleum industries;

(iv) Promoting economic growth and mineral and petroleum resources development;

(v) Providing for security of tenure in respect of prospecting, exploration, mining and production operations;

(vi) Ensuring that mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(vii) Ensuring that holders of mining and production rights contribute towards the socio-economic development of the areas in which they operate.

The MPRD Act provides for reconnaissance permits, retention permits, prospecting rights, mining rights, exploration rights and production rights, amongst others. These rights are limited real rights in respect of the mineral or petroleum and the land to which the right relates. Reconnaissance permits, retention permits, exploration rights and production rights are the relevant rights in the context of the petroleum sector and are dealt with in Chapter 6 of the MPRD Act.

Chapter 6 provides for the appointment of a designated agency and sets out the functions of the designated agency. These functions include:

(i) Receiving applications for permits and rights;

(ii) Evaluating such applications and making recommendations to the Minister; and

(iii) Monitoring compliance with such permits or rights and reporting regularly to the Minister in respect thereof.

Furthermore, Chapter 6 sets out the procedures for applications for reconnaissance permits, technical cooperation permits, exploration rights and production rights.

Subject to compliance with the application requirements, the Minister is obliged to issue a reconnaissance permit if:

(i) The applicant has access to financial resources and has the technical ability to conduct the proposed reconnaissance survey;

(ii) The estimated expenditure is compatible with the intended reconnaissance operation and duration of the reconnaissance programme;

(iii) The reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment;

(iv) The applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996; and

(v) The applicant is not in contravention of any relevant provision of the MPRD Act.

Subject to compliance with the application requirements, the Minister is obliged to issue a technical cooperation permit if:

(i) The applicant has access to financial resources and has the technical ability to conduct the proposed technical cooperation study;

(ii) The estimated expenditure is compatible with the intended technical cooperation study and duration of the technical cooperation study; and

(iii) The applicant is not in contravention of any relevant provision of the MPRD Act

Subject to compliance with the application requirements, the Minister is obliged to grant an exploration right if:

(i) The applicant has access to financial resources and has the technical ability to conduct the proposed exploration operation optimally in accordance with the exploration work programme;

(ii) The estimated expenditure is compatible with the intended exploration operation and duration of the exploration work programme;

(iii) The Minister has approved the environmental management programme required in terms of section 39(4) of the MPRD Act;

(iv) The applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996;

(v) The applicant is not in contravention of any relevant provision of the MPRD Act;

(vi) The applicant has complied with the terms and conditions of the technical cooperation permit, if applicable; and

(vii) The granting of the right will further the objects referred to in section 2(d) and (f) of the MPDR Act (expanding opportunities for historically disadvantaged persons and promoting employment and advancing the social and economic welfare of all South Africans).

Subject to compliance with the application requirements, the Minister is obliged to grant a production right if:

(i) The applicant has access to financial resources and has the technical ability to conduct the proposed production operation optimally;

(ii) The estimated expenditure is compatible with the intended production operation and duration of the production work programme;

(iii) The production will not result in unacceptable pollution, ecological degradation or damage to the environment;

(iv) The applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996;

(v) The applicant is not in contravention of any relevant provision of the MPRD Act;

(vi) The applicant has complied with the terms and conditions of the exploration right, if

applicable;

(vii) The applicant has provided financially and otherwise for the prescribed social and labour plan;

(viii) The petroleum can be produced optimally in accordance with the production work programme; and

(ix) The granting of the right will further the objects referred to in section 2(d) and (f) of the MPDR Act (expanding opportunities for historically disadvantaged persons and promoting employment and advancing the social and economic welfare of all South Africans) and the prescribed land and labour plan.

The MPRD Act provides for conversion of old order mining rights to rights in terms of the MPRD Act.

## 1.10 Mining Titles Registration Act, 1967 (No. 16 of 1967) ("MTR Act")

The MTR Act establishes the Mineral and Petroleum Titles Registration Office ("Mining Titles Office"), which is the office for the registration of all mineral and petroleum titles and all other related rights, deeds and documents. A right registered with the Mining Titles Office is a limited real right binding on third parties.

