Corporate & Commercial

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CDH INCORPORATED

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SOUTH AFRICA

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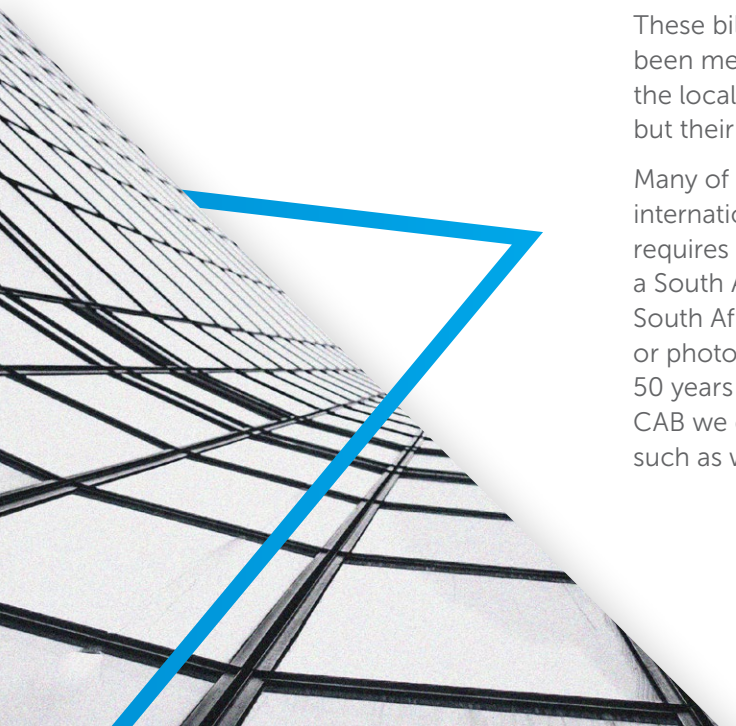
One step closer to law: The Copyright Amendment Bill and Performers' Protection Amendment Bill



On 29 February 2024, both houses of the National Assembly approved these two controversial bills and sent them to the President for assent. The drafters of the Copyright Amendment Bill (CAB) stated that it is aimed at updating the Copyright Act 98 of 1978 (Copyright Act) to make it more effective for educators, researchers, and people with disabilities and also to ensure that artists "*do not die as paupers due to ineffective protection*". This latter aspect is also addressed by the Performers' Protection Amendment Bill (PPAB) which states that it seeks to protect performers' moral and economic rights, as well as the rights of producers of sound recordings.

These bills have, at various stages of the legislative process, been met with criticism from diverse participants in both the local and international publishing and television sectors, but their concerns do not appear to have been addressed.

Many of the changes are in line with measures introduced internationally, such as the "*artist resale right*" which requires that royalties be paid to the artist, if they are a South African citizen (or domiciled or resident in South African), of a painting, sculpture, drawing, engraving or photograph on any "*commercial*" resale for a period of 50 years from the year the creator died. However, in the CAB we don't see the exemptions that the UK provides for, such as where it was bought as stock or for sales between private individuals, without the use of an art market professional, or to public, non-profit making museums. Instead, the CAB uses the word "*commercial*" which requires that the sale be part of a business or trade for financial or economic gain – a definition which will need to be interpreted in circumstances as they arise.

Shift to US model

Despite South Africa having a Copyright Act that is based on UK legislation, and hence decades worth of case law interpreting the concept of "*fair dealing*" to determine whether use or copying of copyrighted material without a license is permissible or not, we will now have to work with the concept of "*fair use*" adopted by the US. Similar to the existing "*fair dealing*", this term is not defined exhaustively but is instead used with an inclusive list of examples. This means that we will still have to look at case law to decide what is permissible, but now with reference to how the US has interpreted this phrase. US law is entirely foreign to our jurisprudence, which draws extensively from the mercantile principles within the UK legal system (as well as Roman-Dutch law).

Technological protection measures and copyright management

Both bills introduce the concept of technological protection measures and copyright management information, in line with the US' Digital Millennium Copyright Act, the EU Directive, and the UK's copyright regulations. All are aimed at protecting copyright in digital media, and the update to our regime is a welcome one.

