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Offshore Petroleum Association of South Africa

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Offshore Petroleum Association of South Africa
(OPASA)

Written submissions to the National Assembly Parliamentary Portfolio Committee on Mineral Resources and Energy on the Upstream Petroleum Resources Development Bill B13-2021

Introduction

OPASA thanks the Chairperson of the Parliamentary Portfolio Committee for the opportunity to make written submissions on the Upstream Petroleum Resources Development Bill B13-2021 (**the Bill**).

OPASA would also like to, through the Parliamentary Portfolio Committee, thank and commend the drafting team of the Petroleum Agency South Africa and the Department of Mineral Resources and Energy for all the diligent work which has gone into drafting the Bill. All of OPASA's comments are made in a spirit of constructive engagement, which it hopes will assist the Committee in improving the Bill to the benefit of South Africa and of attracting local and foreign direct investment in the upstream petroleum industry in South Africa.

About OPASA

OPASA is a member-funded representative body for the offshore upstream petroleum industry in South Africa, and OPASA members include majority Historically Disadvantaged South African owned local companies as well as international oil and gas majors and super-majors. Every OPASA member is the holder of an exploration right and/or a production right in South Africa, granted in terms of sections 80 or 84 of the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**) respectively.

We confirm that this submission reflects the broad-based consensus of the OPASA member companies, which are as follows:

- TotalEnergies EP South Africa B.V.
- CNR International (South Africa) Limited
- Impact Oil and Gas Limited
- New African Global Energy SA Proprietary Limited
- Sasol SA Proprietary Limited
- Shell E&P South Africa B.V.
- Sungu Sungu Petroleum Proprietary Limited

- Sunbird Energy Holding Limited
- The Petroleum, Oil and Gas Corporation of South Africa (SOC) Limited
- Thombo Petroleum Limited

Structure of Submissions

OPASA's submissions are divided into:

- Part A dealing with Key Issues
- Part B dealing with Comments on Sequential Clauses

However, the submissions in Part A must be read with the submissions in Part B.

Part A: Key issues

1 **Licensing Mechanisms (Rights and Permits)**

1.1 Application system

(1) The Bill introduces a new concept, namely the petroleum right, which is intended to combine the functions of exploration rights and production rights as currently provided for under the MPRDA. The Bill provides for two types of licensing rounds for petroleum rights, each of which would be triggered by the Minister publishing an invitation notice in the Gazette. These are referred to as "competitive administrative licensing rounds" (clause 15 of the Bill) and "open licensing rounds" (clause 37 of the Bill) respectively.

(2) Therefore, unless the Minister has done so, persons cannot of their own accord initiate applications. By contrast, the MPRDA provides for an "invitation" to be issued in the context of competitive bidding, but also provides for the direct submission of applications at any time outside of an invitation process. In this Bill, however, both competitive and open licensing rounds must be triggered by ministerial invitation.

(3) OPASA therefore submits that although the Minister should be empowered to invite applications, the parallel procedure of applications initiated by any person, as provided for in sections 74, 76, 79 and 83, of the MPRDA, should be retained. As an example of how this may be implemented, OPASA notes that the licensing mechanism in respect of reconnaissance permits already allows this flexibility. Specifically, clause 16(5) of the Bill states that notwithstanding the provisions of clause 16(1) (concerning the issuing of a ministerial invitation for the submission of reconnaissance permit applications) applications for reconnaissance permits may be lodged in the prescribed manner with the Petroleum Agency "at any time" as is indeed provided for in clause 38.

1.2 New permitting requirements

(1) The Bill introduces two new consents not required in terms of the current regulatory regime, namely "Drilling Permits" in terms of clause 52 and a "Permission to produce petroleum and conduct tests during exploration" in terms of clause 53.

(2) It is respectfully submitted that these new permitting requirements represent an undue administrative burden on both industry and regulators and which may cause operational delays.

(3) The activities which these new permitting requirements seek to govern would in the normal course be contained in the exploration and/or production work programme to be undertaken by rights holders, with relevant environmental authorisations already obtained at the contemplated application stage.

(4) In light of the above:

(a) the need to obtain a drilling permit would delay operations and could cause lapsing of the then current term of the petroleum right, so that the period of 60 days in clause 52(3) should be shortened to a period not exceeding 30 days; and

(b) in regard to clause 53(4), it is unclear why a permit to produce or conduct drill stem tests is non-renewable. In this regard, OPASA submits that such a permit should be valid for the duration of the exploration phase. Alternatively, provision should be made for such permit to be renewed.

1.3 Notarial Execution of Permits and Rights

(1) Clause 42(1)(a) refers to the obligation of a holder notarially to execute a permit, right or deed of renewal of a retention permit, within 30 days from the date of notification by the Petroleum Agency of the outcome of the application. However, the 30 day period is too short and would be an undue and impractical administrative burden on the holder, and should therefore be 90 days. Regulation 41 made in terms of the Mining Titles Registration Act, 1967 provides that for registration of production rights, a diagram prepared by a land surveyor and approved by the Surveyor-General must be attached to the production right. Presumably, Regulation 41 will be amended so as to apply also to petroleum rights. The preparation and approval of such diagrams takes many months so that even 90 days may be insufficient and this certainly cannot be achieved within 30 days. Moreover, resolutions and powers of attorney also take time and in the case of foreign companies would need to be authenticated, all of which also is likely to take well longer than 30 days.

(2) It is therefore proposed that, in the first line, the figure "30" be deleted and substituted with the figure "90".

(3) The above comment applies similarly to clause 42(2), which should refer to more than one extension (i.e. to extensions from time to time), the period of each of which should be a period that is reasonable in the circumstances, and not less than 90 days.

(4) Clauses 42(3) and (4) refer to automatic lapsing and reversion to the State of a permit or right which has not been notarially executed within the periods referred to therein.

(5) OPASA submits that clauses 42(3) and (4) are unwarranted in regard to a formality such as notarial execution, severely jeopardise security of tenure, and hence are contrary to the object of security of tenure in clause 2(h), and should be replaced by provisions to the effect that failure to comply with clause 42(1) will be deemed to constitute a breach to which the provisions of clause 88 will apply. Therefore, OPASA requests that:

(a) clauses 42(3), (4) and (5) be deleted in their entirety;

(6) in the alternative, instead of the right or permit lapsing as contemplated clauses 42(3), (4) and (5), the provisions of clause 88 be invoked so as to afford the holder an opportunity to remedy the breach and in this regard, it is suggested that in clause 42(3), at the end of the second line, the words "subject to section 88" be inserted.

(7) Our full and further submissions in this regard are set out in Part B.

2 Discovery Appraisal and Declaration of Commerciality

2.1 The provisions of the Bill governing discovery of petroleum and appraisal (clause 54) and declaration of commercial discovery (clause 57) require that, when a discovery is made the holder must conduct tests within the prescribed period of time to determine whether such discovery is worthy of appraisal or relinquish the area encompassing the geological structure in which the discovery is located.

2.2 Holders may elect not to conduct tests subject to the approval of an exemption application under the following specific circumstances:

(1) If the holder intends to drill other prospects in the area;

(2) there are other valid technical reasons that justify the deferment of tests; and

(3) the deferment of tests will not defeat the object referred to in section 2(j) (acceleration of exploration and production).

2.3 If the petroleum right holder appraises and determines that the discovery is not commercial, the Petroleum Agency may direct that an area encompassing the geological structure of the discovery that is not of commercial interest be relinquished. The petroleum right holder will have the right to make representations in this respect in terms of clause 55(2)(b).

2.4 The allowance for tests to be deferred is welcomed, given that appraisal in some cases would only be warranted at a later stage depending on further exploration results. The relinquishment of such an area could result in a block being uneconomical.

2.5 OPASA notes that in terms of clause 54(7), an application for exemption from relinquishment will be prescribed by regulation. In that regard, OPASA requests that relinquishment should only be required in terms of clause 54(4) if the holder has obtained sufficient data so as to know that further testing is not warranted or if the holder elects that the discovery is non-commercial, either on its own or in conjunction with other discoveries, or if the holder consents to such relinquishment.

2.6 It is further proposed that, in clause 57(1), allowance should be made for a holder to declare a commercial discovery without needing to undertake appraisal operations.

3 Black Economic Empowerment

3.1 OPASA notes that, in comparison with previous drafts of the Bill:

(1) It has been clarified in clause 31 that the minimum 10 percent undivided participating interest to be held by black persons may be diluted by up to 5%, and that such dilution may be sold to a non-BEE company;

(2) The Once Empowered Always Empowered Principle has been upheld in respect of the 5% dilution; and

(3) An extension application has been included for holders who are unable to comply with the black person participation interest requirement.

3.2 OPASA welcomes several developments in this area, including the clarified definition of "black persons" under the Bill, as well as the provision to allow for BEE interest to dilute a portion of its participating interest in order to raise capital. However, it submits that there are certain areas which require further consideration.

3.3 Clauses 31(3), (4) and (5) provide for an extension for two years to comply with the black persons' participation requirement contemplated in clause 31(1). However, even after such two-year extension, it may arise that there are no black persons who are willing to invest in particular rights. The potential for this situation to arise is fairly high given the difficulty of sourcing funding for the exploration phase and the amount of funding that may be required. Banks are generally reluctant to provide funding at exploration stage due to the high-risk nature of those projects. Consequently, BEE companies would be required to use their personal funding at exploration.

3.4 It is therefore suggested that the Minister be given a discretion to extend the period from time to time to permit black persons to invest at a time when there is more certainty that the venture can proceed to the production phase. This could be achieved by, in clause 31(4), providing for requests for extensions to be lodged from time to time, and in clause 31(6) by providing for the Minister to grant further extensions beyond the two-year period stipulated therein by adding, at the end of clause 31(6), the words "or such further period or periods as may be determined by the Minister".

3.5 Clause 32 of the Bill provides that, concerning offshore blocks which have been 100% reserved for black persons, the black persons' participating interest in a petroleum right granted in respect of such blocks may be diluted to no less than 30 percent to any funder or company. However, it is unclear whether the black person holder, following dilution as contemplated in terms of clause 32(3) is entitled to sell its remaining 30%, and what the consequences of any such sale would be on the required BEE participation in the block.

3.6 Clause 33, governing "Exit of black persons from a Petroleum Right" provides that a petroleum right will retain its empowerment credentials for the duration of the right provided that:

(1) black persons have held undivided participating interest for a minimum period equivalent to a third of the duration of the initial term of the production phase of a petroleum right, or a lesser period if paragraph (b) is complied with before the minimum period in this paragraph;

(2) at least 50 per cent net value has vested in black persons;

(3) an agreement detailing exit mechanisms and black persons' financial obligations is submitted to the Petroleum Agency; and

(4) the recognition of empowerment credentials may not be claimed or recognised for other petroleum rights or future petroleum right applications.

3.7 Similar provisos in paragraph 2.1.6 Mining Charter, 2018 were set aside in *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) (21 September 2021).

3.8 It is requested that:

(1) The terms "net value" and "vested interest" should be defined in the Bill to allow for accurate assessment of holder obligations. It is proposed that net value should in any event be calculated from after the date of entry and up to the point of divesture.

(2) Subject to the definition of "net value", in the event that the requirement imposed by clause 33(b) is met prior to the tenth year of the production phase (end of third of initial term's duration), provision should be made for the minimum ten-year period requirement to be waived; and

(3) The terms which are contemplated in respect of an "agreement detailing exit mechanisms and black persons' financial obligations" need to be set out in the Bill.

3.9 Furthermore, clause 33(a) requires the exiting black person to have held the participating interest for one third of the initial term of the production phase but does not cater for exit during the exploration phase. Provision should therefore also be made for exit during the exploration phase.

4 State Participation

4.1 The Bill provides for the State to acquire a 20% carried interest in petroleum rights, in both the exploration phase and the production phase of the petroleum right. As confirmed in clause 34(3), the Bill provides for the holder to recover a maximum of 50 and 100% of the State's proportionate share of exploration and production costs respectively.

4.2 Individual upstream exploration and production projects differ in nature and extent, with the result being that certain projects would be able to accommodate a larger State participation than others. For example, the level of investment and construction period required for deep-water offshore projects is orders of magnitude greater than what is required for shallow water projects and onshore shale gas projects. A fixed State participation rate at the level of carry currently proposed in the Bill could therefore render some projects economically unviable, which would lead to stranded petroleum resources. This would be contrary to the objects of the Bill as set out in clause 2.

4.3 It is therefore in the interest of the State and the holders that the State be allowed to exercise flexibility in acquiring interest in individual rights. Therefore, we request that the Bill should provide for the State to acquire a participating interest of "up to 20%" as opposed to a fixed "20%". This flexibility would enable the State to make investment decisions on a project-by-project basis.

4.4 Clause 34(1) states that "the State Petroleum Company is designated as a state-owned entity responsible for managing State participation". The term "State Petroleum Company" as used in clause 34(1) should be defined in clause 1, indicating whether it is an existing registered company or a company still to be formed. The Bill should further indicate whether the State or the State Petroleum Company would hold title in relevant rights. In connection with this point, clarification may be required in the Bill on the legal status of the State Petroleum Company, voting rights and Joint Operation Agreement (**JOA**) participation, and scenarios in which PetroSA already holds a participating interest in existing rights.

4.5 Clause 34(7) provides that cost recovery rules governing the recovery of exploration and production costs "are as prescribed, and to the extent necessary, further amplified in the terms and conditions of the petroleum right." It is therefore unclear how terms prescribed

in a petroleum right and/or a Money Bill would operate with one another. Our recommendations in this respect are more fully described in Part B of these Submissions.

5 Review of Petroleum Right terms and Approval of Joint Operating Agreement

5.1 Review of Petroleum Right

(1) OPASA is fundamentally opposed to clause 64 of the Bill in that an investor needs to know at the outset of an investment what the terms of the investment will be for the whole of the life of the investment, clause 24 being contrary to the object in clause 2(h) of security (and hence continuity) of tenure, and is a disincentive to investment in upstream petroleum in South Africa, and hence contrary to various of the other objects in clause 2. All of this gave rise to the international investment community requiring stabilisation agreements such as in the Tenth Schedule in the Income Tax Act, 1962 and in section 13 of the Mineral and Petroleum Resources Royalty Act, 2008

(2) The amendment of existing, or insertion of new, terms and condition may constitute an expropriation within the meaning of section 25 of the Constitution for which compensation in terms of section 25 of the Constitution would be payable. In the absence of such compensation, clause 64 would contravene the Constitution, and fall to be deleted.

(3) The reference in clause 64(1) to "fair share of benefits" indicates that state revenue is contemplated thus constituting a money bill in terms of section 77 of the Constitution which can be tabled only by the Minister of Finance as set forth in the Shuttleworth case, all of which has been mentioned earlier in these submissions.

(4) There is no similar provision in the MPRDA in relation to prospecting, exploration, mining or production rights.

(5) Without detraction from the above, the concept of the Minister being able to determine what constitutes the state deriving a fair share of benefits is vague and open-ended, and contrary to the rule of law requirement in section 1(c) of the Constitution. OPASA submits that there is no reason why this determination should not be made at the time when the Minister grants the petroleum right so that the holder knows with certainty what the terms and conditions of the petroleum right will be and remain for the whole duration of the production right.