Section 5 of the MTR Act sets out the rights and transactions that are capable of registration with the Mining Titles Office. These include prospecting, exploration, production, mining and related rights, leases and sub-leases of any such right and any cession, renewal, modification, amendment, abandonment or cancellation or lapsing of such registered rights.

There are detailed provisions regarding deeds of transfer, cessions and mortgage bonds and the rights of mortgagees.

Of note are the provisions regarding bonds securing future debts. The MTR Act provides that a bond registered after the commencement of the MTR Act will only be effective in respect of debts incurred after registration of the bond if the bond expressly provides that it is intended to secure future debts and the maximum amount of such future debts is specified.

A mortgage bond containing a clause purporting to bind generally all the immovable and/or movable property or registered rights of the debtor cannot be registered.

## 1.11 National Energy Act, 2008 (Act No. 34 of 2008) ("NE Act")

The NE Act was promulgated to ensure that diverse energy resources are available, in sustainable quantities and at affordable prices, to the South African economy. It seeks to ensure that South Africa has an "uninterrupted supply of energy" and to "promote diversity of supply of energy and its sources". Additionally the Act seeks to ensure a safe and healthy environment as far as the use of energy is concerned. An "energy resource" is a "non-value added material or mineral that can be used to produce energy or be converted to an energy carrier".

The Minister is required to collate and analyse relevant data and make energy statistics available to the public.

In addition, the Minister must adopt measures that provide for universal access to energy and energy services at affordable prices and must develop an Integrated Energy Plan that is reviewed on an annual basis.

The NE Act provides for establishment of the South African National Energy Development Institute.

The Minister is authorised to direct any state-owned entity to acquire, maintain, monitor and manage national strategic energy feedstock and to invest in critical energy infrastructure.

## 1.12 National Energy Regulator Act, 2004 (Act No. 40 of 2004) ("NER Act")

The NER Act establishes National Energy Regulator of South Africa ("NERSA") to regulate the electricity, piped-gas and the petroleum pipelines industries.

In addition to its functions under the NER Act, the NERSA is designated as the Gas Regulator, the Petroleum Pipelines Regulatory Authority and the National Electricity Regulator.

## 1.13 National Ports Act, 2005 (Act No. 12 of 2005) ("NP Act")

The Act establishes the National Ports Authority ("NPA"). All ports fall within the jurisdiction of the NPA, which effectively acts as the "landlord" of ports in South Africa.

The NPA must "manage, control and administer ports ..." and is accordingly required to "plan, provide, maintain and improve port infrastructure".

Port users must adhere to the directives of the NPA, which are issued in terms of section 30 of the NP Act.

In terms of section 56 (1) the National Ports Authority may, inter alia, enter into agreements with other persons to design, construct, rehabilitate, develop, finance, maintain or operate port terminals or port facilities, or provide services relating thereto. Such agreements must provide for monitoring and annual review by the NPA. In the absence of such an agreement, only the NPA may "provide a port service or operate a port facility" without a licence.

Guidelines have been developed by the Transnet National Ports Authority to deal with agreements, licences and permits. This has been done in order to ensure "fair, equitable, transparent procedures" in relation to agreements, licences and permits.

Detailed regulations have been promulgated under the NP Act. These deal inter alia with operational issues, health and safety, environmental protection, dangerous and flammable goods, and security and access. Licensing may be required for the following activities: fire protection and fire equipment installation and maintenance, bunkering, pollution control, diving, pest control and vessel agency.

Discharge of oil is prohibited in port repair facilities without the written permission of the harbour master.