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Royalty shares for authors

When it comes to music or literary works, the author/creator will be entitled to *"equitable remuneration, or a fair share of the royalty received"* when the work is dealt with in any way, even if the author/creator has already divested themselves from rights in the work. The fair share is to be agreed in writing in a manner that is yet to be prescribed by the drafters of the CAB and shall prevail over any subsequent assignment of the copyright.

Copyright duration and restrictions

The CAB doesn't tamper with the duration of copyright, so it would seem that the rights of authors/creators to claim a share in royalties can only endure for the period in which the work enjoys copyright protection. However, the current wording of the bill doesn't cover this clearly. On the topic of duration, it is noted that assignments of copyright will now only be effective for 25 years, whereafter the rights will revert to the assignor.

Rights for libraries and educators

Extensive rights are granted to libraries, archives, museums, and galleries to deal with copyrighted works without restriction as well as to enable *"authorised entities"* or *"persons as may be prescribed"* to make works accessible to those with disabilities without authorisation from the copyright owner. Copying of copyrighted works for *"educational and academic activities"* is now also permissible, meaning the value to authors and copyright owners could be materially compromised given the wide terminology. Of some concern is that the translation and reproduction of published works can now be licensed by the Copyright Tribunal without consent from the copyright owner in certain circumstances. Critics of the CAB believe this will result in a decline in the writing of local works as it will no longer be worthwhile for authors or publishers.

Commissioned works

No longer will ownership of copyright in a commissioned work (the concept known as *"work-made-for-hire"* in the US) vest in the commissioner who pays for it (where the work is a photograph, painting, or drawing of a portrait, the making of a gravure, the making of an audio-visual work or the making of a sound recording). It must now be agreed by the parties and, failing agreement, the person commissioning the work only has such rights as are necessary for the purpose of the commission.

Performing artists

Performing artists are, however, feeling very triumphant, because both bills provide that part of the royalties received by owners of copyright in audio-visual works must be paid to the performers featured in them. Actors (the definition of performer expressly excludes extras and persons featured incidentally or in an ancillary manner) could now see additional compensation for the

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programmes they have acted in the past, when whoever owns the copyright in the programme sells it to a streaming platform, for example. The royalty share has to be agreed between the copyright owner and the performer or their collecting society, and that agreement is binding on any subsequent owner of the copyright.

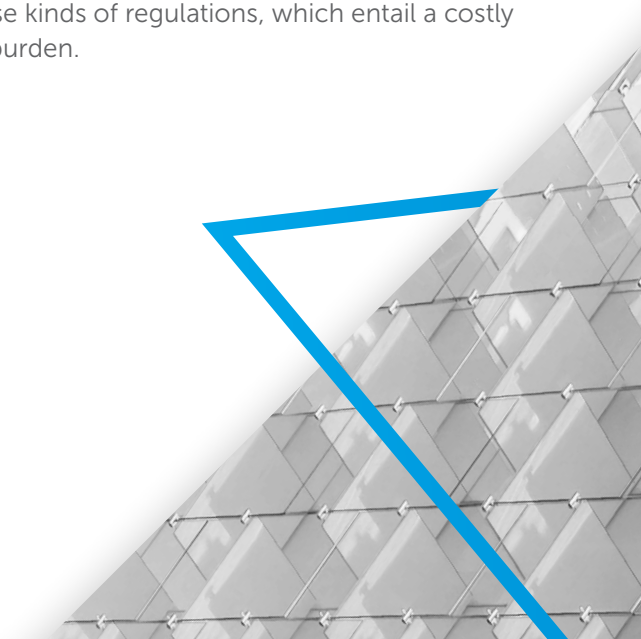
Owners of copyright in sound recordings will have to pay 50% of whatever they receive (as opposed to the existing agreed share) to any performer on the sound recording unless they agree otherwise A form of this provision is included in both bills, with differing terminology, which could create some confusion.