5.2 Approval of Joint Operating Agreements

(1) Clause 86 of the Bill requires that JOAs, as well as any amendments thereto must, after signature by all parties, be submitted to the Petroleum Agency for approval. It is further provided that the Petroleum Agency may refuse to approve a JOA in the event that the provisions of the JOA are inconsistent with this Act.

(2) OPASA submits that clause 86 be deleted in that a joint operating agreement is an agreement between the parties and therefore should not require submission to the Petroleum Agency for approval. The terms of the joint operating agreements do not impact on, detract from, or negate the statutory obligations of holders to comply with the terms of the right or with the provisions of the Act and Regulations.

(3) Moreover, concerning the practical interpretation of this provision, the criteria for refusal to approve a JOA, namely whether any provisions are "inconsistent with this

Act" are particularly broad, and would have the effect of undermining certainty and stability of terms.

6 Third Party Access to Upstream Petroleum Infrastructure

6.1 Clause 68 of the Bill provides that the Petroleum Agency may, subject to certain conditions, direct that upstream petroleum facilities of a petroleum right holder be used by third parties if warranted by considerations of efficient operation and resource management, and provided that:

(1) the use would not unreasonably interfere with the usage requirements of the holder or of any person who has already been granted the right of use; and

(2) it will not result in the reduction of production levels or disruption of the satisfactory progress of petroleum operations by the holder.

6.2 OPASA submits that clause 68 may constitute an expropriation of property within the meaning of section 25 of the Constitution, and for which compensation as envisaged in section 25 would have to be provided in clause 68 failing which clause 68 would be unconstitutional. Clauses 68(4) and (5) regarding determination of tariffs and other conditions of use do not comply with section 25 of the Constitution.

6.3 Our full and further submissions on clause 68 are set out in Part B.

7 Transitional provisions and stability of terms

7.1 OPASA welcomes the provisions of Schedule 1 to the Bill which uphold the principles of certainty and stability of terms for the rights of exploration and production right holders who have already made significant investments in the industry.

7.2 Notwithstanding the comfort provided by such stability, OPASA notes that the status of the terms and conditions of the Petroleum Right after conversion from an exploration right and/or production right are not entirely clear, in that item 10(4) of Schedule 1 states "The terms and conditions of a production right will constitute the terms and conditions of a Petroleum Right, subject to **necessary changes**". (Our emphasis)

7.3 The "necessary changes" referred to in item 10(4) of Schedule 1 are not defined in the Transitional Arrangements, and should be clarified. In this respect, it is noted that any changes to the terms of a converted petroleum right may in certain circumstances be inconsistent with section 8(9) of Schedule 1, which states that "If the terms and conditions for a production right were annexed to an exploration right, then such terms and conditions will constitute terms and conditions for a petroleum right".

7.4 Further to the above, and concerning conversion mechanisms generally, it is proposed that such conversion mechanisms may hold limited practical value, given the stability of terms already provided for the in the Bill. In particular, OPASA does not agree with the need in items 8 and 9 for an exploration right to be converted into a petroleum right. Instead, such an exploration right should simply continue to be in force and the MPRDA should continue to be applicable thereto, including that in terms of sections 82(1)(a) and (b) of the MPRDA, the holder has the exclusive right to apply for and be granted renewals and a production right. That would better give effect to the object of security of tenure in clause 2(h) and item 2(a) in Schedule 1 of the Bill, and would then entitle and oblige the holder of such production right to convert it into a petroleum right in terms of item 10. The comments which will follow are without detraction from the aforegoing.

7.5 Our full and further submissions on specific provisions of Schedule 1 are set out in Part B.

8 The objects in clause 2

Although the objects in clause 2 of the Bill (which are almost identical to those in section 2 of the MPRDA) are laudable, OPASA submits that:

8.1 the Bill is not to achieve such objects in a better way than does Chapter 6 of the MPRDA;

8.2 there are numerous new provisions in the Bill which in fact constitute a disincentive to upstream petroleum investment and hence are contrary to various of the objects in clause 2 such as in clauses 2 (e), (f), (g) and (j) (all of which basically relate to petroleum resources development) and in clause 2(h) (which relates to security of tenure), examples of such clauses (for the details of which recourse should be had to Part B of these submissions) being: 13 (Licensing rounds) in its exclusion of applications initiated by applicants; 31 (Empowerment) in its imposition of requirements which are likely to be unachievable; 34 (State participation) which together with the empowerment requirements in clause 31 detracts from South Africa as an attractive upstream petroleum investment destination; 36 (Strategic stock obligations) which again is a disincentive to investment; 42 (Automatic lapsing for reason of failure to execute notarially); 52 (Drilling permits); 53 (Testing permissions); 64 (Ministerial power to amend, or insert new, terms and conditions) which detract from security and continuity of tenure; 65 (Petroleum agency's power to direct increase or decrease of production rates); 68 (Third party access to infrastructure); 79 (Ownership of information and data vesting in the State); 81 (Disclosure of information and data); 86 (The need for approval of joint operating agreements); 99 (Decisions on appeal being suspended); 102 (Draconian penalties); 103 (Administrative fines) and Schedule 1 (inadequacy of some of the transitional provisions) which offends against security and continuity of tenure for existing rights, some of which will be discussed further below.

9 Administrative procedures

The Bill has various shortcomings in regard to administrative procedures.

9.1 In all instances of decision-making and of which there are very many in the Bill (such as acceptance, grant and refusal and many others), it should be stated that the decision must be taken and with notification thereof to be given, all within a stipulated number of days. This affects many clauses in the Bill.

9.2 A general clause should be inserted (as in section 43C of the National Environmental Management Act, 1998 (**NEMA**)) empowering the Minister, the Petroleum Agency, or relevant official, as the case may be, who is tasked with administration of a particular provision, to grant extensions of, or condone late compliance with, provisions for actions to be taken.

9.3 The sequential two-appeal system in clause 99 is cumbersome, costly, time-consuming, and inefficient, and should be replaced by appeals only to the Minister.

10 Constitutionality

10.1 Various provisions in the Bill may contravene the Constitution of the Republic of South Africa, 1996 (**Constitution**) in various ways.

10.2 OPASA submits that various clauses in the Bill may constitute a Money Bill within the meaning of sections 73(2) and 77 of the Constitution, which can only be tabled by the Minister of Finance, and since they are included in this Bill, which is tabled by the Minister

of Mineral Resources and Energy, may be unconstitutional. Examples of such clauses may be: clause 3(2)(b): Fees; clauses 10(l) and 68: Tariffs and charges for third party access; clause 34: State participation; clause 64: Revision of terms and conditions for State to derive fair share of benefits; clause 67(3)(b): Adjustment of royalties and other fees due to the State; clauses 103(3) and (4): Administrative fines payable to Petroleum Agency Fund instead of to the Central Revenue Fund); and clause 107(2): Regulations relating to State Revenue and Expenditure.

10.3 OPASA submits that various clauses in the Bill may constitute expropriation without compensation in contravention of section 25 of the Constitution and which provisions may therefore be unconstitutional and fall to be deleted. Examples of such clauses are: Clause 31 (Empowerment): where the empowerment percentage in regard to existing rights will increase from 9% to 10%; Clause 34 (State participation): in regard to existing rights which do not provide for State participation or provide for less State participation; Clause 36 (Strategic stock obligations): where the holder could have sold at a price in excess of market value; Clause 51 (Postponement of development); Clause 64 (Amendment to, or new, conditions); Clause 68 (Third party access); Clause 79(2) (Information and data becoming the property of the State); and Clause 102 (Penalties based on turnover and exports.

10.4 OPASA submits that some clauses in the Bill may be so vague as to contravene the rule of law requirement in section 1(c) of the Constitution. Examples of such clauses are: Clause 33: with regard to the terms "net value" and "vested interest"; Clause 59(3): with regard to the term "marginal field"; Clause 61(1): with regard to the term "national interests"; Clause 64: with regard to the term "fair share of benefits"; and Item 10(4) in Schedule 1: with regard to the term "necessary changes".

10.5 OPASA submits that clauses 36 (strategic stock obligations) and 107(1)(b), (i) and (j) (whereby the Minister may make regulations in regard to disposal of petroleum) may not only contravene section 25 of the Constitution as mentioned above, but may also contravene South Africa's international trade agreements and thereby contravene section 7(2) read with section 233 of the Constitution.

(1) The Supreme Court of Appeal has held in Progress Office Machines CC v South African Revenue Services & Others 2008 (2) SA 13 (SCA) by reference to section 233 of the Constitution that when interpreting any legislation, the courts must prefer any reasonable interpretation which is consistent with international law over any alternative interpretation which is inconsistent with international law, and that international law is a basis for determining the legality of subordinate legislation.

(2) The Constitutional Court has also held in Glenister v President of the Republic of South Africa & Others 2011 (3) SA 347 (CC) that the State's obligation in section 7(2) of the Constitution to protect and fulfil the Bill of Rights in the Constitution requires that the Executive in initiating legislation by tabling a Bill and Parliament when enacting legislation, must give effect to the obligations of the State in terms of section 7(2) of the Constitution to promote and fulfil the rights in the Bill of Rights, and that this includes a duty to consider international law and the obligations undertaken by South Africa under international law, and that the State having bound itself under international law must take reasonable measures to implement international law where such is required to protect and fulfil the Bill of Rights.

(3) South Africa is a member of the Work Trade Organisation (WTO) which provides international measures in regard to export restrictions for member countries by way of inter alia the General Agreement on Tariffs and Trade, 1994 (GATT), Article XI.1 of which limits the ability to impose export restrictions, and the WTO Agreement on

Trade-Related Investment Measures, Article 2(2) read with the Annex to which provides an illustrative list of Trade-Related Investment Measures inconsistent with Article XI. South Africa is also a party to the Southern African Development Community Trade Protocol, 1996 which in Article 6 prohibits trade barriers and in Article 8 prohibits quantitative restrictions on export. South Africa and the European Union entered into an Economic Partnership Agreement, 2016, Article 39 of which read with the GATT, 1994, prohibits quantitative export restrictions. Also of relevance are South Africa's bilateral investment treaties (BITs) since they normally contain a "fair and equitable treatment" clause which prohibits subjecting investors or investments to unjustified, unreasonable or discriminatory measures. This has been held in international arbitration cases to encompass transparency and non-discrimination in regulatory processes, full protection and security for foreign investments, acting in good faith and in a non-arbitrary manner towards foreign investors, and not undermining the legitimate expectations taken into account by foreign investors in making their investments. The fact that South Africa has not renewed or has terminated, its BITs does not stop the BITs remaining in force in regard to existing investments made during the currency of the BITs.

(4) In conclusion therefore:

(a) the abovementioned proposed provisions in the Bill entail quantitative restrictions on export;

(b) such export restrictions breach South Africa's international law obligations;

(c) South Africa's international law obligations are of constitutional relevance in that:

(i) they must be considered for the purpose of interpreting legislation;

(ii) international law obligations discipline the exercise of powers granted under primary legislation to make subordinate legislation; and

(iii) where an empowering statute compels the exercise of powers in a manner that breaches international law, the challenge lies against the statute itself whereby a challenge to a statute under the Bill of Rights in the Constitution recognises the importance of international law because in terms of section 7(2) of the Constitution, the state is under obligation to respect its binding commitments under international law.

11 Foreign Company Incorporation

11.1 Clauses 13(3) and (4) provide that grantees of petroleum rights must be "incorporated in South Africa", however, many holders of existing exploration and production rights are incorporated in foreign countries, and merely registered in terms of section 23 of the Companies Act, 2008 as external companies. In other words, they are not "incorporated" in South Africa.

11.2 OPASA therefore requests that clauses 13(3) and (4) be amplified to provide alternatively for registration as an external company in South Africa under the Companies Act, 2008. This could be achieved by inserting after the references to "South Africa" in clauses 13(3) and (4), the words "or registered as an external company,".

12 Acceptance by the Petroleum Agency of Competitive Licensing Round Applications

12.1 Clause 17(2) empowers the Petroleum Agency to accept only one successful application lodged pursuant to a competitive administrative licensing round.

12.2 The selection of the one successful applicant is a weighty issue which should be undertaken by the Minister, considering that in terms of clause 10(f), the function of the Petroleum Agency is only to make recommendations to the Minister who should be the person who decides on the one successful application which the Minister will accept.

12.3 Clauses 17(2) and 18 should therefore be amended by the deletion of the references therein to the Petroleum Agency and the substitution thereof of references to the Minister.

13 **Postponement of Development**

13.1 Clause 61(1) of the Bill provides that the Petroleum Agency may, having regard to **national interests**, after consultation with the Minister and the holder, postpone the development of a petroleum field (our emphasis).

13.2 The concept of "national interests" needs to be amplified to explain the circumstances which might constitute national interests since the term "national interests" is too vague to comply with the rule of law requirements in section 1(c) of the Constitution.

13.3 The Minister and the holder should have to agree and consent to such postponement so that in the first line "after" should be "in": see McDonald & Others v Minister of Minerals and Energy & Others 2007 (5) SA 542 (C), and in which regard OPASA requests that the consent of the holder be expressly required since postponement may have severe negative economic consequences for the holder which has ongoing expenses and cannot simply suspend operations.

14 **Manner of conducting production operations**

14.1 For the same reasons as in relation to clause 64, OPASA is fundamentally opposed to the Petroleum Agency being empowered in clause 65(2) to direct increase or decrease rate of production, and requests deletion of clause 65(2).

14.2 Without detraction from the above, clause 65(2) is inconsistent with the terms and conditions of the production right programme so that a second proviso should be inserted at the end of clause 65(2) as follows:

"and provided further that such increased or decreased rate shall be in accordance with the approved production work programme."

15 **Measurement and ascertainment of petroleum produced**

15.1 Clause 66(1) states that a petroleum right holder must measure petroleum produced, transported and sold from a petroleum field by a measuring device customarily used in Good International Petroleum Industry Practice **and approved by the Petroleum Agency** (our emphasis).

15.2 Similarly, clause 67(1) provides that the quantity of petroleum produced by a petroleum right holder from a well during a period is taken to be the quantity measured by a measuring device approved by the Petroleum Agency.

15.3 Clause 67(2) then states that if the Petroleum Agency is not satisfied that the quantity of petroleum measured by an approved measuring device has been accurately measured, the quantity of petroleum produced by the holder will be taken to be the quantity determined

by the Petroleum Agency or an independent third party appointed by the Petroleum Agency.

15.4 OPASA submits that clause 67(2) is not compatible with the fact that the measuring device must be approved by the Petroleum Agency in terms of clause 66. Once the device has been approved in terms of clause 66, it follows that the quantity measured by such device will be accurately measured. Clause 67(2) therefore constitutes double-dipping by the Petroleum Agency.

15.5 Without detraction from the above, clause 67(2) should not provide for unilateral determination of quantities by the Petroleum Agency, and should merely provide for the inspection, testing, and if necessary, repair of the device.

15.6 OPASA proposes that either the Petroleum Agency or the holder should be entitled, as in clauses 64(3) and (4), to refer any dispute on measurement of quantities to arbitration as provided for in the terms and conditions of the petroleum right or in terms of the Arbitration Act, 1965.