Considerations when constructing a facility at a port:

- Consultation with communities and interested parties;
- Environmental Impact Assessment and Traffic Impact Assessment;
- Maintenance of a Quality Assurance programme;
- Maintenance of Environmental Legal Compliance;
- Maintenance of Occupational Health and Safety Legal Compliance;
- Building Regulations must comply with:
  - National Building Regulations;
  - SANS 10120 series: - Code of practice for use with standardised specifications for civil engineering construction and contract documents;
  - National Water Act, 1998 (Act No 36 of 1998); and
  - Applicable local by-laws.

Furthermore, for specific cases, such as "bulk installations", various other codes might apply:

- SANS 10089-1:2008 The petroleum industry Part 1; Storage and distribution of petroleum products in above-ground bulk installations;

- SANS 10089-2: 2007 The petroleum industry Part 2; Electrical and other installations in the distribution and marketing sector;
- SANS 10108: 2005 The classification of hazardous locations and the selection of apparatus for use in such locations;
- SANS 10105: The use and control of fire-fighting equipment;
- SANS 10232-3: 2011 Transport of dangerous goods, Emergency information systems Part 3: Emergency response guide.

• Design codes (Electrical)

Compliance with South African and International Codes is required. These include:

(i) Occupational Health and Safety Act 85 of 1993;

(ii) The SANS 10142-1: 2009. The wiring of premises;

(iii) Earthed according to the correct earthing standards; and

(iv) SANS 10123: 2014 dealing with "undesirable static" must be considered.

• Development of site

This must be in conformance with the relevant city planning criteria in respect of the "Harbour" zoning. The following must be considered:

(i) Coverage;

(ii) Floor area ratio;

(iii) Height restriction;

(iv) Building lines;

(v) Building restrictions;

(vi) Parking;

(vii) Ingress/Egress; and

(viii) Loading/Off-loading.

## 1.14 Petroleum Pipelines Act, 2003 (Act No. 60 of 2003) ("Pipelines Act")

The Pipelines Act establishes a national regulatory framework for petroleum pipelines. It also establishes a Petroleum Pipelines Regulatory Authority ("PPRA") as the custodian and enforcer of the framework. In terms of the NER Act, NERSA has been designated as the PPRA.

The objects of the Pipelines Act are:

(i) Promotion of competition in the construction and operation of and equitable access to petroleum pipelines, loading facilities and storage facilities;

(ii) Promotion of the efficient, effective, sustainable and orderly development, operation and use of petroleum pipelines, loading facilities and storage facilities;

(iii) Ensuring the safe, efficient, economic and environmentally responsible transport, loading and storage of petroleum;

(iv) Facilitating investment in the petroleum pipeline industry;

(v) Providing for the security of petroleum pipelines and related infrastructure;

(vi) Facilitating participation in the industry by historically disadvantaged South Africans, by means of licence conditions to enable them to become competitive;

(vii) Promoting the development of competitive markets for petroleum products;

(viii) Promoting access to affordable petroleum products; and

(ix) Ensuring an appropriate supply of petroleum to meet market requirements.

NERSA is authorised to issue licences in accordance with this Act for

(i) construction and conversion of petroleum pipelines, loading facilities and storage facilities and

(ii) the operation of petroleum pipelines, loading facilities and storage facilities.

The owner of the pipeline or facility in question must apply for the licence. The application must include the following information:

(i) the name, company number (if any) and principal place of business of the applicant,

(ii) particulars of the owners or shareholders of the applicant if the applicant is not a natural person,

(iii) documents demonstrating the administrative, financial and technical abilities of the applicant,

(iv) a description of the proposed pipeline, loading facility or storage facility to be constructed or operated, including maps and diagrams where appropriate,

(v) a description of the tariff policies to be applied,

(vi) the plans and the ability of the applicant to comply with applicable labour, health, safety, security and environmental legislation,

(vii) the identity and particulars of the individual who will be responsible for the control, management and operation of the pipeline or facility in question, and

(viii) such other particulars as may be prescribed.

The applicant must publish a notice of the application in at least two newspapers circulating in the area of the proposed activity in any two official languages, for such period or in such number of issues of a newspaper as may be prescribed.