The PPAB extends the principle of "*moral rights*" in the Copyright Act to actors, singers, musicians, dancers, and any person who performs literary, musical, artistic, dramatic, or traditional works, meaning that performers can claim to be identified with their performances and object to any changes of the performance which they deem prejudicial.

The bill also creates a specific list of rights, along the lines of those in the Copyright Act, which a performer will exclusively hold in their performance. Some of those rights will pass to the producer of the audio-visual fixation or sound recording if such fixation or recording is done with the performer's written consent. That written consent has to contain elements which are still to be prescribed but include provision for equitable remuneration or royalties. In the case of a sound recording, the consent is only valid for 25 years, whereafter the rights revert to the performer.

Details to be confirmed in regulations

Much of the detail in both bills (royalty percentages, time frames, and offices of authority) must still be published in regulations, so the economic impact of the changes is yet to be assessed. However, anyone dealing in an audio-visual work or a sound recording, for example distributing it or copying it, must register that dealing, in a way still to be prescribed, with an entity unspecified by the bills, and submit reports to performers, owners or collecting societies, including reporting on royalties payable – otherwise they face five years in prison if they are a natural person, or a fine of 10% of annual turnover. These provisions in the law will be alarming for foreign companies acting in our industries who have in the past been attracted to working with South Africa due to the absence of these kinds of regulations, which entail a costly administrative burden.



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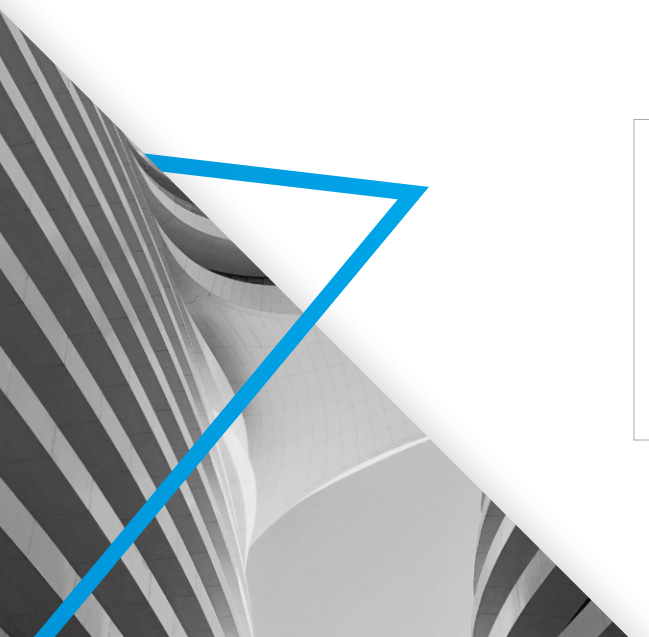
From a legal point of view, the interpretation of the new provisions presents many challenges. In addition to establishing precedent for the interpretation of "*fair use*", we will have to deal with anachronisms like the requirement that where an author is unknown, one has to the apply to the Commission of Companies and Intellectual Property (for what, the CAB does not say) as well as publish an advertisement in the Government Gazette and two daily newspapers.

Also, the CAB will hold that contracts that renounce a right or protection afforded by the Copyright Act are not enforceable unless it is to make the work subject to an open license or dedicated to the public domain. This prevents parties from contracting out of the provisions of the Act, which seems an unfair restriction of one's right to contract freely. This has the potential to create a number of obstacles to the effective commercial exploitation of intellectual property, which have to date been successfully managed in accordance with international practice, the common waiver of moral rights being only one such example.

With these bills being one step away from becoming law, it looks like we are facing (with credit to Aldous Huxley) a "*Brave New World*", where we will have to grapple with unclear provisions and newly empowered regulating bodies, but it is no doubt time that we get on with the show.

Emma Kingdon



Cession confessions: FAQ guide to cession in security

In South Africa, a cession in security serves as a cornerstone for securing transactions and protecting creditors. This article addresses common questions surrounding the perfection of various assets under a security cession.

Cession in security of shares

Certificated securities: Does one need to take delivery of share certificates to create a valid cession in security?

