

ACT

To amend the Petroleum Products and Energy Act, 1990, so as to grant more comprehensive powers to the Minister of Mines and Energy to make regulations, more particularly relating to the import, supply, storage, possession and sale of petroleum products, the licensing of and conducting of business by wholesalers, resellers and consumer installation operators, the application of health, hygiene, safety and environmental standards and requirements, and minimum specifications as regards standards of facilities, structures and equipment and restrictions on the sale and use of petroleum products; to provide for reasonable and just contractual rules and principles in the petroleum industry; to provide for increased penalties for contravention in certain cases of the regulations and the Act; and to provide for incidental matters.

(Signed by the President on 28 February 2000)

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

Amendment of section 1 of Act No. 13 of 1990

1. Section 1 of the Petroleum Products and Energy Act, 1990 (hereafter referred to as the principal Act), is amended by the insertion after the definition of 'petroleum products' of the following definition:

" 'regulation' means a regulation made or in force under this Act;"

Insertion of section 2A in Act No. 13 of 1990

2. The following section is hereby inserted after section 2 of the principal Act:

"Regulations

2A. (1) The Minister may make, without prejudice to any other power granted by this Act to him or her to make regulations, regulations especially relating to-

(a) the licensing of outlets and petroleum product wholesalers, including-

(i) the establishment and constitution of a licensing authority to evaluate and consider applications for the granting of licences, and the different kinds of licences which may be granted;

(ii) the form and manner in which an application for a licence shall be made, including the procedures relating to the lodging of applications, the evaluation or consideration of an application, and the granting or refusal of licences;

(iii) the qualifications of applicants;

(iv) the application fees and the licence fees payable, and the circumstances in which application fees or licence fees may be refunded;

(v) general conditions, restrictions or privileges applicable to all licences;

(vi) special conditions, restrictions or privileges which may be imposed by the licencing authority, at its discretion, in respect of a particular licence or a category of licences, and the manner in which such discretion shall be exercised;

(vii) criteria or procedures to be applied in the evaluation of an application for a licence;

(viii) the form and duration of a licence, the obligations of a licence-holder to furnish, during the currency of a licence and on the discontinuance of the business conducted in terms of the licence, information to the licensing authority, and the information to be furnished;

(ix) the discontinuance of a business conducted in terms of a licence, and the procedures relating to such discontinuance;

(x) amendments to, and the transferability of, licences;

(xi) the consequences of the contravention of, or the failure to comply with, any restriction or general or special condition relating to a licence, including the unconditional or conditional suspension or cancellation of a licence, the procedures to be followed in connection with such suspension or cancellation, and the effects thereof; and

(xii) circumstances other than those provided for in paragraph (xi), wherein licences may be unconditionally or conditionally suspended or cancelled, and procedures to be followed in connection with such suspension or cancellation, and the effects thereof;

(b) the conducting of business in respect of petroleum products, including-

(i) the prohibition on discounting with regard to petroleum product sales, or any category thereof, and self-service by consumers, cash deposits and storage facilities, and the prevention of vertical integration in the oil industry;

(ii) the application of health, hygiene, safety and environmental standards and requirements, including-

(aa) the obligation to comply with standards and requirements prescribed by any other law;

(bb) the duties of persons in respect of the protection of the health of others and the avoidance of environmental harm, the precautions in respect of the keeping, handling, conveying, using and disposing of petroleum products and in respect of underground leaks or other spills of petroleum products; and

(cc) the minimum safety standards, fire-fighting, security drills and contingency plans, pre-planning against fires and pollution, security of premises, safety equipment, emergency measures and provisions for product security;

(c) the premises where petroleum products are stored, including-

(i) the specifications in respect of the physical aspects;

(ii) the facilities, equipment, design and construction;

(iii) the minimum electrical and other standards; and

(iv) the regulation of the abandonment,

of or in respect of such premises, and the application to such premises, facilities and equipment of specifications or standards prescribed by any other law;

(d) the records and information to be kept in respect of licences and registrations by the licensing authority;

(e) the maintenance of security and the continuity of petroleum product supplies in Namibia, and the maintenance of contingency and reserve petroleum product stocks;

(f) the regulation of, including the imposition of prohibitions and duties in connection with, consumer installations;

(g) the powers and functions of controllers and inspectors;

(h) the cleaning-up of petroleum product spills, leaks and other accidents or incidents relating thereto, and the insurance and recovery of costs in respect thereof;

(i) the regulation of state subsidies, rebates, refunds and remissions in respect of the sale of petroleum products;

(j) the specifications for quality control and other standards in respect of petroleum products, including the incorporation by reference into the regulations of specifications prescribed by or issued under any other law and the prohibition on the blending or mixing of such products with other substances;

(k) the powers, duties and functions of the Permanent Secretary in respect of the implementation of measures to enforce, on an administrative level, compliance with the regulations by licence-holders and by the petroleum products industry, the appointment of compliance officers by licensed resellers and wholesalers, the approval of such appointments by the Permanent Secretary, and the powers, duties and functions of such compliance officers;

(l) appropriate transitional provisions for the phasing-in of the provisions of the regulations made under this section, in order to ensure a smooth and fair phasing-in of the regulatory regimes envisaged by this section; and

(m) any other matter related to any subject-matter specified or referred to in this subsection and deemed necessary or expedient to be prescribed by the Minister for the better achieving of the objects of this Act, the generality of this paragraph not being limited by anything contained in any paragraph of this subsection.