Before considering a licence application, NERSA is subject to the following:

(i) If NERSA is of the view that the proposals for the pipeline or facility should be altered to provide access to third parties, NERSA must inform the applicant of that view and request the applicant to motivate why the application should not be subject to a condition to that effect;

(ii) NERSA may direct the applicant to alter the plans for the proposed facilities to comply with the applicable health, safety, security and environmental legislation;

(iii) NERSA must furnish the applicant with all substantiated objections to the application so as to enable the applicant to respond; and

(iv) NERSA may request such additional information as may be necessary to consider the application properly.

NERSA must provide the applicant with a copy of its decision as well as a list of the factors on which the decision was based.

The Pipelines Act authorises NERSA to impose licence conditions, but requires these conditions to fall within the framework of requirements set out in section 20. These requirements include the following:

(i) Promotion of historically disadvantaged South Africans;

(ii) Separate management of the petroleum loading, pipeline and storage activities of vertically integrated companies, with separate accounts and data and with no cross-subsidisation;

(iii) Ensuring sufficient pipeline capacity for crude oil to enable the uninterrupted operation of the crude oil refinery located at Sasolburg;

(iv) Access to petroleum pipelines for shippers of petroleum and sharing of a pipeline's capacity among all users and prospective users in proportion to their needs and within the commercially reasonable and operational constraints of the pipeline, subject to appropriate remuneration;

(v) Provision for interconnection with other facilities, subject to technical feasibility;

(vi) Approval of tariffs by NERSA; and

(vii) Compliance with the health, safety and environmental standards required by NERSA.

Provision is made for any person aggrieved by a condition to object to that condition. Licences are valid for 25 years, subject to renewal.

Licensees are prohibited from discriminating between customers regarding access, tariffs, conditions or service except on objectively justifiable and identifiable grounds approved by NERSA.

Other powers of NERSA include collation of information, investigations, mediation and arbitration, setting tariffs and charges, monitoring, expropriating land and promoting competition.

Agreements are void if they contravene any provision of the Pipelines Act, any licence granted under the Pipelines Act, any condition attached to such a licence or any regulation, rule or directive issued under the Pipelines Act.

## 1.15 Regulations in terms of the Petroleum Pipelines Act, 2003, GNR.342 of 4 April 2008.

The regulations deal with a number of matters, including licence conditions, tariffs, third party access to storage facilities, expropriation, rehabilitation of land, mechanisms to promote historically disadvantaged South Africans and dispute resolution. In particular, provision is made for disputes to be referred to NERSA for resolution by way of mediation or arbitration under the auspices of NERSA.

When setting tariffs for petroleum pipelines, NERSA may:

- Require tariffs to follow the general principles of increasing with the distance over which petroleum products are or will be transported;
- Consider batch size;
- Consider funding requirements and debt service requirements of the licensee by adjusting the licensee's allowed revenue to enable the licensee's debt service cover ratio to be maintained at a reasonable level; and
- Consider any other relevant matter.

Tariffs set by the Authority must "relate to investment in the operation and maintenance, and profits arising from only parts of a licensed activity for which the tariffs are being set".

## 1.16 Petroleum Pipelines Levies Act, 2004 (Act No. 28 of 2004) ("PPL Act")

The PPL Act provides for the imposition of levies by NERSA and deals further with the disposal and management of levies and non-payment of levies.

Levies must be based on the amount of petroleum, measured in litres, delivered by importers, refiners and producers to inlet flanges of petroleum pipelines.

In the event of non-payment of a levy on the date it becomes due and payable, the person liable for payment of the levy is required to pay interest on the unpaid amount. Amounts payable may be recovered by NERSA by judicial process.

Levy imposition lapses after five years. However, provision is made for re-imposition thereof.

## 1.17 Petroleum Products Act, 1977 (Act No. 120 of 1977) ("PP Act")

The PP Act regulates petroleum products in the South African economy. It aims to maintain and control the prices of petroleum products, regulate services in connection with petroleum products, license the manufacturing and sale of petroleum products and promote transformation of the petroleum and liquid fuels industry.