16 Overlapping competences

16.1 The Bill deals with issues which fall within competences allocated to other organs of state and not to the Petroleum Agency, and which should therefore be aligned in the Bill.

16.2 Functions in regard to mine health and safety vest in the Chief Inspector and Principal Inspector of Mines in terms of the Mine Health and Safety Act, 1996 which deals not only with minerals but also with petroleum due to the way in which word "mineral" is defined in section 102 of that Act. Therefore, in regard to minerals the Regional Managers do not deal with mine health and safety. Notwithstanding that, there are various clauses in the Bill which seek to confer powers on the Petroleum Agency in regard to health and safety relating to petroleum. An example is clause 10(i).

16.3 Functions in regard to geoscience information including in regard to petroleum vest in the Council for Geoscience in terms of the Geoscience Act, 1993. Notwithstanding that, there are various clauses in the Bill which seek to confer powers on the Petroleum Agency in regard to geoscience information and data relating to petroleum. Examples of such clauses are clauses 79 and 80.

16.4 Functions in regard to environmental matters reside in the Minister of Environmental Affairs in terms of the National Environmental Management Act, 1998, although the Minister of Mineral Resources and Energy has in terms of section 24C(2A) of that Act been designated as the competent authority in respect thereof insofar as petroleum is concerned. The function of the Petroleum Agency in that regard is limited as appears from clause 10(m) to receiving and reviewing applications for environmental authorisations and making recommendations to the Minister in regard thereto. Notwithstanding that, there are various clauses in the Bill which seek to confer powers on the Minister or on the Petroleum Agency in relation to environmental authorisations. Examples of such clauses are clauses 105 and 107(1)(g).

16.5 Determination of tariffs is the function of the National Energy Regulator whereas in clause 68, the Petroleum Agency is to be allocated that function.

16.6 As mentioned above, the tabling of money bills as envisaged in sections 73(2) and 77 of the Constitution must be undertaken by the Minister of Finance. Notwithstanding that, various clauses of the Bill as tabled by the Minister of Mineral Resources and Energy, set forth above, may constitute money bills.

Part B: Comments on Sequential Clauses

17 **Clause 1: definition of "appraisal operations"**

17.1 In the last line reference is made to other existing discoveries as part of a unitised development.

17.2 As in the definition of "commercial discovery", reference should be made to existing discoveries or as part of a unitised development.

17.3 In the last line, after "discoveries", "or" should be inserted.

18 **Clause 1: definition of "block"**

18.1 The definition refers to a "block" situated wholly or partly in the Republic or its exclusive economic zone.

18.2 The definition should also like the definition of "the sea" include the continental shelf.

18.3 Therefore, in the third line, after "exclusive economic zone" insert "or its continental shelf".

19 **Clause 1: definition of "carried interest"**

19.1 The definition refers to the costs being borne by the carrying holder.

19.2 The definition does not reflect the content of clause 34 which envisages cost recovery by the carrying holder from the State.

19.3 Therefore, in the third line, after "an", insert "subject to the cost recovery provisions in section 34".

20 **Clause 1: definition of "controlling interest"**

20.1 In paragraph (b), the wording refers to a business other than a company or a petroleum right, and the assets of the business or a petroleum right.

20.2 In the:

(1) first line of paragraph (b), reference should be to "any other business..., or a petroleum right";

(2) last line of paragraph (b), reference should be to the assets of the business or "of" a petroleum right.

20.3 Therefore, in the:

(1) first line of paragraph (b), after "paragraph (a)" insert a comma;

(2) last line of paragraph (b), after "or" insert "of".

21 **Clause 1: definition of "deep water"**

21.1 Reference is made to depths above 301 metres.

21.2 The definition of "shallow water" refers to depths equal to or less than 300 metres so that the definition of "deep water" should refer to depths below 300 metres.

21.3 Therefore, the reference to "above 301" should be replaced with the reference to "below 300".

22 **Clause 1: definition of "exploration right"**

22.1 Reference is made to section 80 of the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**).

22.2 If there are still exploration rights which have been converted in terms of item 4 of Schedule II to the MPRDA, reference thereto would additionally have to be made to such converted exploration rights.

22.3 Therefore, if there are still exploration rights which have been converted in terms of item 4 in Schedule II to the MPRDA, in the first line after "80", insert ", or converted in terms of item 4 in Schedule II,".

23 **Clause 1: definition of "holder"**

23.1 It should not be necessary for the right or permit to be registered or recorded as such at the Mineral and Petroleum Titles Registration Office for the grantee to be recognised as the holder: see *Minister of Mineral Resources and Others v Mawetse (SA) Mining Corporation (Pty) Ltd* [2015] 3 All SA 408 (SCA) in terms whereof the grant occurs on receipt of the letter of grant.

23.2 Similarly, it should not be necessary for the notarially executed Deed of Cession and Assignment to be registered at the Mineral and Petroleum Titles Registration Office for the grantee's successor in title to be recognised as the holder.

23.3 Therefore, in the third line, after "title" insert ", whether or not such right or permit has been registered or recorded at the Mineral and Petroleum Titles Registration Office and whether or not a notarially executed deed of cession and assignment has been registered at the Mineral and Petroleum Titles Registration Office".

24 **Clause 1: definition of "officer"**

24.1 Reference is made to "any employee" of the Petroleum Agency.

24.2 The term officer is not used since clause 94 also refers to "any employee". In both instances, reference should be made to an officer above a specified grade i.e. to a senior officer.

24.3 Therefore, after "employee" insert "above Patterson Grade _____", the relevant grade to be a senior grade.

25 **Clause 1: definition of "owner"**

25.1 Reference is made in paragraph (b) to "any occupant".

25.2 Reference should in paragraph (b) be made to any *lawful* occupant (although on the general principles of interpretation of statute, references are presumed to be references to lawful actions: see Du Plessis, Statute Law and Interpretation, in Joubert, The Law of South Africa, Second Edition, paragraph 343.

25.3 Therefore, in the first line of paragraph (b) after "any", insert "lawful".

26 **Clause 1: definition of "petroleum"**

26.1 References are made to:

(1) liquid, solid;

(2) associated liquid, or liquid or gas.

26.2 The wording of this important definition is incorrect in that:

(1) it should refer to liquid or solid.

(2) it should refer to associated liquid or solid hydrocarbon or combustible gas.

26.3 Therefore, in the:

(1) first line, after "liquid" delete the comma and insert the word "or"

(2) second line, after "associated" delete "liquid or gas, any".

27 **Clause 1: definition of "production operation"**

27.1 The definition refers to exploration and appraisal.

27.2 To avoid confusion between exploration and production, reference should be made only to exploration and appraisal either of which is in connection with production: see analogously the definition of "mine as a verb" in section 1 of the Minerals Act, 1991, which included prospecting in connection with mining. Furthermore, it should include de-commissioning.

27.3 Therefore, in the third line, delete "exploration, appraisal," and after "petroleum" insert "including exploration and appraisal either of which is in connection with such production, and including de-commissioning of such operation".

28 **Clause 1: definition of "production right"**

28.1 The definition refers to a production right granted in terms of section 70 of the MPRDA.

28.2 The reference to section 70 should be section 84 of the MPRDA. If there are converted production rights in item 5 of Schedule II to the MPRDA, reference should additionally be made to such item 5.

28.3 Therefore, OPASA suggests the following.

(1) In the first line, delete "70" and replace with "84".

(2) If there are converted production rights, in the first line after "of" insert ", or converted in terms of item 5 to Schedule II to".

29 **Clause 1: definition of "sea"**

29.1 The definition refers to territorial waters, exclusive economic zone and continental shelf.

29.2 The definition should additionally refer to the seashore.

29.3 Therefore, in the last line, before the semi-colon, insert "and includes the seashore as defined in section 1 of the National Environmental Management: Integrated Coastal Management Act, 2008".

30 **Clause 1: Suggested additional definitions**

30.1 The following terms are used in the Bill but are not defined in clause 1.

30.2 Therefore, OPASA suggests that the following definitions be additionally inserted alphabetically in clause 1, namely:

(1) Chief Executive Officer;

(2) frontier acreage;

(3) Good International Petroleum Industry Practices;

(4) local content plan;

(5) national interests;

(6) open area;

(7) Principal Inspector;

(8) State Petroleum Company; and

(9) upstream training trust.

31 **Objects of the Act (Clause 2)**

31.1 Clause 2(h) refers to security of tenure in respect of exploration and production operations.

31.2 Clause 2(h) should refer additionally to retention permits and to technical co-operation permits.

31.3 Therefore, in the second line, after "operations" insert "and in respect of retention permits and technical co-operation permits".

32 **Custodianship of nation's petroleum resources (Clauses 3)**

32.1 Clause 3(2)(a) refers to permission to remove.

(1) The Bill no longer contains permissions to remove.

(2) Therefore, in the second line of clause 3(2)(a), delete "permission to remove,".

32.2 Clause 3(2)(b) provides that the Minister may prescribe administrative fees and other fees payable in terms of the Act.

(1) This may constitute a money bill as defined in section 77 of the Constitution of the Republic of South Africa, 1996 (Constitution) which in terms of sections 73(2) and 77 of the Constitution may be tabled only by the Minister of finance.

(2) Therefore, clause 3(2)(b) should be deleted, alternatively prefaced by the words "subject to section 107(2)," although such alternative may also not be sufficient.

33 **Legal nature of petroleum right, and rights of holders thereof (Clause 5)**

33.1 In clause 5(3)(a), the reference to land should again appear in the second line.

33.2 Therefore, in the second line of clause 5(3)(a), before "block" insert "land".

34 Prohibition relating to illegal acts (Clause 6)

34.1 In clause 6(a), reference is made to the need for an environmental authorisation.

34.2 The 2014 Listing Notices made in terms of NEMA have only recently from 11 June 2021 required an environmental authorisation for reconnaissance.

34.3 Therefore, after "authorisation" insert "if legally required".

35 Principles of administrative justice (Clause 7)

35.1 In clause 7(2), reference is made to an administrative action having to be in writing and accompanied by written reasons.

35.2 The definition of administrative action in clause 1 seems to adopt the definition in the Promotion of Administrative Justice Act, 2000 (**PAJA**) which includes a failure to take a decision, which cannot be in writing and would not be accompanied by written reasons.

35.3 In the first line, after "action" insert "except a failure to take a decision".

36 Geotechnical data (Clause 10)

36.1 Clause 10(h) refers to geotechnical data. In terms of section 88(1A) of the MPRDA which was inserted by the Mineral and Petroleum Resources Development Act, 2008, with effect from 7 June 2013, the Petroleum Agency must submit progress reports and data submitted to it by holders of permits and rights, to the Council for Geoscience.

36.2 The Geoscience Act, 1993 in sections 3 and 5 broadly defines the objects and functions of the Council for Geoscience to relate to geoscientific information and geotechnical information, and which therefore includes information in regard to petroleum.

36.3 OPASA submits that clause 10(h) would have to be reconciled with the Geoscience Act, 1993.

37 Health and safety (Clause 10)

37.1 Clause 10(i) requires the Petroleum Agency to enforce health and safety standards in accordance with the applicable legislation regulating upstream petroleum health and safety. The applicable legislation is the Mine Health and Safety Act, 1996, which includes petroleum in its definition of "mineral" in section 102. In terms thereof, the enforcement lies with the Chief Inspector and Principal Inspector of Mines. It is therefore not correct to include enforcement of health and safety as a function of the Petroleum Agency.

37.2 Clause 10(i) should be deleted insofar as it refers to health and safety.

38 Petroleum Agency's functions to include providing assistance and support to holders of rights and permits (Clause 10)

38.1 In furtherance of the objects in clauses 2(d), (e), (f), (g), (h), and (j), the functions of the Petroleum Agency should include providing assistance and support to holders of rights and permits granted, issued, or which remain in force, in terms of the Act.

38.2 Therefore OPASA suggests that a new clause 10(o) be inserted to provide as function of the Petroleum Agency that it provide assistance and support to such holders along the

following lines, "(o) provide assistance and support to holders of rights and permits granted, issued, or which remain in force, in terms of this Act.".

39 **Funding of the Petroleum Agency (Clause 11)**

39.1 In clause 11(1)(d), reference is made to funds of the Petroleum Agency consisting of revenue received from the sale of petroleum geotechnical data.

39.2 Regulation 7(2) of the Geoscience Act Regulations, 2022 provides for dissemination of information by the Council for Geoscience subject to recoupment of the Council's administrative costs.

39.3 Therefore, clause 11(d) be deleted or amended so as to avoid conflict with the Geoscience Act, 1993 and the Geoscience Act Regulations, 2022.

40 **Licensing rounds (Clause 13)**

40.1 In clause 13(1), reference is made to prohibiting exploration or production without a permit or right granted in terms of the Act. This is already dealt with in clause 6(b), is therefore a duplication, and should be deleted. Clause 13(1) be deleted.

40.2 Clause 13(2) empowers the Minister to initiate licensing rounds. Therefore, unless the Minister has done so, persons cannot of their own accord initiate applications. OPASA submits that although the Minister should be empowered as in section 73 of the MPRDA currently, to invite applications, the parallel procedure of applications initiated by any person, as in sections 74, 76, 79 and 83, of the MPRDA, should be retained.

40.3 The same issue arose in clause 5 of the MPRDA Amendment Bill B15 D-2013 in relation to section 9 of the MPRDA. After representations were made, the following new sections 9(2) and (5) to be inserted into the MPRDA, were included in clause 5 of that Bill, namely:

> "*(2) Any person may, after identifying an area of land, block or blocks and the type of mineral, mineral product or form of petroleum in or on such area of land, request the Minister to invite applications in such area of land, block or blocks in terms of sub-section (1).*
>
> ...
>
> *(5) The Minister shall, when processing applications, give preference to an application lodged by a person referred to in sub-section (2).*".

Notwithstanding the above however, OPASA submits that the existing parallel process being in section 73, and in sections 74, 76, 79 and 83 respectively, of the MPRDA, is preferable.

40.4 OPASA submits that the existing parallel process in the MPRDA regarding applications initiated by any applicant, and of licensing rounds, be reinstated in the Bill.

40.5 Clauses 13(3) and (4) provide that grantees of petroleum rights must be "incorporated in South Africa", however, many holders of existing exploration and production rights are incorporated in foreign countries, and merely registered in terms of section 23 of the Companies Act, 2008 as external companies. In other words, they are not "incorporated" in South Africa.

40.6 OPASA therefore requests that clauses 13(3) and (4) be amplified to provide alternatively for registration as an external company in South Africa under the Companies Act, 2008. This could be achieved by inserting after the references to "South Africa" in clauses 13(3) and (4), the words "or registered as an external company,".

41 Duration (Clause 14)

41.1 In clause 14(2), reference is made to onshore and offshore acreage in shallow waters. Onshore acreage cannot be in shallow waters. In the first line after ""onshore", insert "acreage".

41.2 Clauses 14(2)(b)(ii) and 14(3)(b)(ii) provide for renewal periods of 10 years each, whereas section 85(4) of the MPRDA provides for renewals of up to 30 years each, the latter of which OPASA submits is more reasonable and practical.