No, delivery of a share certificate is not a requirement to create a valid cession. As a general rule the law prescribes no formalities for a cession of certificated shares and the cession is created by consensus between the parties.

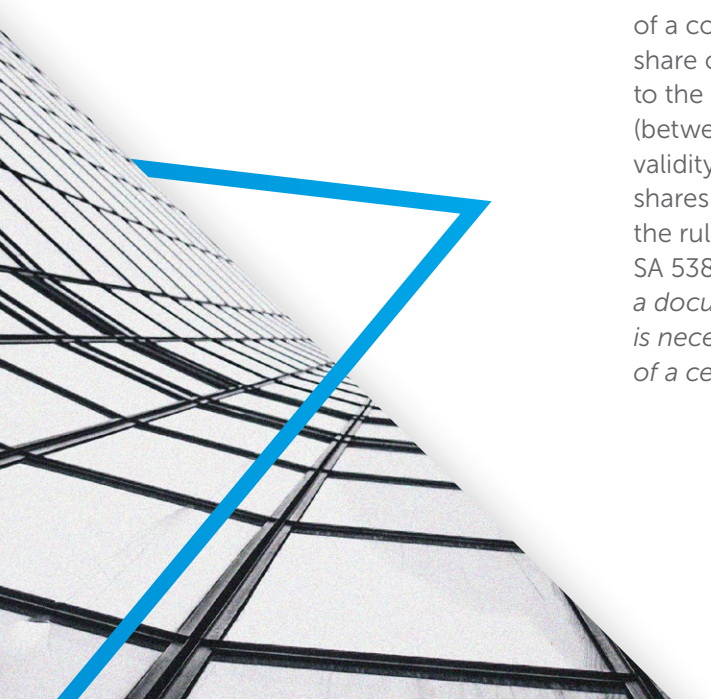
In *Botha v Fick* [1995] (2) SA 750 (A), the court held that no formalities are required for the cession of ownership – mere consensus is sufficient to establish a cession. The legal duty resting on a registered shareholder of a company who has sold their shares to deliver a share certificate and a completed share transfer form to the purchaser arises from the obligatory agreement (between the parties) and is not a requirement for the validity of a cession whereby the right and title to the shares are transferred. The court further explained that the rule referred to in *Labuschagne v Denny* [1963] (3) SA 538 (A) – that *"where a right of action is evidenced in a document, delivery of the document to the cessionary is necessary, not for the validity but for the completion of a cession of that right of action"* – is not a rule of substantive law and it does not establish any requirement for the validity of the cession. This rule amounts only to a **matter of evidence** wherein delivery will be considered to be an important factor where the question arises as to whether or not the cession has been proved.

Uncertificated securities: What is the procedural requirement to create a valid cession in security of uncertificated shares?

Uncertificated securities are defined in section 1 of the Companies Act 71 of 2008, read with section 1 of the Financial Markets Act 19 of 2012 (Financial Markets Act), as securities that are not evidenced by a certificate or written instrument and that are transferable by entry without a written instrument. There is therefore no share certificate that can be delivered to effect a cession.

While delivery of a share certificate is not a requirement for validity, as explained above, it may still be vital evidence of a cession. In order to address this, section 39 of the Financial Markets Act provides that a cession to secure a debt must be effected by entry into the account of the cedent in favour of the cessionary, specifying the name of the cessionary, the interest in the securities ceded and the date. This will ensure that the security interest is effective against third parties.

In this respect securities account administrators are often provided with a written notice of the security interest being created and request a signed acknowledgement and confirmation that the interest has been noted against those particular uncertificated shares.