The Minister has the power to regulate or prohibit the sale of any petroleum product, prescribe the price for a petroleum product, and regulate the supply of any petroleum product to a business, amongst others. In particular, the Minister may prescribe the quantities of crude oil or petroleum products to be maintained by any person. The Minister is also required to prescribe a system for the allocation of site licences, and their corresponding retail licences, by which system the Controller of Petroleum Products is bound. Such a system must be directed at achieving equilibrium amongst all participants in the petroleum products industry within the constraints of the PP Act. Similarly, the Minister is authorised, but not obliged, to prescribe licensing systems for the wholesaling and retailing of liquefied petroleum gas and paraffin, by which system the Controller of Petroleum Products is also bound. Such a system must, amongst others, be targeted at poverty alleviation for low, income households.

The Controller of Petroleum Products is appointed by the Minister, who is also authorised to appoint inspectors and regional controllers. Subject to certain qualifications, the Minister may confer wide-ranging powers on inspectors, including searching premises and vehicles without warrant, seizure without warrant of petroleum products and the disposal thereof.

Provision is made for arbitration under the auspices of the Controller of Petroleum Products on request of a licensed retailer alleging unfair or unreasonable contractual practices by a licensed wholesaler, or vice versa.

Certain activities are prohibited without a licence. These activities are:

- Manufacturing petroleum products without a manufacturing licence;
- The wholesale of prescribed petroleum products without a wholesale licence;
- Holding or developing a site without a site licence; and
- Retailing prescribed petroleum products without a retail licence.

The Controller of Petroleum Products is responsible for issuing licences. When considering whether to grant a licence, the Controller must have due regard to section 2C, which deals with transformation of the petroleum industry. This section stipulates that the Controller must "promote advancement of historically disadvantaged South Africans". The following must also be considered:

(i) Promoting efficient manufacturing, wholesaling and retailing;

(ii) Facilitating efficient and commercially justifiable investment;

(iii) Creation of employment opportunities and development of small businesses;

(iv) Ensuring countrywide availability of petroleum products at competitive prices; and

(v) Promoting access to affordable petroleum products for low-income consumers.

As an alternative to directing that a person conducting an unlicensed activity cease that activity, the Controller of Petroleum Products is authorised to allow such a person to continue with the unlicensed activity in question pending an application and the issuing of a licence, if

the cessation of that activity is likely to lead to a material interruption in the supply of petroleum products.

A manufacturing licence may be applied for only by the owner of the land in question or a person holding the written permission of the owner. In the case of a site licence, the application must be made by the owner of the land in question or, in the case of publicly owned land, a person holding the written permission of the owner. Retail and wholesale licences must be applied for by the owner of the business in question.

The PP Act prohibits arrangements that result in

(i) a licensed wholesaler holding a retail licence except for training purposes (subject to certain exclusions relating to petroleum gas and paraffin) or

(ii) self-service by consumers of prescribed petroleum products on the premises of licensed retailers.

Licensed manufacturers are only permitted to sell petroleum products to licensed wholesalers or retailers, except for export purposes. Licensed retailers are only permitted to purchase petroleum products from licensed wholesalers or manufacturers.

Applicants for site licences must publish notice of the application in a prominent manner in two or more of the most popular newspapers circulating in the area of the proposed activity, in two official languages, one of which must be English. Provision is made for submission of an environmental management plan approved by a competent authority or person, which plan must include a record of public participation undertaken and the results thereof and an undertaking by the applicant to execute the environmental management plan. Financial security must be provided for rehabilitation of the site. A site licence may be transferred on transfer of ownership of the land in question, subject to satisfaction of the prescribed requirements.