41.3 Therefore, clauses 14(2)(b)(ii) and 14(2)(b)(ii) should be amended to delete references to ten years and replace them with references to 30 years.

41.4 In clause 14(4), reference is made to the holder from the second term structuring the period for each term according to the nature and dynamics of the project, and to the object in section 2(k).

(1) The question is whether this includes, or is after, the second term.

(2) It is unclear what is meant by "structure the period for each term" i.e. whether this refers to a period of less than the period of the term specified in clauses 14(2) and (3).

41.5 OPASA therefore requests the following.

(1) In the first line, after "from" insert "and including".

(2) In the first line, delete "structure the period of each term" and replace with "reduce the period for the relevant term to a period which is less than the period stipulated in sections 14(2) or (3) for such term.

(3) In clause 14(4)(b) second line, delete "k" and replace with "j".

42 Competitive administrative licensing round for petroleum right (Clause 15)

42.1 The issues in regard to clause 15 are the following.

(1) As set out above, OPASA proposes that the Bill provide for submission of direct applications without the requirement for Ministerial invitation as is done in clause 38 in relation to reconnaissance permits. This could be achieved by the inclusion in clause 15 of a provision similar to clause 16(5) and/or by the insertion of a new clause similar to clause 38 but relating to petroleum rights.

(2) Ministerial invitations should not be required in any of the circumstances envisaged in Schedule 1. This could be achieved by the insertion of a new provision equivalent to clause 37(6).

(3) Ministerial invitations should also not be possible where land or blocks are subject to any of the situations envisaged in clause 1.

42.2 Therefore, OPASA requests that:

(1) a new clause 15(6) be inserted embodying the substance of clauses 16(5) and 37(6) as follows:

"(6) Notwithstanding the provisions of subsection (1):

(a) *applications for petroleum rights may be lodged in terms of section 43 in the prescribed manner with the Petroleum Agency at any time and to which sections 37(4) and (5) shall apply;*

(b) *any matters dealt with in Schedule 1 will not be subject to the publication of a notice of invitation by the Minister as contemplated in subsection (1) and section 15.".*

(2) clause 15(1) be prefaced by the words "Save in respect of land or blocks which are subject to Schedule 1,".

(3) administrative licensing rounds should be limited to open areas, so that at the end of clause 37(1), the words "in an open area" should be inserted.

43 **Competitive administrative licensing round for reconnaissance permit (Clause 16)**

43.1 In regard to licensing rounds for reconnaissance permits over existing exploration, production and petroleum rights, the invitations envisaged in clause 16(1) should not be limited to seismic companies since members of OPASA may also wish to accept such invitations.

43.2 Therefore, in clause 16(1), second line, the words "from seismic companies" should be deleted.

43.3 Clause 16 would empower the Minister to grant reconnaissance permits over blocks encumbered by exploration, production or petroleum rights, even after consultation with the holders of such rights. OPASA submits that the prior written consent of the holders of such rights should be required for a reconnaissance permit to be issued in respect of blocks which are so encumbered. This could be achieved by the addition at the end of clause 16(4)(a) of the words "and with the written consent of such holders".

43.4 The reference in clause 16(5) to section 34 should be to section 38.

44 **Acceptance by the Petroleum Agency of competitive administrative licensing round application (Clause 17)**

44.1 Clause 17(2) empowers the Petroleum Agency to accept only one successful application lodged pursuant to a competitive administrative licensing round.

44.2 The selection of the one successful applicant is a weighty issue which should be undertaken by the Minister, considering that in terms of clause 10(f), the function of the Petroleum Agency is only to make recommendations to the Minister who should be the person who decides on the one successful application which the Minister will accept.

44.3 Clauses 17(2) and 18 should therefore be amended by the deletion of the references therein to the Petroleum Agency and the substitution thereof of references to the Minister.

44.4 Clause 17(2) refers to acceptance within 90 days from date of acknowledgement of the application. However, there may be many applications so reference to 90 days from date of "the application" does not work.

44.5 Therefore, clause 17(2) should be amended to delete in the first and second lines "the date of acknowledgment of the application" and insert "expiry of the period".

45 **Consultation with interested and affected parties by Petroleum Agency (Clause 19)**

45.1 Clause 19(4) provides for the situation where an agreement is reached with an objector.

45.2 OPASA suggests that the current clause 19(4) become clause 19(4)(a), and that a new clause 19(4)(b) be inserted to deal with the situation where no agreement is reached, and which clause 19(4)(b) could read:

> "(b) should no agreement contemplated in subsection (4)(a) be reached, the process in clause 19(3)(a) should proceed.".

46 **Composition of Committee** (Clauses 23)

46.1 In clauses 23(2)(a) and (c), and elsewhere, the terms Chief Executive Officer and Principal Inspector are not defined.

46.2 Therefore, the above terms would have to be defined in clause 1 or the above clauses would have to be amplified to refer to the Chief Executive Officer of the Petroleum Agency and the Principal Inspector of mine health and safety.

47 **Transferability and encumbrance of petroleum right (Clauses 28 and 29)**

47.1 Since it is only a company or close corporation which holds a petroleum right or interest therein which is contemplated in clause 28(1), the words "which is the holder of such right or interest" should be inserted.

47.2 In order to clarify the concept of controlling interest, OPASA suggests that clause 28(1) be amplified by the insertion at the end thereof of the following:

> ", and for purposes of the aforegoing, in the determination of controlling interest, reference shall be made to the holding company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008)".

47.3 Clause 29(4) refers to variation whereas variation is not contemplated in clause 29.

47.4 Clause 29(4) refers to notarial execution whereas mortgage bonds are not executed notarially, so it is suggested that at the end of clause 29(4) the words "or in the case of encumbrance by mortgage, within 60 days of grant of the consent in terms of section 28(1)" be inserted.

48 **Partitioning of petroleum right (Clause 30)**

48.1 Clause 30(2)(b) refers to the application for Ministerial consent in terms of section 105 for the partitioning of a petroleum right. However, no reference is made to the reciprocal applications which would have to be carried out by both persons' whose petroleum rights would be affected by such partitioning.

48.2 It is suggested that:

(1) In the first line, after the word "right" insert "by the exclusion of the area or block that is being partitioned"; and

(2) in the second line after the word "right" that the words "by the acquirer" be inserted.

48.3 Furthermore, in clause 30(3) it is suggested that the word "the applicant" be replaced by "proposed acquirer".

49 Participation of, reservation for, and exist of, black persons (Clauses 31, 32 and 33)

49.1 Clause 31(1) provides that every petroleum right must have a minimum of 10% undivided participating interest by black persons. That requirement should not apply in any of the transitional circumstances in Schedule 1, and either clause 31(1) or Schedule 1 should expressly provide for that.

49.2 Clause 31(2) envisages the dilution to <u>any</u> funder or company for purposes of raising capital but is subject to section 29. However sections 29(2)(a), (b) and (c) operate only for purposes of funding or financing by a bank, other approved financial institution, or other approved institution, and then only if the bank or institution gives the undertaking therein provided, and therefore not in favour of "any funder or company" as envisaged in clause 31(2). There is therefore a conflict between clauses 31(2) and 29 which should be resolved by, in clause 31(2), deleting the words "subject to section 29" and replacing them with the words "and in respect of which the consent contemplated in section 29(1) is not required.".

49.3 The concept of dilution in clauses 31(2) and (3) is not clear or appropriate considering that the upstream petroleum industry consists of unincorporated joint ventures in which dilution is not possible, so that the word "dilution" should be replaced with "reduced".

49.4 It should be indicated that the provisos in clause 33 will not apply in the circumstances of clause 31(2).

49.5 Clauses 31(3), (4) and (5) provide for an extension for two years of the requirement for black persons participation. However, even after such two year extension, there may be no black persons who are willing to invest in what are high risk and capital intensive exploration ventures. It is therefore suggested that the Minister be given a discretion to extend the period from time to time to permit black persons to invest at a time when there is more certainty that the venture can proceed to the production phase. This could be achieved by, in clause 31(4), providing for requests for extensions to be lodged from time to time, and by providing in clause 31(6) for the Minister to grant further extensions beyond the two year period stipulated therein by adding at the end of clause 31(6) the words "or such further period or periods as may be determined by the Minister".

49.6 The above comments on clause 31(2) apply equally to clause 32(3).

49.7 Furthermore, clause 32(2) should provide that, subject to clause 32(3), the black persons holding such petroleum rights granted in terms of clause 32 should not be entitled to dispose thereof or of any interest therein, other than to black persons.

49.8 Clause 32(1) should not apply to a block or blocks which are subject to the transitional provisions in Schedule 1 or to any existing licencing rounds or applications for, or granted, petroleum rights.

49.9 Clause 33(a) requires the exiting black person to have held the participating interest for one third of the initial term of the <u>production</u> phase, but does not cater for exit during the exploration phase. Provision should therefore also be made for exit during the exploration phase.

49.10 The concept of net value needs to be defined or explained. In paragraph 2.1 of the Codes of Good Practice for the Minerals Industry, 2009, published in GN 446 GG 32167 of 29 April 2009, the concept of net value is described as follows:

*"**Net Value***

(a) ownership fulfilment occurs:

(i) On the release of HDSA participants in the measured entity from all third party rights arising from the financing their transaction with the measured entity.

(ii) If the HDSA participants in the measured entity has never been subjected to any such third party rights.".

49.11 It is not clear what agreement is intended in clause 33(c): perhaps after "agreement" the words "between the exiting black person and the acquirer of the petroleum right or interest therein" should be inserted".

50 **State participation (Clauses 2(f) and (j), and 34)**

50.1 The term "State Petroleum Company" as used in clause 34(1) should be defined in clause 1, indicating whether it is an existing registered company or a company still to be formed.

50.2

(1) The participation in clause 34(2) should be a flexible maximum of 20% which could be achieved if after the words "right to" the words "up to" were to be inserted. A 20% carried interest requirement for the life of the project is very onerous for smaller petroleum right holders who themselves may have limited funding. A fixed 20% state carried interest together with the black persons participation requirements in clause 31 could render marginal projects and those in technically challenging and high cost environments, for example in ultra-deep water, uneconomic and which would lead to stranded petroleum resources. This would be contrary to many of the objects in the clause 2 of the Bill. Provision for a discretion by the Minister to impose less than, or indeed no, 20% state carried interest, would allow otherwise marginal projects to become economic, and permit the development of a greater number of petroleum fields. Other jurisdictions in Africa and internationally implement less onerous terms for challenging deep water environments and marginal fields for these reasons.

(2) Additionally, any existing state participation should rank towards such 20%. This could be achieved by the addition in the second line after "phase" of "; provided however that any existing State participation shall rank towards achievement such 20 percent".

(3) It should be provided in clause 34(2) that the State's carried interest is not transferable. This could be achieved by the insertion in the second line after "phase" of "which carried interest shall not be transferable".

50.3 The cost recovery in clause 34(3) should be stated to bear interest at a stipulated interest rate compounded daily from date of incurring of the cost by the carrying holder to date of recovery.

50.4 In clause 34(8), provision should be made for the State and the State Petroleum Company to waive any sovereign immunity which might otherwise avail them. This could be achieved by the insertion in the fourth line after "State" of "and in which new or existing joint operation agreement the State and the State Petroleum Company shall waive any sovereign immunity which might otherwise apply".

50.5 In clause 34(9), it should be indicated that the State Petroleum Company's participation (including voting rights) takes effect when the State Petroleum Company acquires its undivided share in the petroleum right, namely on notarial execution.

50.6 Clauses 2(f) and (j) of the Bill provide that objects of the Bill are to promote petroleum resources development; and to accelerate exploration and production. OPASA submits, however, that State participation is contrary to those objects and is a disincentive to investment.

50.7

(1) In terms of section 73(2) of the Constitution, only the Minister of Finance may table a money bill which is defined in section 77 of the Constitution to mean a bill that appropriates money or imposes taxes, levies or duties.

(2) OPASA submits that since the State Participation in clause 34 of the Bill is calculated to raise revenue,[1] clause 34 of the Bill constitutes a money bill which therefore cannot be tabled by the Minister of Mineral Resources and Energy and would have to be tabled by the Minister of Finance. This was the reason why royalties could not be dealt with in the MPRDA as tabled by the Minister of Mineral Resources and had to be dealt with in the separate Mineral and Petroleum Resources Royalty Act, 2008 which was tabled by the Minister of Finance.

50.8 OPASA submits that in principle, it is wrong for the State to be both the regulator and a participant since this confuses the role of regulator and investor, and could give rise to perceptions of undue influence and bias.

50.9 The state participation in clause 34 should not apply in any of the circumstances envisaged in Schedule 1, and which non-application should be stipulated in clause 34 and/or Schedule 1 and additionally, item 8(7) in Schedule 1 should be deleted. This would promote the object of security of tenure (which includes continuity of tenure) in clause 2(h) of the Bill. Retrospective imposition of state participation in any of the circumstances envisaged in Schedule 1 would offend against the object of security of tenure in clause 2(h) of the Bill, and hence also of continuity of tenure from exploration to production.

(1) Security (and hence also continuity) of tenure is an object in clause 2(h) of the Bill, as it currently is in section 2(g), and item 2(a) in schedule II, of the MPRDA. This is necessary considering that exploration and production are highly capital intensive, high risk, and involve a very long lead time.

(2) Security and continuity of tenure were achieved in sections 14 and 30 of the Mining Rights Act, 1967 in that a prospecting lease for natural oil already attached the terms of the resultant mining lease, these being referred to in item 1 in Schedule II to the MPRDA as OP26 rights, OP26 mining leases and OP26 sub-leases.[2] This became an issue upon conversion in terms of items 4 and 5 of Schedule II to the MPRDA, during which investors such as Pioneer Resources (an American company) remonstrated with PetroSA, and with the Department of Mineral Resources and Energy, that in the OP26 rights, the State had guaranteed its ability to acquire a mining lease on the terms and conditions of the draft mining lease which was attached to the relevant OP26 prospecting lease and sublease. Pioneer Resources threatened to invoke international arbitration as provided for in the OP26 lease and sublease. Those terms and conditions included various fiscal relaxations. This led to the enactment of

[1] See *South African Reserve Bank & Another v Shuttleworth & Another* 2015 (5) SA 146 (CC) para 62.
[2] See *Dale et al*, op.cit, page Sch II-101 (Service Issue 27).

section 61 of the Small Business Tax Amnesty and Amendment of Taxation Laws Act, 2006 and ultimately of the Tenth Schedule to the Income Tax Act, 1962, preserving the special fiscal terms and conditions.3 It also led to the stability provisions contained in sections 13 and 14 of the Mineral and Petroleum Resources Royalty Act, 2008 and in item 8 in the Tenth Schedule to the Income Tax Act, 1962. Where such stability agreements have been concluded, or even where not but where fiscal provisions appear in existing exploration rights or in existing or consequent production rights, clause 39 will give rise to conflicts. This also relates to other clauses in the Bill which do not accord with the existing terms and conditions of exploration or production rights. This is so both when exploration or production rights were acquired upon conversion in terms of items 4 and 5 in Schedule II to the MPRDA, and where new such rights were acquired in terms of sections 80 and 84 of the MPRDA.