Cession confessions: FAQ guide to cession in security

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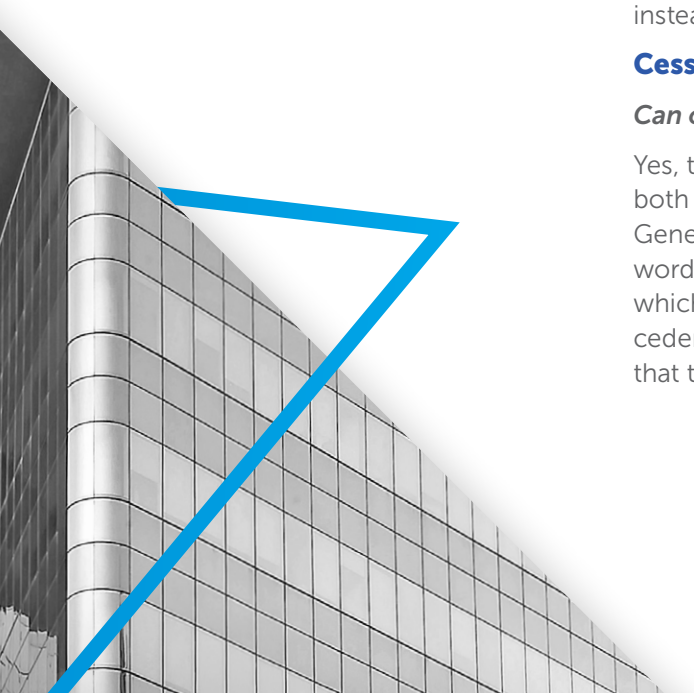

Cession of bank accounts

Does one need to adopt any perfection process to create a valid cession in security of bank accounts?

No, there are no specific requirements or formalities prescribed for establishing a cession in security over a bank account. As is the case with a cession in security of certificated shares, consensus, usually in the form of a valid cession in security agreement, alone is sufficient to establish the security.

We often request a signed notice from the cedent to the account bank notifying them of a particular cession and a signed acknowledgement from the account bank, acknowledging the security interest created over the particular bank account(s). A notice and acknowledgement in this instance is made for purposes of protecting the cessionary against any loss that it may incur in cases where the account bank renders performance to the cedent instead of the cessionary in cases of default.

Cession of book debts

Can one cede both existing and future book debts?

Yes, the cession in security of book debts can extend to both existing debts and debts which may arise in the future. Generally, a cession in security of this nature would be worded so as to endure for as long as the obligation for which the cession acts as security exists, ensuring that the cedent has the right to claim and receive until such time that the debt is satisfied.

In practice, the debtor of the book debt must be notified of the cession in security to ensure that, upon notice of default, payment is made to the cessionary, and not inadvertently received by the cedent. If the cession results in a splitting of claims, i.e. if the book debt is ceded to a consortium of lenders who are not acting through a single lender, then the written consent of the debtor is required.

Cession of insurance proceeds

Does one need to adopt any specific perfection process to create a valid cession in security of insurance proceeds?

The conclusion of a valid cession in security agreement to establish a security interest over insurance proceeds requires certain free choice provisions, as contained in section 43 of the Short-Term Insurance Act 53 of 1998 (Short-Term Insurance Act), to be included in the cession in security agreement for it to not be void (except in cases where money is loaned upon the security of the mortgage of immovable property).

Each cedent needs to be provided with notice of their entitlement and rights under section 43 of the Short-Term Insurance Act and to then confirm that they have exercised their freedom of choice and that they were not subject to any coercion or inducement as to the manner in which that freedom of choice was exercised. We often include the notice and confirmation requirement in the security agreement itself.