Applicants for retail licences must publish a notice of the application in a prominent manner in two or more of the most popular newspapers circulating in the area of the proposed activity, in two official languages, one of which must be English. Licenced wholesalers are not permitted to apply for retail licences, except for training purposes. One such retail licence is permitted for the first 100 sites supplied with the petroleum products of the retailer in question, and thereafter one retail licence for every 200 such sites, subject to a maximum of nine such retail licences. Provision is made for temporary retail licences to be issued in certain circumstances. A licensed retailer may only retail from the site specified in the retail licence.

Applicants for wholesale licences must publish a notice of the application in a prominent manner in two or more of the most popular newspapers circulating in the area of the proposed activity, in two official languages, one of which must be English. Applications must include a declaration by the applicant of compliance with the Charter or a statement of the applicant's plans to meet the requirements of the Charter. Provision is made for submission of an environmental management plan approved by a competent authority or person, which plan must include a record of public participation undertaken and the results thereof and an undertaking by the applicant to execute the environmental management plan. Financial security must be provided for rehabilitation of any affected land. A licensed wholesaler is required to purchase petroleum products only in bulk from other licensed wholesalers or licensed manufacturers (except in respect of importation of petroleum products). Similarly, a licensed wholesaler may only sell in bulk to licensed manufacturers, licensed wholesalers, licensed retailers, or end consumers for own consumption (subject to certain qualifications regarding liquefied petroleum gas, paraffin and exports). Provision is made for temporary wholesale licences to be issued in certain circumstances.

Applicants for manufacturing licences must publish a notice of the application in a prominent manner in two or more of the most popular newspapers circulating in the area of the proposed activity, in two official languages, one of which

must be English. Applications must include a declaration by the applicant of compliance with the Charter or a statement of the applicant's plans to meet the requirements of the Charter. Provision is made for submission of an environmental management plan approved by a competent authority or person, which plan must include a record of public participation undertaken and the results thereof and an undertaking by the applicant to execute the environmental management plan. Financial security must be provided for rehabilitation of any affected land. A licensed manufacturer may only manufacture petroleum products within the maximum design capacity stated on its licence and must maintain minimum working stock levels in compliance with applicable regulations. If ownership of the land in question or the manufacturing activity changes, an application must be made within six months for an amendment to the licence.

## 1.18 Petroleum Products Amendment Act, 2003 (Act No. 58 of 2003) ("PPA Act"), and

## 1.19 The Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry ("the Charter")

The PPA Act amends the Petroleum Products Act, 1997 and inserts the Charter as Schedule 1.

The Charter seeks to empower historically disadvantaged South Africans in the petroleum and liquid fuels industry and applies to all "parts of the value chain". The ultimate goal is ownership of 25% of the industry by historically disadvantaged South Africans.

The Charter applies to:

(i) Exploration and production of oil;

(ii) Liquid fuels pipelines, single buoy moorings, depots and storage tanks;

(iii) Oil refining and synthetic fuel manufacturing plants, including lubricants;

(iv) Transport, including road haulage and coastal shipping;

(v) Trading, including import and export; and

(vi) Wholesale and retail assets/infrastructure.

The Charter deals with capacity building so as to address the deficit of local knowledge concerning the industry. This is intended to take place both at the government (through bilateral arrangements with other countries, amongst others) and industry levels.

The Charter requires companies to publish their employment equity targets and work towards achievement of the following:

(i) Focusing on historically disadvantaged South Africans when considering overseas placements and training programmes;

(ii) Identifying a talent pool and fast-tracking it;

(iii) Ensuring inclusiveness of gender;

(iv) Implementing mentorship programmes; and

(v) Setting and publishing "stretch"' (i.e. demanding) targets and their achievement.

Historically disadvantaged South African companies are required to be given preferential supplier status with regard to procurement. Procurement includes supplies, products "and all other goods and services".

Similarly, historically disadvantaged South African companies are to be encouraged to acquire ownership in pipelines, storage tanks, depots and the like.

The Charter encourages prioritisation of access

to refining capacity, retailing and wholesaling for historically disadvantaged South African companies. Oil refiners and synthetic fuel manufacturers are required to consider selling shares in their facilities to HDSA companies, making capacity available to HDSA companies (such as by way of toll refining agreements) and including HDSA companies as joint venture partners in any expansions or upgrades.