(3) In terms of sections 78(1) and 82(1)(a) of the MPRDA, the holder of a technical co-operation permit or of an exploration right has the exclusive right to apply for and be granted an exploration right or a production right, i.e. a right to a 100% exploration right or a 100% production right. In effect, State Participation of 20% means that the holder of the technical co-operation permit or of the exploration right acquires only an 80% exploration right or an 80% production right, or an 80% petroleum right. This is contrary to sections 78(1) and 82(1)(a) of the MPRDA.

(4) OPASA submits that it is an aspect of the rule of law in section 1(c) of the Constitution that Parliament not enact legislation which has the effect of retrospectively or retroactively negatively affecting rights such as those contained in existing exploration rights and in existing or potential production rights.

51 **Development of petroleum resources to advance national developmental imperatives (Clause 35)**

51.1 In clause 35(1), reference is made to the Minister reserving a block, part of a block or blocks in an open area to advance national developmental imperatives.

51.2 OPASA submits that the term "open area" should be defined in clause 1 to enable it to be used elsewhere in other affected clauses, and which could read:

> "an area which is not subject to rights or permits granted, or which remain in force in terms of this Act, or to applications for such rights or permits made or which remain in force in terms of this Act;".

51.3 Clause 35(3) refers to the dilution of the State Petroleum Company's participation interest for purposes of undertaking operations in a reserved block or blocks with any other person.

51.4 It is suggested that the reference in clause 35(2)(a) to "any other person" be broadened to include parties to a prospective joint operating agreement with the State Petroleum Company in respect of such a reserved block or blocks.

51.5 It is suggested that a new clause 35(7) be inserted empowering the state petroleum company to conclude a joint operating agreement with the other person contemplated in clause 35(2)(a).

52 **Strategic stock obligations (Clause 36)**

[3] *Dale et al*, op.cit page Sch II-113.

52.1 Clause 36(1) refers to a petroleum right holder selling a percentage of petroleum at the prevailing market price to the State Petroleum Company or any other state-owned entity to meet the State's strategic stock requirements, subject to agreed terms and conditions.

52.2 OPASA submits that clause 36(1) should be amplified to indicate that the determination of the State's strategic stock requirements will be done by the Minister, and not by the State Petroleum Company, or other state-owned entity, so that after "requirements" should be inserted "determined by the Minister". This is so because the determination of strategic stock is of national interest and should therefore be only a Ministerial competency.

52.3 Alternatively, and without detraction from the above comment:

(1) OPASA submits that the determination of the percentage referred to in clause 36(2) should be stated in clause 36(2) and determined exclusively by the Minister, and not by any other state-owned entity designated by the Minister. Therefore, it is suggested that references to "any other state-owned entity designated by the Minister" in clauses 36(2) and (3) be deleted and replaced with ""a maximum of _____ percent as determined by the Minister from time to time in relation to the State's strategic stock requirements at that time".

(2) OPASA submits that the obligation of a petroleum holder to sell a percentage of petroleum as contemplated in clause 36(1) should also be subject to pre-existing agreements between right holders and the Petroleum Agency. In this regard, it is suggested that in clause 36(3), in the third line, after the word "Company" the words ", and subject to obligations which the holder has on date of commencement of this Act to supply petroleum to third parties in terms of their existing sale agreements concluded by the holder with such third parties".

(3) It is suggested that clause 36(5) be clarified by the addition at the end thereof, of the words "by way of a notarial deed of amendment to the production right, to be executed between the Minister and the holder, and lodged at the Mineral and Petroleum Titles Registration Office in accordance with section 50(a)".

(4) OPASA further submits that the logistical specifics for collection and delivery of strategic stock be governed by the agreed terms and conditions of the agreement between the petroleum right holder and the Petroleum Agency.

53 **Open licensing round (Clause 37)**

53.1 Clause 37(1) refers to Ministerial invitation for open applications. In this regard, see OPASA's comments above that any person should be able to apply mero motu. As mentioned above, OPASA submits that the parallel procedure initiated by any person should be retained. To that end, clause 37 should be deleted.

53.2 As mentioned earlier in these submissions, OPASA submits that the parallel process for voluntary applications to be submitted, as in the MPRDA, be provided for in the Bill, as in clause 38 which is however limited to reconnaissance permits.

53.3 Without detraction from the above comments, it is suggested that at the end of clause 37(1), the words "in an open area" be inserted so as to prevent open licensing rounds in blocks which are subject to rights or permits which have been granted or which remain in force, or to applications for such rights or permits. See OPASA's similar comment in regard to clause 15.

53.4 If the suggestion above is accepted, clause 37(6) should commence with the words "Without detraction from the fact that open applications are limited to open areas,".

54 Application for a reconnaissance permit (Clause 38))

54.1 Clause 38(2) refers to the requirements to be met for an application for a reconnaissance permit to be accepted by the Petroleum Agency, namely that the requirements in subsection (1) be met and that no other person holds a right or permit over the same block or blocks.

54.2 Clause 38(2) should additionally include as a requirement for an application for a reconnaissance permit to be accepted that no prior application for a right or permit has been accepted over the same block or blocks. This is on the basis that the equivalent section of the MPRDA, namely section 74 thereof, includes the aforesaid proposed requirement in section 74(2)(c) thereof and should be carried over. A new clause 38(2)(c) should be inserted as follows:

> "(c) no prior application for a technical co-operation permit, exploration right, production right, or petroleum right, has been received over the same block or blocks",

and in which case, clause 38(3) would have to refer also to consent from such prior applicant.

54.3 Clause 38(4) should be deleted since it offends against the object of security of tenure.

54.4 Clause 38(6) refers a block or blocks in respect of which technical co-operation permits or exploration rights were granted prior to the commencement of the Bill not being subject to open licensing rounds and administrative licensing rounds referred to in clauses 15 and 38 respectively.

54.5 Without detraction from the above comments, OPASA submits that all rights and permits contemplated in Schedule 1 of the Bill not be subject to open licensing rounds and administrative licensing rounds referred to in clauses 15 and 38 respectively.

55 Granting and duration of reconnaissance permit (Clause 39(5)

55.1 Clauses 39(1) and (2) refer to the grant or refusal by the Minister of an application reconnaissance permit.

(1) A time period within which the Minister must decide to grant or refuse the reconnaissance permit should be inserted.

(2) In both clauses 39(1) and (2), in the first lines, after the word "must" the words "within 30 days after acceptance or after grant of an environmental authorisation, if necessary" be inserted, and within which period the Minister must grant a permit and notify the applicant of such grant.

55.2 Clause 39(5)(a) refers to the Minister granting a reconnaissance permit over an area subject to an existing permit or right after consulting with the permit or right holder.

(1) The requirement of consultation with the permit or right holder is insufficient, as the granting of a reconnaissance permit in such instance would substantially detract from the rights of such permit or right holder. OPASA submits that the written consent of the permit or right holder be obtained instead.

(2) After the word "after", the deletion of the words "consultation with", and the substitution thereof with the words "obtaining the written consent of".

55.3 Clause 39(5)(b) refers to granting a reconnaissance permit over an area subject to an existing permit or right on condition that the reconnaissance activities do not unreasonably interfere with the holder's activities.

55.4 Without detraction from the comment immediately above, the word "unreasonably" should be deleted considering that interference with an existing permit or right holder's rights should be kept to a minimum, and to insert at the end thereof the words "and are to be performed in accordance with Good International Petroleum Industry Practices".

56 **Rights of a reconnaissance permit holder (Clause 40)**

56.1 Reference is made in clauses 40(1)(b) and (2) to the holder's exclusive right to market data acquired under a reconnaissance permit subject to the exclusive agreement between the holder and the Petroleum Agency.

56.2 The following proviso should be inserted at the end of clause 40(2) namely:

"; provided that

(a) such agreement shall provide that an existing or future holder of a technical co-operation permit, exploration right, production right, or petroleum right, granted or which remains in force in terms of this Act over the block or blocks which are the subject of the reconnaissance permit, shall have the option to purchase the data in section 40(1)(b) at the prevailing market price which in the absence of agreement on such price shall be determined by arbitration in accordance with the Arbitration Act, 1965;

(b) should such agreement not be agreed upon, the exclusive right to market data shall lapse and be of no force or effect.".

56.3 The alternative to proviso (a) above would be to grant the holder a right of first refusal.

57 **Notarial execution of permit, right or deed of amendment (Clause 42)**

57.1 Clause 42(1)(a) refers to the obligation of a holder notarially to execute a permit, right or deed of renewal of a retention permit, within 30 days from the date of notification by the Petroleum Agency of the outcome of the application. However, the 30 day period is too short and would be an undue and impractical administrative burden on the holder, and should therefore be 90 days. Regulation 41 made in terms of the Mining Titles Registration Act, 1967 provides that for registration of production rights, a diagram prepared by a land surveyor and approved by the Surveyor-General must be attached to the production right. Presumably, Regulation 41 will be amended so as to apply also to petroleum rights. The preparation and approval of such diagrams takes many months so that even 90 days may be insufficient and this certainly cannot be achieved within 30 days. Moreover, resolutions and powers of attorney also take time and in the case of foreign companies would need to be authenticated, all of which also is likely to take well longer than 30 days.

57.2 It is suggested that in the first line, the figure "30" be deleted and substituted with the figure "90".

57.3 The above comment applies similarly to clause 42(2), which should refer to more than one extension (i.e. to extensions from time to time), the period of each of which should be a period that is reasonable in the circumstances, and not less than 90 days.

57.4 Clause 42(2) refers to an application by a holder to the Petroleum Agency for an extension of a further 30 days for the notarial execution of a permit, right or deed of amendment. Without detraction from the above comments, it is suggested that:

(1) in the first line, after the word "apply", the words "from time to time" be inserted; and

(2) in the second line, the words and figure "of a further 30 days" be deleted and the words "for a period that is reasonable in the circumstances" be substituted therefor.

57.5 Clauses 42(3) and (4) refer to automatic lapsing and reversion to the State of a permit or right which has not been notarially executed within the periods referred to therein.

57.6 OPASA submits that clauses 42(3) and (4) are unwarranted in regard to a formality such as notarial execution, severely jeopardise security of tenure, and hence are contrary to the object of security of tenure in clause 2(h), and should be replaced by provisions to the effect that failure to comply with clause 42(1) will be deemed to constitute a breach to which the provisions of clause 88 will apply. Therefore OPASA requests that:

(1) clauses 42(3), (4) and (5) be deleted in their entirety;

(2) in the alternative, instead of the right or permit lapsing as contemplated clauses 42(3), (4) and (5), the provisions of clause 88 be invoked so as to afford the holder an opportunity to remedy the breach and in this regard, it is suggested that in clause 42(3), at the end of the second line, the words "subject to section 88" be inserted.

57.7 Clause 42(6) sets out that where an appeal has been lodged against the grant of a petroleum right or the approval of an environmental authorisation, the notarial deed of granting may not be notarially executed until the appeal has been finalised. However, there is not a sufficient nexus between the notarial execution of the notarial deed of granting and an appeal to warrant not proceeding with such notarial execution.

57.8 It is suggested that clause 42(6) be deleted in its entirety since, as suggested in the submissions below in clause 99, an appeal should not suspend the decision so that notarial execution should proceed.

58 **Application for a petroleum right (Clause 43)**

58.1 OPASA reiterates its above submission that provision should be made for voluntary applications, so that in clause 43(1), the words "subject to sections 15 and 37" should be deleted.

58.2 Without detraction from the comment above, clause 43(2)(c) should be subject to clause 17(2) so as to cater for applications made in terms of clause 15 (administrative licensing rounds for petroleum rights). It is therefore suggested that clause 43(2)(c) be prefaced by the words "subject to section 17(2)".

58.3 Furthermore, in clause 43(2)(c), third line, it is suggested that the word "accepted" be replaced by the word "received" since the reference to acceptance leaves a lacuna between date of receipt and date of acceptance during which a third party's application could be accepted in terms of clause 43(2).

59 **Granting and duration of petroleum right (Clause 44)**

59.1 Clause 44(2) refers to the Minister refusing a petroleum right if the petroleum right application does not meet the requirements in subsection (1) within 60 days of receipt thereof from the Petroleum Agency. However, there is no time period referred to in clause 44(1) in regard to the Minister granting a petroleum right.

59.2 OPASA suggests that in clause 44(1), first line, after the word "must" the words "within the later of 180 days of receipt of the application, and the date of grant of the environmental authorisation", be inserted.

60 **Application for approval to progress to the next term (exploration phase) (Clause 46)**

60.1 Clause 46(4) refers to fixed percentages of the total extent of the petroleum right area to be relinquished when applying for approval to progress to the next term. OPASA submits that there is no justification for relinquishments just because the holder is proceeding to the next term, and that clauses 46(4), (5) and (6) should be deleted.

60.2 Without detraction from the above comment, should clause 46(4) be retained, OPASA submits that these fixed percentages should depend on the facts and circumstances. It is therefore suggested that in clause 46(4), first line, after the word "must" the words "subject to any reduced percentage agreed in the petroleum right or otherwise agreed by the Petroleum Agency in accordance with the circumstances such as small acreage, prospectivity of geological formations identified in the previous term or terms, and other relevant circumstances" be inserted, and further that in clauses 46(4)(a) and (b) the percentages of 20% and 15% be reduced to 15% and 10% respectively.

60.3 Clauses 46(7) and (8) refer to a "term that has expired" remaining in force. However, a term that has expired cannot remain in force so that OPASA submits that the wording in section 81(5) of the MPRDA is preferable so that OPASA suggests that clauses 46(7), (8) and (9) be deleted and be replaced by a new consolidated clause 46(7) which reads as follows:

> *"(7) A term in respect of which an application to progress to the next term has been lodged before the expiry of the preceding term, shall, despite its expiry date, remain in force:*
>
> (a) *until the application to progress to the next term has been approved or refused by the Petroleum Agency, and*
>
> (b) *in the case of approval, a notarial deed of amendment has been executed,*
>
> *during which extended period the holder is entitled to continue with exploration operations in accordance with the approved minimum or optional work commitment.".*

61 **Approval of application to progress to next term (Clause 47)**

61.1 In clause 47(1), a period such as not exceeding 30 days from receipt of the application in terms of clause 46, should be inserted for grant and written notification thereof to the holder.

61.2 In relation to clause 47(1)(c) regarding relinquishment, see the above comments on clauses 46(4), (5) and (6).

61.3 In relation to clause 47(1)(g), see the above comments on clauses 31 and 34.

61.4 In relation to clause 47(2):

(1) the period of validity for the subsequent term would automatically be the periods provided for in clause 14(2)(a)(ii);

(2) the method of recordal should be stated, which in terms of clause 46(8)(b) seems to be by way of a notarial deed of amendment, so that it is suggested that wording similar to that in clause 61(3) be used, namely that the holder must notarially execute a deed of amendment of the petroleum right recording that the new term is applicable and submit it to the Mineral and Petroleum Titles Registration Office in accordance with clause 50(a).

62 Refusal of application to progress to next term (Clause 48)

62.1 OPASA suggests that clause 48(1) be amended to insert in the first line, after "may the words "within 30 days of receipt thereof and after having given the holder notice of intention to refuse it setting out the reasons for such intended refusal, and affording the holder a reasonable opportunity to show why such refusal should not occur". This would accord with procedural fairness as embodied in clause 88(2).