Cession confessions: FAQ guide to cession in security

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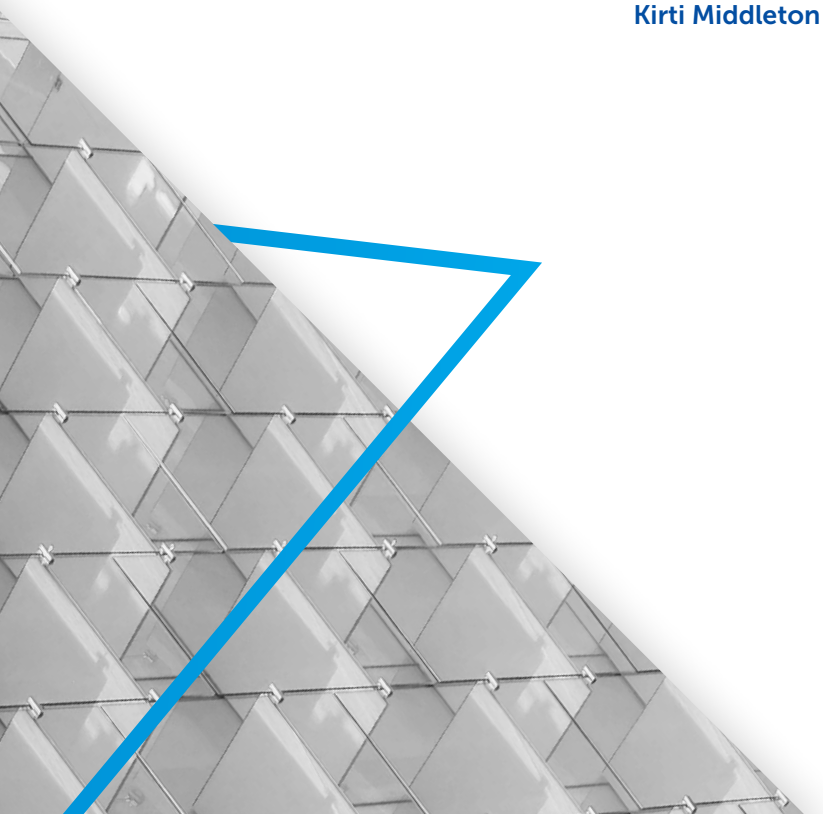
While there are no specific perfection requirements or formalities prescribed for validity, we often request that a signed notice be sent to an insurer from the cedent and for a signed acknowledgement, together with confirmation of noting of the cessionary's interest on an insurance policy to be returned. This facilitates enforcement as it serves as evidence of the cession and ensures the co-operation of the insurer at enforcement as a means of protecting the cessionary against any loss that may be incurred by way of the insurer rendering performance to the cedent instead of the cessionary in cases of default.

It is worth noting that in cases where the underlying insurance policy requires the consent of the insurer to effect any security interest, such consent will be required for the creation of a valid cession, and in cases where the security cession amounts to a splitting of claims, then the insurer's consent is required.

Kirti Middleton and Kerah Hamilton



Chambers Global 2024 Results

Corporate & Commercial

Chambers Global 2021–2024 ranked our Corporate & Commercial practice in: **Band 1**: Corporate/M&A and in

Chambers Global 2024 ranked our Corporate & Commercial practice (Kenya) in Band 4 Corporate/M&A.

Chambers Global 2024 positioned our Private Equity sector in the "**spotlight**".

Ian Hayes ranked by Chambers Global 2022–2024 in **Band 1**: Corporate/M&A.

David Pinnock ranked by Chambers Global 2022–2024 in **Band 1**: Private Equity.

Peter Hesseling ranked by Chambers Global 2022–2023 in **Band 2**: Corporate/M&A and in **Band 3**: Capital Markets: Equity in 2023–2024.

Willem Jacobs ranked by Chambers Global 2022–2024 in Band 2: Corporate/M&A and in **Band 3**: Private Equity.

Sammy Ndolo ranked by Chambers Global 2021–2024 in **Band 4**: Corporate/M&A.

David Thompson ranked by Chambers Global 2024 in **Band 5:** Corporate/M&A.

Vivien Chaplin ranked by Chambers Global 2024 in **Band 5**: Corporate/M&A.

Chambers TOP RANKED Global 2024
Cliffe Dekker Hofmeyr

The unpacking of a Strategic Integrated Project

Speaking at the third Sustainable Infrastructure Development Symposium in Cape Town on 19 March 2024, President Cyril Ramaphosa stated that investment in infrastructure is central to the achievement of South Africa's development goals. President Ramaphosa highlighted some initiatives which seek to address this, including the amendment of the Division of Revenue Act 5 of 2023 to enable provincial governments to use their infrastructure grants and budget allocations to crowd-in private sector finance for large social infrastructure programmes, as well as amendments to the public-private partnership regulations. Of specific importance to South Africa's development goals is the implementation of Strategic Integrated Projects (SIPs) which aims to minimise the red tape associated with projects that are of social or economic importance to South Africa.