Licences for exploration and production will remain subject to the following:

(i) All licences for exploration and production in South Africa's offshore area should reserve not less than 9% for buy-in; and

(i) All licensees should contribute funds toward the "Upstream Training Trust" to fund skills development at various levels.

Provision is made for funding of HDSA companies.

## 1.20 Guidelines governing the recommendations by the Department of Minerals and Energy to the International Trade Administration Commission in respect of the importation and exportation of crude oil, petroleum, petroleum products and blending components, GNR.1069 of 3 November 2006 ("Guidelines")

The Guidelines deal with the following matters, inter alia:

(i) Importation of crude oil, petroleum products and blending components;

(ii) Importation of jet fuel;

(iii) Importation of liquefied petroleum gas;

(iv) Exportation of crude oil and petroleum products;

(v) Applications for import or export recommendations; and

(vi) Payment of fuel levies.

Importation of crude oil, petroleum products and blending components requires a permit issued by ITAC and will only be allowed if such importation does not conflict with any relevant legislation. A permit may only be issued if ITAC has received a recommendation from the Department of Minerals and Energy in respect of the applicant. Only licensed manufacturers and licensed HDSA wholesalers may apply for a recommendation to import petroleum products or blending components. Any person may apply for a recommendation to import crude oil.

Importation of jet fuel requires a permit issued by ITAC, which will only be issued if ITAC is in receipt of a recommendation from the Department of Minerals and Energy. Only licensed manufacturers and HDSA wholesalers may apply for such recommendation. However, commercial airline companies or their representatives may apply for a recommendation to import jet fuel for their own consumption.

Importation of liquefied petroleum gas requires a permit issued by ITAC, which will only be issued if ITAC is in receipt of a recommendation from the Department of Minerals and Energy. Only licensed manufacturers and licensed wholesalers may apply for such a recommendation.

Exportation of crude oil and petroleum products requires a permit issued by ITAC, which will only be issued if ITAC is in receipt of a recommendation from the Department of Minerals and Energy. Any person can apply for a recommendation to export crude oil, petroleum products or blending components.

Local fuel levies payable in respect of petrol, diesel and illuminating paraffin must be paid to the South African Revenue Services.

# 2 Provincial Legislation and Municipal By-Laws

In terms of section 156(2) of the Constitution, 1996, "a municipality may make and administer by-laws for the effective administration of matters which it has the right to administer." Schedule 4 to the Constitution lists Functional Areas of Concurrent National and Provincial Legislative Competence. Part A includes "environment", "soil conservation", and "urban and rural development". Part B sets out local government matters and includes "air pollution", "building regulations", "firefighting services" and "storm water management systems in built-up areas". Schedule 5 to the Constitution sets out the Functional Areas of Exclusive Provincial Competence. Part B of this schedule identifies "noise pollution" as one of the exclusive provincial competencies.

Accordingly, in addition to national legislation and regulations, provincial legislation and municipal by-laws must also be considered and complied with. Provincial legislation and by-laws differ in their details from one province or municipality to the other.

The types of issues usually dealt with include land use and zoning regulations, firefighting services, environmental issues and nature conservation, water management, noise and air pollution, amongst others.

Waste management by-laws would, by way of example, regulate disposal of industrial effluent into municipal effluent systems. It would generally not be permitted to dispose of such effluent into the municipal effluent system. The owner of the property on which a water incidents occurs or the person responsible for the incident would generally be required to report the incident and take all reasonable measures to contain and minimise the effects of the pollution, including rehabilitation of the environment.

Fire management by-laws would generally regulate the storage of flammable substances and flammable waste, the provisioning of buildings with firefighting equipment and the preparation of safety plans to deal with potential fires.