62.2 OPASA suggests that in clause 48(2), second line, after "must" the words "within 30 days of receipt of the Petroleum Agency's decision" be inserted.

62.3 Furthermore, clause 48(2) does not provide the holder of a petroleum right an opportunity to make representations to the Minister as to why the application should not be refused by the Petroleum Agency. In this regard, OPASA submits that in clause 48(2), last line, the words "after the Minister has afforded the holder a reasonable opportunity to make representations as to why the application should not have been refused" be inserted.

62.4 Clause 48(3) should be amended so that in the second line, after "must", the following replacement wording be inserted:

"(a) grant the application if the Minister is satisfied that the holder has met the requirements in section 47(1), or

(b) should the Minister not be so satisfied, refer the application back to the Petroleum Agency for the holder to implement such directives as the Minister may issue to the holder, and on satisfaction of which, the Petroleum Agency must grant the application.".

62.5 OPASA submits that the reference in clause 48(4) to outright cancellation of the petroleum right is a disproportionate measure flowing from a refusal by the Petroleum Agency of an application to progress to the next term. Furthermore, the reference to cancellation does not accurately reflect the provisions of clause 88 which in any case require the Minister to give notice of intended cancellation, and provide the holder with an opportunity for representations as to why the right should not be cancelled, prior to cancelling the right in question. In this regard, it is suggested that in clause 48(4), last line, after "88" the words "and in regard to which section 88(2) applies" be inserted.

63 Rights of a petroleum right holder (Clause 49)

63.1 Clause 49(1), first line, after the word "the" the word 'exclusive" be inserted.

63.2 In regard to the reference in clause 49(1)(c) to section 52, see OPASA's comments on clause 52.

63.3 OPASA suggests that clause 49(1)(d) be split into two provisions dealing with separately with exploration and production, along the following lines:

> " (d) (i) subject to section 53, exclusively to explore for petroleum and to remove and dispose of any petroleum found during the course of exploration operations, and
>
> (ii) exclusively to produce, remove and dispose of, any petroleum produced during the course of production operations; and".

In regard to the above reference to section 53, OPASA refers to its comments on clause 53.

64 **Obligations of petroleum right holder (Clause 50)**

64.1 It is suggested that clause 50 be prefaced by the words "Subject to the provisions of this Act," since there are other provisions such as in clauses 61, 69 and 70, which may dilute the obligations in clause 50.

64.2 In clause 50(a), first and second lines, the words "from the date of notification by the Petroleum Agency" should be replaced with "of the date of notarial execution in accordance with section 42, or within such extended period which the Mineral and Petroleum Titles Registration Office may allow".

64.3 In relation to clause 50(e), see the comments on state participation and empowerment above.

64.4 In relation to the prescribed fees in clause 50(f), see the comments on prescribed fees in other parts of these submissions.

64.5 Clause 50(i) should permit self-insurance if accepted by the Petroleum Agency at inception. In this regard, it is suggested that in clause 50(i), first line, after the word "insurance" the words ", including self-insurance if applicable," be inserted.

64.6 In regard to the relinquishment mentioned in clause 50(j), see the comments on clause 46(4) above.

65 **Manner of conducting exploration operations (Clause 51)**

65.1 For purposes of clauses 51(1)(a) and 51(2)(c), the concept of Good International Petroleum Industry Practices should be defined in clause 1.

65.2 Clause 51(1)(e) refers to the recorded obligation in the petroleum right to take reasonable steps to warn persons of hazards resulting from structures, equipment or other goods. OPASA submits that this is vaguely worded, and in terms of which it is suggested that clause 51(1)(e) be deleted, and replaced with, "(e) ensure compliance with the relevant health and safety legislation.".

65.3 OPASA suggests that clause 51(2) be dealt with in the Regulations to the Act, and not within the Act itself.

65.4 Without detraction from the above comment, in clause 51(2)(e), last line, after the word "approval" the words "except in case of an emergency" should be inserted.

66 **Application for drilling permit (Clause 52)**

66.1 The activity regulated by the proposed drilling permit would have been set out in the work programme with the relevant environmental authorisations already having been obtained at the application stage, so that there is no need for an additional drilling permit.

66.2 The need to obtain a drilling permit would delay operations and could cause lapsing of the then current term of the petroleum right, so that the period of 60 days in clause 52(3) should be shortened to a period not exceeding 30 days.

67 **Permission to produce petroleum and conduct tests during exploration (Clause 53)**

67.1 The comments in regard to clause 52 apply equally to clause 53.

67.2 Without detraction from the above comment, it is suggested that clarity be provided in respect of the tests that are to be conducted in respect of this clause.

67.3 In regard to clause 53(4), it is unclear why a permit to produce or conduct drill stem tests is non-renewable. In this regard, OPASA submits that such a permit should be valid for the duration of the exploration phase. Alternatively, provision should be made for such permit to be renewed.

68 **Discovery of petroleum and appraisal (Clause 54)**

68.1 In clause 54(1)(a), the reference to "five days" is too short and should be deleted and be replaced with "30 days".

68.2 In clause 54(1)(b), the reference to "100 days" is too short and should be deleted and be replaced with "180 days".

68.3 In clause 54(1)(d), first line, before the word "conduct" insert the words "unless the holder applies to proceed to the production phase,". The reason for this is that appraisal is not necessarily necessary to enable the holder to proceed directly to production. At least one example of this exists.

68.4 In clause 54(2), second line, after the word "must" the words "unless the holder applies to proceed to the production phase" be inserted.

68.5 In clause 54(4), first line, after "(1)(d)" the words "and does not apply to proceed to the production phase" be inserted.

68.6 OPASA notes that in terms of clause 54(7), an application for exemption from relinquishment will be prescribed by regulation. In that regard, OPASA requests that relinquishment should only be required in terms of clause 54(4) if the holder has obtained sufficient data so as to know that further testing is not warranted or if the holder elects that the discovery is non-commercial, either on its own or in conjunction with other discoveries, or if the holder consents to such relinquishment.

68.7 In clause 54(6)(a), after the words "(1)(d)" the words "and does not apply to proceed to the production phase" be inserted.

68.8 In clause 54(8)(b), last line, the word "and" should be deleted and replaced with "or".

68.9 In clause 54(10):

(1) first line, the word "finalise" should be deleted and replaced with "decide";

(2) second line, after "subsection (7)", insert the words ", and give written notice of such decision to the holder,".

69 **Discovery not worthy of appraisal (Clause 55)**

OPASA refers to its comments on clause 54 in regard to appraisal not necessarily being necessary before the holder proceeds to production.

70 **Extension of exploration phase (Clause 56)**

70.1 Clause 56(1) should be amended to delete "may" and replace it with "must, within 30 days of such application" and after "extend" to insert "and give written notice of such extension to the holder".

70.2 In clauses 56(1)(a) and clause 56(1)(b)(ii), the references to appraisal should be amplified to provide alternatively for proceeding directly to production.

70.3 OPASA submits that clause 56(2) be deleted in its entirety.

70.4 Alternatively, should clause 56(2) be retained, in clause 56(2)(c), the words "two years" should be deleted, and replaced with "a reasonable period in the circumstances".

70.5 Clause 56(3):

(1) The decision to grant an application for extension should not be discretionary but rather peremptory considering that it relates to minimum work commitments and the absence of any breach. It is suggested therefore, that in the second line, the word "may" be deleted and replaced with the word "must".

(2) unless this is done in clause 56(1), wording similar to that suggested in relation to clause 56(1) be inserted in clause 56(3).

71 **Declaration of a commercial discovery (Clause 57)**

71.1 In clause 57(1), allowance should be made for a holder to declare a commercial discovery without needing to undertake appraisal operations.

71.2 OPASA submits that in clause 57(1), first line, before "A" the words "Without detracting from such holder's right to progress to the production phase in accordance with section 59, without appraisal operations." be inserted.

72 **Application for approval to progress to production phase (Part A and B) (Clause 58)**

72.1 In clause 58(2), second line, "section 54(1)(d)" should be "section 57(1)(c)".

72.2 Clause 58(2)(e) which requires relinquishment on application to progress to production phase and which refers to sections 46(4) and (5) should be deleted in that relinquishment should not apply at that stage, and in which regard sections 46(4) and (5) apply to the next term of the exploration phase, not to progression to the production phase.

72.3 In relation to clause 58(3):

(1) "local content plan" should be defined in clause 1.

(2) "upstream training trust" as referred to in clause 58(3)(d)(ii) should be defined in clause 1, presumably being the upstream training trust that was established in terms

of the Petroleum Charter which is Schedule 1 to the Petroleum Products Amendment Act, 2003.

(3) Clause 58(3)(d)(ii) needs to be amplified to explain what the fees of the trust are, and who determines them.

73 **Approval of application to progress to production phase (Clause 59)**

Clause 59(3) needs to be:

73.1 Amplified to explain what constitutes a "marginal field", which term is otherwise too vague to satisfy the rule of law requirements in section 1(c) of the Constitution.

73.2 Amplified to render it clear that the marginal field must be within the production right area, and which can be achieved by the addition after "field" of "within the production right area".

73.3 Amended by the deletion of "and" in the second line, and the insertion of "or".

74 **Refusal of application to progress to production phase (Clause 60)**

OPASA's comments on clause 48 apply equally to clause 60.

75 **Postponement of development (Clause 61)**

75.1 In clause 61(1):

(1) The concept of "national interests" needs to be amplified to explain the circumstances which might constitute national interests since the term "national interests" is too vague to comply with the rule of law requirements in section 1(c) of the Constitution.

(2) The Minister and the holder should have to agree and consent to such postponement so that in the first line "after" should be "in": see McDonald & Others v Minister of Minerals and Energy & Others 2007 (5) SA 542 (C), and in which regard OPASA requests that the consent of the holder be expressly required since postponement may have severe negative economic consequences for the holder which has ongoing expenses and cannot simply suspend operations.

75.2 In passing, the reference in clause 61(3) to section 50(1)(a) should be to section 50(a).

76 **Application for approval to progress to next term (production phase) (Clause 62)**

76.1 OPASA's comments on clause 46 apply equally to clause 62.

76.2 In passing, in clause 62(6), first line, "exploration" should be "production".

77 **Approval of application to progress next term (production phase) (Clause 63)**

OPASA's comments on clause 47 apply equally to clause 63.

78 **Review of petroleum right (Clause 64)**

78.1 OPASA is fundamentally opposed to clause 64 of the Bill in that an investor needs to know at the outset of an investment what the terms of the investment will be for the whole of the life of the investment, clause 24 being contrary to the object in clause 2(h) of security

(and hence continuity) of tenure, and is a disincentive to investment in upstream petroleum in South Africa, and hence contrary to various of the other objects in clause 2. All of this gave rise to the international investment community requiring stabilisation agreements such as in the Tenth Schedule in the Income Tax Act, 1962 and in section 13 of the Mineral and Petroleum Resources Royalty Act, 2008.[4]

78.2 The amendment of existing, or insertion of new, terms and condition may constitute an expropriation within the meaning of section 25 of the Constitution for which compensation in terms of section 25 of the Constitution would be payable. In the absence of such compensation, clause 64 would contravene the Constitution, and fall to be deleted.

78.3 The reference in clause 64(1) to "fair share of benefits" indicates that state revenue is contemplated thus constituting a money bill in terms of section 77 of the Constitution which can be tabled only by the Minister of Finance as set forth in the *Shuttleworth* case, all of which has been mentioned earlier in these submissions.

78.4 There is no similar provision in the MPRDA in relation to prospecting, exploration, mining or production rights.

78.5 Without detraction from the above, the concept of the Minister being able to determine what constitutes the state deriving a fair share of benefits is vague and open-ended, and contrary to the rule of law requirement in section 1(c) of the Constitution. OPASA submits that there is no reason why this determination should not be made at the time when the Minister grants the petroleum right so that the holder knows with certainty what the terms and conditions of the petroleum right will be and remain for the whole duration of the production right.

78.6 In clause 64(3), at the end, insert ", or in terms of the Arbitration Act, 1965".

79 **Manner of conducting production operations (Clause 65)**

79.1 The obligations of the holder in clause 65(1) must be in accordance with the production work programme, so that after "must" should be inserted "in accordance with the approved production work programme".

79.2 For the same reasons as in relation to clause 64, OPASA is fundamentally opposed to the Petroleum Agency being empowered in clause 65(2) to direct increase or decrease rate of production, and requests deletion of clause 65(2).

79.3 Without detraction from the above, clause 65(2) is inconsistent with the terms and conditions of the production right programme so that a second proviso should be inserted at the end of clause 65(2) as follows:

> "and provided further that such increased or decreased rate shall be in accordance with the approved production work programme.".

80 **Measurement of production (Clause 66)**

In clause 66(2), it would be preferable if a direct reference to the South African Bureau of Standards and to the Legal Metrology Act, 2014 were to be made.

81 **Ascertainment of petroleum produced (Clause 67)**

[4] In regard to which, see the commentary on Dale et al, op cit, pages MPRRA-34 (Service Issue 23) and following.

81.1 Clause 67(2) is not compatible with the fact that the measuring device must be approved by the Petroleum Agency in terms of clause 66. Once the device has been approved in terms of clause 66, it follows that the quantity measured by such device will be accurately measured. Clause 67(2) therefore constitutes double-dipping by the Petroleum Agency.

81.2 Without detraction from the above, clause 67(2) should not provide for unilateral determination of quantities by the Petroleum Agency, and should merely provide for the inspection, testing, and if necessary, repair of the device.

81.3 Clause 67(3)(a) is irrational, not rationally connected to its purpose, and arbitrary, and as such OPASA requests its deletion.

81.4 Clause 67(3)(b) constitutes a money bill in terms of section 77 of the Constitution and which, as previously discussed in these submissions, can be tabled only by the Minister of Finance, is thus unconstitutional, and falls to be deleted.

81.5 OPASA proposes that either the Petroleum Agency or the holder should be entitled, as in clauses 64(3) and (4), to refer any dispute on measurement of quantities to arbitration as provided for in the terms and conditions of the petroleum right or in terms of the Arbitration Act, 1965.

82 **Third party access (Clause 68)**

82.1 OPASA submits that clause 68 may constitute an expropriation of property within the meaning of section 25 of the Constitution, and for which compensation as envisaged in section 25 would have to be provided in clause 68 failing which clause 68 would be unconstitutional. Clauses 68(4) and (5) regarding determination of tariffs and other conditions of use do not comply with section 25 of the Constitution. The comments which follow are without detraction from the aforegoing.

82.2 In clause 68(1)(a), any interference, not only unreasonable interference, should suffice so that the word "unreasonably" should be deleted.

82.3 Clause 68(2) refers to consultation with the holder. OPASA submits that that is not sufficient and that what should be required is the consent of the holder.

82.4 Clause 68(3) should not be peremptory and should instead require that an agreement be concluded insofar as possible.

82.5 Since agreement will have been reached between a holder and a third party, there should be no requirement for the Petroleum Agency to approve it and clause 68(3)(b) should be amended by the deletion of the words "for approval". Similarly, in clause 68(4), the words "or where the Petroleum Agency has not approved the agreement as contemplated in subsection (3)" should be deleted.