What is an SIP?

Broadly speaking, SIPs are projects that are specifically designated as such in terms of the Infrastructure Development Act No 23 of 2014 (IDA).

In terms of section 7 of the IDA, for a project to qualify as an SIP, the project must comply with any of the following criteria:

- the project would be of significant economic or social importance to South Africa;
- the project would contribute substantially to any national strategy or policy relating to infrastructure development; or
- the project meets a certain monetary value determined by the Presidential Infrastructure Coordinating Commission (Commission), which has been established by the IDA.

In addition, the project must comprise one or more installation, structure, facility, system, service, or process relating to any matter specified in Schedule 1 and the project must be included in the national infrastructure plan by the Commission. Schedule 1 of the IDA then goes on to list the various types of structures, facilities, systems, services, and process applicable to the IDA, one of which is oil or gas pipelines, refineries, or other installations.

Practical steps

Applications to have a project declared an SIP must be lodged online with Infrastructure South Africa. The Commission will then decide whether or not to declare the project to be an SIP and this will be published in the

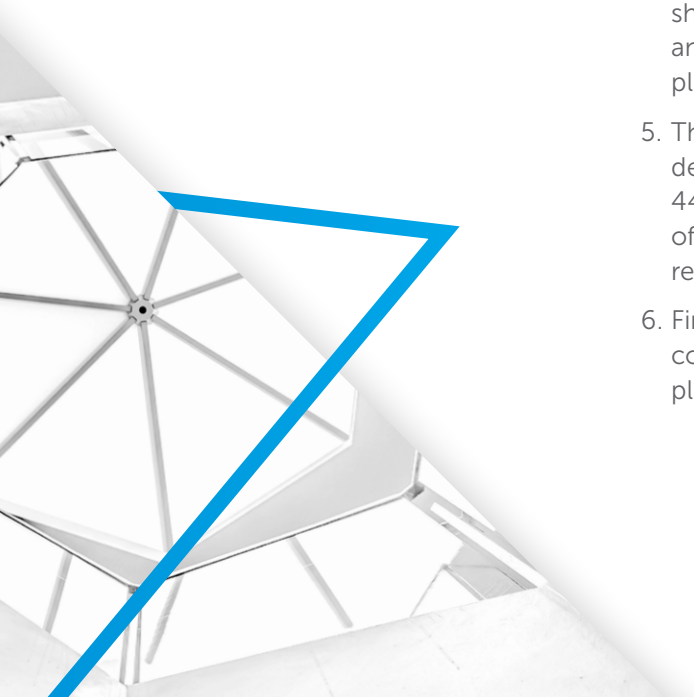
The unpacking of a Strategic Integrated Project

CONTINUED

Government Gazette. Applicants need to specify whether their project relates to the public sector or the private sector; thereafter applicants must submit the relevant documentation and complete the application form.

Schedule 2 of the IDA then provides the framework and guide for the implementation of an SIP:

1. After the submission of the application, the steering committee shall consider and approve the application and the project plan within seven days.
2. Public consultations regarding the application and project plan shall be held for 30 days.
3. The applicant shall then have 52 days in which to amend the application and project plan and must submit it to the relevant authority for consideration and approval.
4. After the approval of the project plan, the applicant shall have 60 days to submit a detailed development and mitigation plan based on an approved project plan to the relevant authority.
5. Thereafter, public consultations regarding the development and mitigation plan shall be held for 44 days. These consultations also include a review of the development and mitigation plan by the relevant authority.
6. Finally, the relevant authority shall have 57 days to consider and assess the development and mitigation plan and make a final regulatory decision.



SIPs in the oil and gas space

Several projects in the oil and gas sector have been declared SIPs in the Government Gazette:

- Renergen's onshore Virginia Gas Project was declared an SIP on 6 December 2022. In October 2021 Renergen discovered a large concentration of helium on a site which produces liquified natural gas (LNG). The project has since been designated to have a "*strategic*" status. Currently, Renergen has continued the production of LNG while finalising construction plans on infrastructure for helium production.
- Several projects related to green hydrogen production were declared to be SIPs in November 2022 and given priority status. These onshore projects aim to produce different renewable energy resources, including green hydrogen and green ammonia. One of the projects that was declared to be an SIP is the Hydrogen Valley Programme which is estimated to be able to create 14,000 to 30,000 jobs per year and contribute billions to South Africa's GDP.