(2) Different regulations may be made under subsection (1) in respect of different categories of petroleum products, outlets, licences, licence-holders, standards, specifications and requirements, wholesalers, subsidies, rebates, refunds or remissions, provided that any such differential treatment does not amount to unfair discrimination.

(3) The provisions of this section, in so far as they provide for a limitation on the right to conduct business relating to the petroleum industry by any person are enacted upon the authority of Article 21(2) of the Namibian Constitution."

Insertion of section 4A in Act No. 13 of 1990

3. The following section is hereby inserted after section 4 of the principal Act:

"Agreements between operators and wholesalers

4A. (1) Any dealer agreement concluded between a wholesaler and an operator, and any supplementary provisions to such an agreement, shall be based on and comply with the following:

(a) Any law, including a provision of the common law, applicable in Namibia regarding competition and fair contractual procedures and practices;

(b) in so far as the dealer agreement or any provision supplementary thereto provides for the exercise of any discretionary powers which adversely affects rights or interests, such owner shall, subject to the other provisions of

this section be exercised in accordance with fair and reasonable practices and procedures, which shall include -

(i) the giving of adequate notice of the exercise of the discretion and the nature and purpose thereof, as well as the furnishing of reasons for a decision (if requested thereto);

(ii) compliance with the principle providing the other party reasonable opportunity to be heard;

(iii) acting in good faith having regard to clearly established facts and circumstances only;

unless it is justifiable and reasonable under the circumstances to depart from the requirements set out in this paragraph;

(c) notwithstanding paragraph (b), in so far as the dealer agreement or any provision supplementary thereto provides for the termination of the agreement in the event of a breach thereof -

(i) in the case of a non-material breach, written notice shall be given that such non-material breach has occurred and a reasonable period shall be allowed to rectify such breach prior to termination of the agreement;

(ii) in the case of a material breach, the agreement may be terminated without prior notice or opportunity to rectify the material breach if it is fair and reasonable under the circumstances to do so,

and for the purposes of this paragraph -

(aa) only a breach of the agreement which relates to a fundamental and substantive term of the agreement shall be deemed to be a material breach; and

(bb) no agreement shall contain a provision deeming all provisions of the agreement to be material;

(d) reasonable access to correspondence, documents and property only in so far as they relate to the business of operating an outlet in terms of the dealer agreement; and

(e) promotion of security of tenure, but subject thereto that a reasonable probationary lease period may be provided for in the case where a dealer agreement is concluded with a new operator.

(2) (a) Without derogating from any other right a person may have in terms of any other law or with regard to access to a court, where a party is of the opinion that a provision in a dealer agreement does not comply

with a principle set out in subsection (1), such party may refer the matter for arbitration as provided in paragraph (b).

(b) The Minister shall by notice in the *Gazette* determine the arbitration procedure which shall apply with regard to a matter referred to in paragraph (a) and the Minister may by regulation prescribe any matter supplementary to such arbitration procedures.

(3) The provisions of this section, in so far as they provide for a limitation on the right to conduct business relating to the petroleum industry by any person, are enacted upon the authority of Article 21(2) of the Namibian Constitution.

(4) Section 21 of this Act shall not apply to subsection (1) of this section.

(5) For the purposes of this section -

(a) "wholesaler" means any person who imports or distributes petrol or diesel for purposes of the wholesale thereof by that person in Namibia or who exports petrol or diesel;

(b) "operator " means any person who conducts business for the sale of petrol and diesel at an outlet."

"Substitution of section 6 of Act No. 13 of 1990

4. The following section is hereby substituted for section 6 of the principal Act:

"6. The Minister may on such conditions as the Minister may deem fit **[by regulation or]** by notice in writing to any person or category of persons, or by notice in the *Gazette*, exempt such person or category of persons from any provision of this Act."

Amendment of section 8 of Act No. 13 of 1990

5. Section 8 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Minister may by notice in the *Gazette* declare any regulation issued under section 2(1)(a), 2A or 4 to apply also with reference to any person or category of persons in the service of the State while acting in the performance of his or her duties."

Amendment of section 21 of Act No. 13 of 1990, as amended by section 4 of Act No. 29 of 1994

6. Section 21 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) If any person contravenes or fails to comply with any provision of this Act, and such contravention or failure is not elsewhere in this Act declared an offence, or

hinders an inspector in the exercise of his or her powers or the performance of his or her duties under this Act, such person shall be guilty of an offence and liable on conviction to a fine not exceeding **[two thousand rand]** N\$20 000 or to imprisonment for a period not exceeding **[one year]** two years or to both such fine and such imprisonment."

Short title

7. (1) This Act shall be called the Petroleum Products and Energy Amendment Act, 2000 and shall come into operation on a date to be determined by the Ministry of Mines and Energy by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.