82.6 In regard to clause 68(4), determination of tariffs is a competency of the National Energy Regulator of South Africa so that tariffs should be determined in accordance with the Gas Act, 2001, and the Petroleum Pipelines Act, 2003, and not be a competence of the Petroleum Agency let alone "or any other state-owned entity".

82.7 OPASA does not accept that the Petroleum Agency may alter the conditions of an agreement since an agreement is contractually binding between the parties. For the above reasons, clause 68(6)(b) may also be unconstitutional. OPASA requests that clause 68(6)(b) be deleted.

83 **Application for retention permit (Clause 69)**

83.1 OPASA proposes that a new clause 69(1)(c) be inserted which provides for application for a retention permit for ultra-deep blocks, on the basis that such development of such blocks poses significant challenges from a time and investment perspective.

83.2 As for all decisions relating to acceptance and grant, a period such as 30 days for acceptance or rejection and for notification of the decision should be provided.

83.3 In passing, the reference in clause 69(1) to section 54(1)(d) should be a reference to section 57(1)(c).

84 **Granting and duration of retention permit (Clause 70)**

84.1 In clause 70(1), "may" should be "must", and a period such as 30 days for grant or refusal and for notification thereof should be provided.

84.2 It is not indicated by the insertion of "and" or "or" at the end of clause 71(c) whether the requirements in (a) to (d) are cumulative (conjunctive) or alternative (disjunctive). Since (a) and (d) apply to all petroleum, whereas (b) and (c) apply (subject to the below comments) only to gas, OPASA recommends that clauses 70(1)(a) to (d) be split into these two categories.

84.3 OPASA requests that in clauses 70(1)(b), (c) and (d), "proved" be replaced with "explained in accordance with Good International Petroleum Industry Practices" and which term needs to be defined in clause 1.

84.4 OPASA requests that the renewal and the renewal period in clause 70(4) not be limited to a single renewal of three years, but that renewals be possible from time to time, and that each renewal period be a reasonable period in accordance with the purpose of the retention permit.

84.5 Clauses 70(1)(c) and (5) should not be limited to gas, and instead should apply to all forms of petroleum, so that OPASA requests that in those clauses, "gas" be replaced by "petroleum".

85 **Refusal of application for retention permit (Clause 71)**

85.1 A period such as 30 days for grant or refusal and notification thereof, should be provided in clauses 70(1) and 71(1).

85.2 In clause 71(1)(b), contravention of any law should be a ground for refusal, so that "or any other law" should be deleted.

85.3 Clause 71(2) can apply only to a holder who has elected to proceed to development, not to a holder who is already in the production phase, so that in the first line after "right", should be inserted "who has elected to develop a discovery as contemplated in section 57(1)(c)".

85.4 In clause 71(2), the period of 60 days should be at least 90 days.

85.5 Clause 71(2) should not result in automatic lapsing, but rather should entitle the Minister to invoke section 88, which includes the administrative fairness provisions in section 88(2).

86 **Granting of renewal of retention permit (Clause 73)**

86.1 In clause 73(1)(a), "any other relevant law" should be deleted.

86.2 Clauses 73(1)(b) and (c) should be alternatives (disjunctive), so that after (a) "and" should be inserted, and (b) and (c) should become (i) or (ii).

86.3 Clause 73(2) is a repetition of clause 70(4), and should either be deleted or if retained, should be subject to section 70(4). However, OPASA's comments on clauses 70(4) and (5) apply equally here.

87 **Refusal of application for renewal of retention permit (Clause 74)**

87.1 The heading to clause 74 should be corrected to insert after "for", the words "renewal of."

87.2 In clause 74(a), if OPASA's above recommendations relating to clauses 70(1)(c) and 70(5) are accepted, "gas" should be deleted.

87.3 Clause 74(b) should require an objective assessment so that "the Petroleum Agency is of the view that" should be deleted.

87.4 In passing, in clause 74(c), perhaps the reference to section (2)(i) should be to section (2)(j).

87.5 The refusal in clause 74 should be subject to Ministerial confirmation as in clauses 48 and 60 (as amended in accordance with OPASA's comments on clauses 48 and 60).

88 **Rights and obligations of retention permit holder (Clause 75)**

88.1 Since clause 75 deals only with obligations, the heading should be amended to delete "rights and".

88.2 Clauses 75(c)(i) and (ii) should be disjunctive so that "and" should be "or".

88.3 In the light of OPASA's earlier comments on retention permits, in clause 75(c)(i), "gas" should be deleted.

88.4 In clause 75(d), "issued" should be replaced with "notarially executed in terms of section 42".

89 **Vis major (Clause: 76)**

89.1 Clause 76(1) is restrictive in regard to what constitutes vis major, and does not take account of government directives (such as in relation to Covid-19), lack of water, lack of electricity, strikes, lock-outs, other labour disruptions, failure of machinery, commercial frustration, and many more. Moreover, reference should directly be made in clause 67(1), third line, to "any event of vis major including but not limited to...". An example of wording that is used in agreements is the following:

"i. acts and/or omissions of any government, government agency, national, provincial or local authority or similar authority, any laws, regulations, or directives, or orders having the force of law, or any act or restraint of or by any governmental or semi-governmental or other public or statutory authority, or judicial orders including but not limited to interdicts;

ii. civil strife or commotion, riots, insurrection, sabotage, acts of war, war (whether declared or undeclared), revolution, or acts of terrorism or public enemy;

iii. legal and illegal strikes and industrial action, lock-outs, stoppage, ban or limitation on work or restraint of labour, interruption, unavailability, or

breakdown, of transport, plant or machinery, prohibition or limitation of imports, or rationing of, interruption in, or delays in, supplies;

iv. flood, storm, fire, cyclone, lightning, tempest, an earthquake, or an explosion;

v. electricity or water shortages and/or interruptions, load-shedding and/or rolling blackouts;

vi. disease, quarantines, pandemics, endemics, plagues and/or pestilence all, whether already existing, current, and/or future, including but not limited to the ongoing Covid-19 pandemic and its viruses and variants thereof, and related governmental actions and laws;

vii. any other circumstances beyond the reasonable control of the party and comprehended in the term force majeure;

viii. any other circumstances which constitute and/or lead to commercial frustration beyond the reasonable control of the party".

89.2 Clauses 76(3) and (4) should refer to a period such as 30 days for granting or refusing requests and for notifying the holder.

89.3 Clause 76(5) is a money bill to which OPASA's earlier comments relating to money bills, apply. Furthermore, there are no annual charges or rents payable in terms of the Bill, or any regulations which could be made in terms thereof, so that "annual charges, rent" should be deleted.

90 **Unitisation (Clause 77)**

Clause 77(4)(b) should provide that clause 88 will apply to any cancellation.

91 **Geoscience Information and data (Clause 79)**

91.1 As mentioned above, the Geoscience Act, 1993 established the Council for Geoscience whose objects, functions, and powers in terms of sections 3, 5 and 6 relate to geoscience data and information. Regulations in terms thereof were made in GN 1940 GG 46126 of 30 March 2022 (i.e. after the Bill was tabled in 2021) and which deal inter alia with lodgement, classification, dissemination, and disclosure, of geoscience data and information, and which are therefore the preserve of the Council for Geoscience, and not of the Petroleum Agency. Clauses 79 and 80 will therefore need to be amended so as to remove from them those functions which are vested in the Council for Geoscience.

91.2 Clause 79(2) in its provision that data and information become the sole property of the state, constitutes an expropriation without compensation and hence is unconstitutional in its contravention of section 25 of the Constitution, and needs to be deleted. It also conflicts with the Geoscience Act, 1993, and Regulations.

91.3 Similarly, clause 79(3) cannot limit the rights of use of the owner of the data and information to the duration of the right or permit, since ownership therein vests in the holder.

91.4 Clause 79(2)(b) refers to a period determined in section 14, but section 14 only determines the period of the reconnaissance permit itself, and not for use for data and information.

92 **Disclosure of information and data (Clause 80)**

92.1 OPASA again refers to the non-disclosure and secrecy provisions contained in the Geoscience Act, 1998, and Regulations, with which clause 80 conflicts.

92.2 Confidentiality in clause 80(1) cannot be limited to the period in clause 79(3) since ownership in the information and data vests in the holder. Accordingly, in clause 80(1), second line, the words "for a period contemplated in that section" should be deleted, as do clauses 80(2)(a) to (c). The comments which follow are without detraction from that.

92.3 The period of 10 years in clause 80(2)(b) is arbitrary, considering that the duration of permits or rights could be much longer, has no rational connection to anything and falls to be deleted.

92.4 If notwithstanding the above comments, clause 80(2)(c) is retained, it should cater for the holder having applied for, or holding, permits or rights on adjacent or neighbouring areas, since the information and data may be relevant and of use in regard to such areas, and to which end after "relinquished" the words "unless the holder of, or successor in title to, such permit or right has applied for, or been granted a right or permit, in respect of an adjacent or neighbouring area, or an area which geologically forms part of the same petroleum reservoir" should be inserted.

92.5 OPASA's comments on clause 79, including 79(3)(b), apply to clause 80(3).

93 **Samples (Clause 81)**

93.1 The prohibition in clause 81 against export of samples contravenes South Africa's foreign trade commitments, and is for that reason unconstitutional, and falls to be deleted. The following comments are without detraction from this.

93.2 In clause 81(2), "may" should "must", and a period such as 30 days for grant and notification of approval needs to be inserted.

94 **Environmental authorisations (Clause 83)**

94.1 Since reconnaissance is now since 11 June 2021 listed activity 21B in Listing Notice 1 of 2014 (as amended on 11 June 2021) made in terms of the NEMA, clause 83(1) should additionally refer to reconnaissance so that before "exploration" insert 'reconnaissance".

94.2 Where such listing notices refer to reconnaissance, exploration and production operations, they go on to refer to those operations as well as to any other activity required to exercise the relevant permit or right, and section 24C(2A) of NEMA also refers to activities "directly related" to such operations. It is therefore suggested that clause 83(1) be amended by the addition, at the end thereof, of "and any other activity required to exercise the relevant permit or right or directly related to such first mentioned activities".

94.3 It is suggested that after "is" be inserted "insofar as required in terms of the National Environmental Management Act".

95 **Issuing of closure certificates (Clause 84)**

95.1 The references in clause 84 to exploration and production rights conflict with Schedule 1, items 8(1) and 10(1) in which provide that such rights remain in force subject to the terms and conditions under which they were granted, i.e. section 43 of the MPRDA would

continue to apply to them. Perhaps therefore, clause 84(1) should commence with the words "Notwithstanding Schedule 1 to this Act".

95.2 Clause 84(3)(a) should refer to the whole, or any part of parts of the right, so that after "of" insert "the whole or any part or parts of".

95.3 The period of 30 days in clause 84(4) is likely to be insufficient, as was recognised in section 43(4) of the MPRDA, which refers to 180 days. OPASA requests that reference be made to 180 days.

95.4 In clause 84(8):

(1) In the first line, "may" should be "must";

(2) The reference to section 45 of NEMA should be a reference to section 24P of NEMA.

95.5 In passing:

(1) The references in clause 84(13) to subsections (9) and (10) should respectively be to subsections (11) and (12).

(2) The references in clause 84(15)(a) and (b) to sections 50 and 93 seem to be incorrect, since sections 50 and 93 do not deal with exploration reports, or with data, respectively.

96 **Approval of the Joint Operation Agreements (Clause 86)**

OPASA submits that clause 86 be deleted in that a joint operating agreement is an agreement between the parties and therefore should not require submission to the Petroleum Agency for approval. The terms of the joint operating agreements do not impact on, detract from, or negate the statutory obligations of holders to comply with the terms of the right or with the provisions of the Act and Regulations

97 **Financial guarantee (Clause 87)**

97.1 In clause 87(1), the format of the guarantee should be prescribed by regulation rather than being left to the determination of the Petroleum Agency, so that "determined by the Petroleum Agency" should be "as prescribed". Compare Appendix 7 in the proposed Financial Provisioning Regulations, 2022 published in GN 2272 GG 47112 of 11 July 2022 for comment.

97.2 Clause 87(1) should allow for parent company guarantees where the parent company is a listed company as defined in clause 1.

97.3 The cancellation in clause 87(2) should be subject to the Minister having complied with section 88.

98 **Minister's power to suspend or cancel (Clause 88)**

98.1 In regard to the references to exploration and production rights, the comment in regard to Schedule 1 in relation to clause 84 applies equally to clause 88.

98.2 The instances for cancellation or suspension listed in clauses 88(1)(a) to (g) could be subject to extensions, exemptions, retentions, vis major, and the like in other clauses in the Bill or in provisions of NEMA, so that it is suggested that in clause 88(1), first line, after "(4)" be

inserted "and to any other relevant provisions of this Act or of the National Environmental Management Act". "

98.3 In clause 88(3), as in section 47(3) of the MPRDA, "may" should be "must", and additionally in the second line, after "measures" should be inserted "within a reasonable period of not less than 30 days having regard to the circumstances, and which period the Minister may from time to time on written application by the holder, extend,".

99 **Restriction or prohibition of exploration and production (Clause 89)**

99.1 The heading to clause 89 should, so as to align with the substance of clause 89, refer to restriction or prohibition of grant of a reconnaissance permit or a petroleum right on certain land or block.

99.2 Clause 89(2)(b) should be amplified by the addition at the end thereof of "or of any holder of a permit or right granted in terms of this Act", which inserted words appear in section 48(2)(c) of the MPRDA.

100 **Optimal production (Clause 90)**

100.1 At the end of clause 90(1), it is suggested that the words "and is contrary to Good International Industry Petroleum Practices" be added and that in clause 1, a definition of that term be provided.

100.2 It is suggested that as in section 51(3)(b) of the MPRDA, the period in clause 90(2) to make representations be 60 days.

100.3 In order to harmonise clause 90(3)(b) with clause 90(1), OPASA suggests that in clause 90(3)(b), second line, after "optimally" be inserted "in accordance with the production work programme".

101 **Lapsing (Clause 93)**

101.1 Since clause 29 relates only to petroleum rights, it is suggested that in clause 93(1)(a), second line, after "application" be inserted "can be made or if it can be made".

101.2 In passing, in clause 93(1)(a), third line, "permission" should be "consent".

101.3 OPASA refers to its comments on clause 42 that failure to execute notarially should not result in lapsing, and consequentially also requests deletion of clause 93(1)(d).

101.4 In relation to clause 93(2):

(1) As in clause 93(1)(a), reference should be made to final liquidation or final sequestration.

(2) In the second line, delete "licence" and replace with "permission".

(3) In the second line, after "must" insert "insofar as such right, permit, or permission is transferable and insofar as a buyer can be found after reasonable endeavours by the liquidator or trustee of the holder".

(4) In the second line, at the end, insert "insofar as section 29 is applicable thereto".

102 **Power to enter (Clause 94)**

102.1 In clause 94(1), first line, "employee" should be replaced by "officer" in accordance with the definition of officer in clause 1, but subject to OPASA's comment there in regard to an employee above a certain grade.