# 3 Laws of Other Jurisdictions

Each jurisdiction has laws affecting the petroleum and liquid fuels sector. As a starting point, these laws are not applicable outside the jurisdiction in question. Multijurisdictional activities must accordingly be entered into with due consideration to the laws of the jurisdictions in which the proposed activities are to be undertaken. Notwithstanding the above, two further factors must be taken into account. First, there is a considerable degree of convergence in the laws of different jurisdictions with regard to certain key aspects. This is reflected in the body of international conventions that apply across jurisdictional boundaries. Second, certain laws in various jurisdictions have a certain degree of extraterritorial application. This is often encountered in anti-corruption legislation.

By way of example, the USA's Foreign Corrupt Practices Act of 1977 prohibits payments to foreign government officials to assist in obtaining or retaining business. It also prohibits transactions involving payments or transfers of value with the knowledge that all or a portion of the money in question will be offered to foreign officials to assist in obtaining or retaining business. These provisions apply to all US persons and certain foreign issuers of securities (even if the acts in question occur outside the USA) and to foreign firms and persons who further corrupt payments in the USA. Provision is made for record-keeping and the filing of reports.

Similarly, the UK's Bribery Act 2010 extends to corrupt activities even if there is no connection with the UK or they occur in a country other than the UK. A person who bribes a foreign public official is guilty of an offence if that person's intention is to influence the public official in his/her capacity as a foreign public official in order to obtain a business or other commercial advantage. The Bribery Act 2010 has extraterritorial effect and the UK authorities may prosecute bribery when committed abroad by persons ordinarily resident in the UK or by UK corporations.

## 3.1 International law

## 3.2 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 and

## 3.3 Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil 1973

The abovementioned instruments have been incorporated into South African law. In brief, the parties to the Convention are permitted to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences, except in relation to any warship or other ship owned or operated by a "State" and used only on government non-commercial service at the relevant point in time. Provision is made for

(i) consultation with other states and with expert advisers and

(ii) dispute resolution.

The Protocol extends the Convention to certain non-oil substances.

## 3.4 International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990

This Convention was adopted by states because of a recognised need to protect the marine

environment from oil pollution caused by ships and offshore units.

Each state party is required to ensure that any ship flying its flag has an oil emergency plan. Similarly any offshore unit within the state party's jurisdiction must have an oil emergency plan.

If there is a discharge or possible discharge, the master of the ship or any person navigating the ship must immediately report the incident to the nearest costal state. If the discharge is from an offshore unit, a report must be made to the coastal state "to whose jurisdiction the unit is subject." Once a state party receives an oil pollution report it is required to notify all affected states.

If the oil incident is severe, all the state parties to the Convention should be notified. Each state party is required to have a national system to respond as effectively and timeously as possible to the oil pollution incident. In the event of a severe oil spill, parties to the Convention are required to provide assistance according to their resources and capabilities, at the request of the state party affected.

## 3.5 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978

The objective of the Convention is to protect the marine environment from the discharge of harmful substances and effluences containing harmful substances. The Convention sets out detailed regulations directed at achieving this objective by way of Annexes to the Convention. The 1978 Protocol modified the Convention.

Annex I contains regulations for the prevention of pollution by oil, whether from operational measures or accidental discharges. The 1992 amendments require that new oil tankers have double hulls and prescribed a phase-in schedule for existing tankers to fit double hulls.

Annex II contains regulations for the control of pollution by noxious liquid substances in bulk.

Annex III deals with harmful substances carried by sea in packaged form and sets out general requirements for standards on packing, marking, labelling, documentation, stowage, quantity limitations and the like.

Annex IV and Annex V deal with pollution of the sea by sewage and garbage from ships.

Recent amendments introduced Annex VI, which limits sulphur oxide and nitrogen oxide emissions from ship exhausts as well as particulate matter. It also prohibits the deliberate emission of ozone depleting substances.

## 3.6 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924

This convention has been incorporated into South African law in terms of the Carriage of Goods by Sea Act, 1986 and is dealt with in Section Two of Part One.

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