In addition to this, the CEO of Kinetiko Energy Ltd has recently stated that a joint venture between Afro Energy Pty Ltd, a subsidiary of Kinetiko Energy Ltd, and South Africa's Industrial Development Corporation was registered under the Government's SIP mechanism. The joint venture project aims to appraise and produce LNG onshore. It is estimated that it will unlock around two trillion cubic feet in gas reserves in South Africa.

The unpacking of a Strategic Integrated Project

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Benefits of a project being declared an SIP

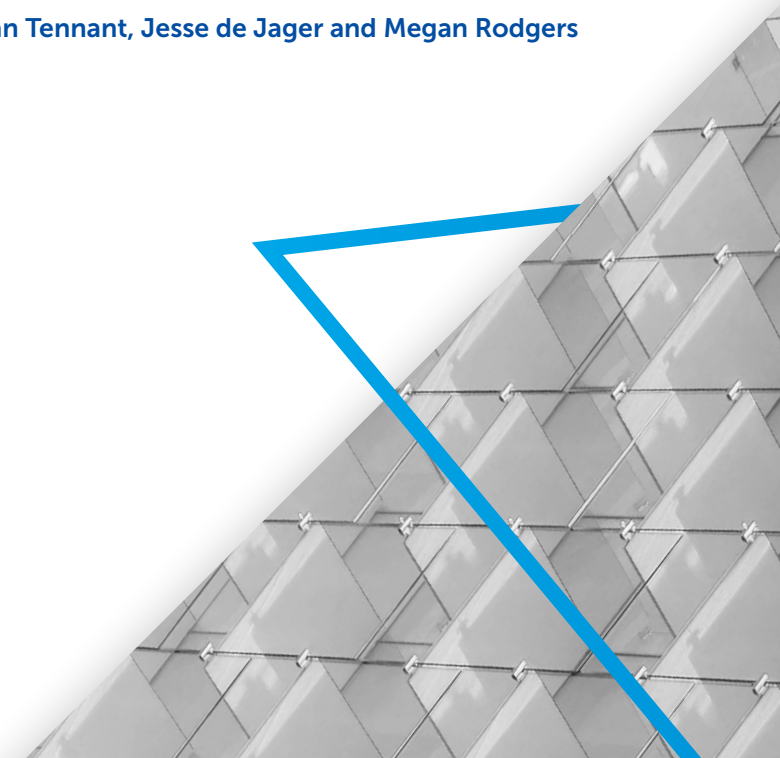
The primary benefit of a project being declared an SIP is that the processes relating to any application for approval, authorisation, licence, permission, or exemption are streamlined.

In this regard, the IDA establishes mechanisms through which declared SIP projects are implemented in an effective and expeditious manner. Once declared to be SIPs, the projects are assigned to steering committees whose main purpose is to see out the implementation and operation of the SIPs. The steering committee will then be tasked with facilitating the implementation of the SIP in line with the time periods listed in Schedule 2 as outlined above.

Practically speaking, a project that has been designated as an SIP carries the benefit of accelerated timeframes for competent authorities to make a decision without compromising the process. In the context of oil and gas exploration and production, what this could mean is that permitting processes such as obtaining environmental authorisations, as required by the National Environmental Management Act 107 of 1998 will be faster since the Director General of the Department of Mineral Resources and Energy would be expected to make a final decision on the environmental authorisation sooner than what would be the case in the ordinary course.

Ultimately the benefit of a project being declared an SIP is substantial, particularly in sectors such as the oil and gas space which have considerable licencing and permit requirements. Where possible, companies should look to have their projects declared SIPs so as to speed up processes related to permits and licensing and to minimise time periods related to legislative obligations such as consultations and participations.

Dean Tennant, Jesse de Jager and Megan Rodgers



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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