102.2 It is suggested that modified versions of sections 91(5) and 91(6)(a) of the MPRDA as new clauses 94(6) and (7) be inserted in the Bill as follows:

> *"(6) A warrant referred to in subsection (4) must be issued by a magistrate who has jurisdiction in the matter and may only be issued if he or she is satisfied that there are reasonable grounds to believe that any material, substance, appliance, book, record, statement or document or electronic information, documents or data that may relate to a contravention of this Act, is or are in the respective area or in the possession of a person in the respective area against whom such a warrant is sought.*
>
> *(7) If:*
>
> (a) *no criminal proceedings are instituted in connection with any item seized in terms of section 94(4)(f),*
>
> (b) *such item is not required for purposes of evidence or of such criminal proceedings; or*
>
> (c) *criminal proceedings have been concluded,*
>
> *such item must be returned as soon as possible to the person from whom it was seized.".*

103 **Orders (Clause 96)**

103.1 As in previous comments, in clause 96(1), second line, "or any other law" should be deleted.

103.2 In the fifth and sixth lines of clause 96(1), "or processing operations" should be deleted since the Bill does not govern processing operations.

103.3 Since the effect of an order to take rectifying steps, let alone an order of suspension or termination, is dramatic:

(1) Clause 96(2) should be amended to provide that any order in terms of clause 93(1) is suspended until such time as the Director-General confirms it or sets it aside.

(2) If OPASA's request in paragraph (a) above is not acceded to, clause 96(2) should provide that the Director-General must within a very short period such as 7 days from data of the order, confirm or set aside the order and immediately notify the holder or other person accordingly, failing which such order lapses.

This has been found to be a defect in section 93 of the MPRDA.

104 **Internal appeal (Clause 99)**

104.1 OPASA submits that appeals should have to be lodged within 30 days of the decision, since reference to 30 days of becoming aware could leave the position uncertain for years.

104.2 It is suggested that a provision similar to section 47(CB) in NEMA be inserted into clause 99 along the following lines:

"(1) The Director-General or the Minister may only in exceptional circumstances extend or condone a failure by a person to comply with a time period applicable to an appeal.

(2) The Director-General or the Minister may not accept an application for condonation to submit an appeal after 30 days have elapsed from the date of the decision under appeal.

(3) When considering an extension or condonation, the Director-General or the Minister must consider the following factors:

(a) the degree of lateness;

(b) a detailed explanation for the lateness;

(c) whether and to what extent that person or the decision-maker will suffer prejudice if the time period is extended or failure to comply with the time period is condoned; and

(d) a detailed explanation of the merits of the application for extension or condonation.

(4) The time period may only be condoned for a maximum period equal to the time period allowed for the action for which condonation is sought in terms of this Act.".

104.3 Experience of sections 96(1)(a) and (b) of the MPRDA has shown that two sequential appeals first to the Director-General, and thence to the Minister, are cumbersome, time-consuming and costly, and that since the same officials make recommendations to the Director-General and to the Minister on appeals, there is no point in having two sequential appeals. OPASA therefore requests that all internal appeals be directly to the Minister.

104.4 OPASA submits that section 96(2)(a) of the MPRDA in terms whereof an appeal does not suspend the decision on appeal unless it is suspended by the appeal authority, is preferable to clause 99(2) which provides for suspension, since thereby an interferer can cause suspension simply by lodging an appeal.

104.5 In the interests of clarity, OPASA proposes that in clause 99(2)(b) the words "subsequent application" be replaced by the words "application subsequent to the decision which is the subject of the appeal".

104.6 Since in terms of section 7(2)(c) of PAJA, a court may exempt a person having to exhaust internal remedies, clause 99(3) should be prefaced by the words "Subject to section 7(2)(c) of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000),".

104.7 It is essential, particularly if an appeal suspends the decision under appeal, that appeals be dealt with expeditiously in accordance with stipulated time periods. Such time periods should therefore be inserted in the Regulations to be prescribed in terms of clause 99(1), and that such periods be very short.

105 **Serving of documents (Clause 100)**

105.1 Given that email is now a recognised mode of communication, OPASA suggests that a new clause 100(c) be inserted referring to sending by email to that person's email address, and in respect of which a non-delivery notice has not been received.

105.2 In regard to the term "officer" as used in clause 100(2), and as defined in clause 1, being above a certain rank, see OPASA's comments on that definition in clause 1.

106 **Penalties (Clause 102)**

106.1 Clauses 102(a) to (g) are not correctly related to the relevant paragraphs of clauses 101(a)(i) to (vii) or to paragraph 101(b) in that:

(1) The penalties for the relevant offences seem in some cases to be disproportionate so that reference has been made to the wrong offence.

(2) Section 101(a)(ii) to which reference is made in clause 102(b) has nothing to do with perjury.

(3) Section 101(a)(v) to which reference is made in clause 102(d) has nothing to do with offences for which penalties may be imposed in a magistrate's court.

(4) Section 101(b) to which reference is made in clause 102(f) is not something that can be persisted in, and in any event, a penalty of R 500 000 per day is grossly excessive.

106.2 Penalties based on turnover and exports, as in clauses 102(a), (c), and (e), are draconian, and in fact unconstitutional as constituting an expropriation of money within the meaning of section 25 of the Constitution, and therefore fall to be deleted.

107 **Administrative penalty (Clause 103)**

107.1 In clause 103(1)(a):

(1) The reference to section 109 should be to section 94.

(2) The reference to section 101(a)(iv) which relates to contravention of, or failure to comply with, section 36 which deals with strategic stock obligations, seems incorrect since there is no readily apparent reason why contravention of section 36 should attract an administrative fine.

107.2 The maximum fine of R800 000 in clause 103(2)(a)(ii) is excessive.

107.3 Unless there are offences in clause 101 which merit the imposition of an administrative fine instead of a penalty in terms of clause 102, it is suggested that clause 103 be deleted.

107.4 Clauses 103(3) and (4) are a money bill as discussed earlier in these submissions, and would have to be tabled by the Minister of Finance who ordinarily requires that state monies be paid into the Central Revenue Fund.

107.5 Clauses 103(3) and (4) are undesirable in that they will encourage the imposition of administrative fines in order to boost the monies in the Petroleum Agency's fund.

108 **Amendment (Clause 105)**

108.1 Since amendments to environmental authorisations are dealt with in Chapter 5 of the Environmental Impact Assessment Regulations, 2014 made in terms of NEMA, it is suggested that the reference in clause 105 to environmental authorisations be deleted.

108.2 As in section 102(2) of the MPRDA, it might be useful in the third line of clause 105, after "varied" to insert "including by the extension of the area covered by it or by the addition of a type of petroleum, which is not at the time the subject thereof".

108.3 If rights are granted in respect of specific types of petroleum, e.g. only for oil or only for gas, rather than for petroleum generally, it might be useful to include the following new subclauses 105(2) and (3):

> *"(2) Any right holder producing any type of petroleum under a petroleum right may while producing such petroleum, also produce and dispose of any other type of petroleum in respect of which such holder is not the right holder, but which must be of necessity be produced with the first mentioned type of petroleum, provided that such holder declares such associated petroleum discovered in the production process.*
>
> *(3) The right holder contemplated in section 105(2) must within 60 days of making the declaration apply for an amendment to its right to include the type of petroleum so declared.".*

109 **Delegation (Clause 106)**

109.1 Clause 106:

(1) Uses the term "Chief Executive Officer" which needs to be defined in clause 1.

(2) Uses the term "officer" in regard to which OPASA's comments on the definition of "officer" in clause 1 apply.

109.2 A new clause 106(6) should be inserted providing that all delegations and assignments, except urgent or temporary ones, should be published in the Government Gazette so that the public is informed of them, a problem of lack of information thereof frequently having arisen in regard to the corresponding section 103 of the MPRDA.

110 **Regulations (Clause 107)**

110.1 The term "local content plan" as used in clause 107(1)(a) needs to be defined in clause 1.

110.2 In clause 107(1)(d), after "fees" should be inserted "in respect of any application".

110.3 In clause 107(1)(g), second line:

(1) "environmental authorisation" should be deleted and replaced by "right", since environmental authorisations are dealt with in terms of NEMA, and therefore cannot be the subject of Regulations in terms of the Bill, considering that the court set aside the Petroleum Regulations in terms of the MPRDA for that very reason in Minister of Mineral Resources v Stern & Others and Treasure the Karoo Group & Another v Department of Mineral Resources & Others [2019] 3 All SA 684 (SCA).

(2) "licence" should be deleted since the Bill does not provide for licences.

110.4 Use and disposal of petroleum as dealt with in clauses 107(1)(b), (i) and (j), are downstream matters which are not appropriate in this Upstream Bill, and further the restrictions and prohibitions therein constitute yet another disincentive to investment, and may contravene South Africa's international trade agreements as discussed earlier in these submissions.

110.5 Clause 107(2) deals with state revenue and expenditure and which therefore may constitute a money bill in terms of sections 73(2) and 77 of the Constitution as discussed earlier in these submissions, and which can only be tabled by the Minister of Finance, so that concurrence of the Minister of Finance is not sufficient.

111 **Amendment of laws (Clause 110)**

111.1 Since the provisions which are proposed to be amended in Schedule 2 need to be retained for purposes of the transitional provisions in Schedule 1, it is suggested that clause 110 be prefaced by the words "Subject to the provisions of Schedule 1".

111.2 In relation to the reference in clause 110 to Schedule 2, comments will be raised below on Schedule 2.

111.3 Additionally to what is currently referred to in Schedule 2:

(1) There are many other Acts which will have to be amended or replaced in order to give effect to the Bill such as:

(a) the Geoscience Act, 1993;

(b) the Mine Health and Safety Act, 1996;

(c) NEMA;

(d) the Petroleum Products Act, 1997, which includes as a schedule the Petroleum Charter, which would have to be amended to delete the paragraph therein headed "Upstream" and to introduce a new sentence into the paragraph headed "Scope of Application" so as to indicate that the Charter does not apply to the upstream petroleum industry, or to anything governed by the Bill, considering that those matters are now dealt with in clause 31 of the Bill, and in the local content plan to which reference is made in clause 107(1)(a) of the Bill;

(e) the Mining Titles Registration Act, 1967, in order to refer to the new petroleum rights, and to the other new concepts which are contained in the Bill.

(2) It is also probable that fiscal legislation such as the Income Tax Act, 1962, the Transfer Duty Act, 1949, the Value-Added Tax Act, 1991, and the Mineral and Petroleum Resources Royalty Act, 2008, and the Mineral and Petroleum Resources Royalty Administration Act, 2008, would need to be amended. As those Acts are money bills as contemplated in sections 73(2) and 77 of the Constitution, amendments to them can be tabled only by the Minister of Finance and not by the Minister of Mineral Resources and Energy.

(3) In saying the above, OPASA is however cognisant of section 12(1) of the Interpretation Act, 1957 which provides that where a law repeals and re-enacts with or without modifications any provision of a former law, references in any other law to the provisions so repealed must, unless the contrary intention appears, be construed as references to the provision so re-enacted, and of item 22 in Schedule 2 to the Bill, but since the concepts in the Bill are significantly different to those in the MPRDA, recourse to the abovementioned section 12(1) or to the said item 22 is not likely to suffice.

112 **Transitional arrangements (Schedule 1)**

112.1 Item 3 deals with pending applications.

(1) Item 3(1) should also provide for pending applications for reconnaissance permits.

(2) Item 3(2) provides that the relevant right remains in force whereas item 8(2)(b) provides for cessation of existence of such right so that these items conflict. To remedy this, it is suggested that item 8(2)(b) be amended to insert before the word "must" the words "subject to item 3(2),".

112.2 In item 4, reference is made to a permission to remove and dispose in terms of section 20 of the MPRDA, which however relates only to minerals since it is not mentioned in section 69 (1)(a) of the MPRDA but is rendered applicable to petroleum by virtue of the reference thereto in section 82(1)(c), to which a reference should accordingly be made in item 4. To that end, it is suggested that in the first line of item 4, after "20" be inserted "read with section 82(1)(b)".

112.3 Item 5(1) should provide that a social and labour plan which remains in force remains subject to Regulations 40 to 46C of the MPRD Regulations (including the five year reviews in terms of Regulation 46B of the MPRD Regulations). To achieve this, it is suggested that in item 5(1), second line, after "force" be inserted "and Regulations 40 to 46C of the MPRD Regulations including the five year reviews (including Regulation 46B of the MPRD Regulations) remain applicable thereto".

112.4 Item 6 provides for continuation of a reconnaissance permit.

(1) If item 3 is amended also to refer to pending applications for reconnaissance permits, such permits could still be granted after the new Act takes effect, so that as in items 7(1), 8(1) and 10(1) after the word "effect" in the first line of item 6, the words "or after this Act takes effect," should be inserted.

(2) Such continuance is subject to the terms and conditions under which it was granted, but perhaps item 6 should go on to provide that the MPRDA continues to apply to it. This could be achieved by the insertion after the word "granted" in the third line, of the words "and the MPRDA shall continue to apply thereto".

112.5 OPASA does not agree with the need in items 8 and 9 for an exploration right to be converted into a petroleum right. Instead, such an exploration right should simply continue to be in force and the MPRDA should continue to be applicable thereto, including that in terms of sections 82(1)(a) and (b) of the MPRDA, the holder has the exclusive right to apply for and be granted renewals and a production right. That would better give effect to the object of security of tenure in clause 2(h) and item 2(a) in Schedule 1 of the Bill, and would then entitle and oblige the holder of such production right to convert it into a petroleum right in terms of item 10. The comments which will follow are without detraction from the aforegoing.

(1) In item 8(1), it is proposed that the exploration right continue to be in force until 180 days after the expiry of the current term, given the logistical challenges presented by Covid-19 that have made travel impossible notwithstanding that physical presence is required to deal with certain aspects of the work programme. To that end, it is suggested that in the second line, after "until" be inserted "180 days after".

(2) As mentioned above in relation to item 3(2), item 8(2)(b) should be subject to item 3(2).

(3) Item 8(5) should provide for the Minister to grant a conversion within a stipulated period such as the later of 180 days of the lodgement of the application for conversion, or the date of grant, where applicable, of an amended or new environmental authorisation, and provision should be made for written notification of such conversion to the applicant within 14 days of such conversion.

(4) In items 8(6) and 8(8)(b), a mechanism needs to be provided should the holder and the Petroleum Agency not be able to agree. Perhaps referral to arbitration in terms of the Arbitration Act, 1965 would be suitable.

(5) As previously mentioned, item 8(7) is contrary to the object of security of tenure in clause 2(h) and item 2(a) in Schedule 1, and OPASA requests that it be amended to provide that clauses 31 and clause 34 will not apply.

(6) Item 8(12) should be stated to be subject to the applicant's rights of internal appeal and/or judicial review, so that in the second line, after "will" insert "subject to section 99 and judicial review,".

(7) Item 8(13) should provide for notarial execution of a converted petroleum right and that such right must be lodged within 90 days from date of notarial execution thereof at the Mineral and Petroleum Titles Registration Office.

(8) Item 9(1) should be subject item 3(2) which would apply where the holder of an exploration right has applied for a production right.

(9) Item 9(2)(b) should be subordinated to any right to defer development during a gas marketing period. This could be achieved by the insertion before "elected" of "subject to research during any gas marketing period provided for in a draft production right annexed to the exploration right,".

(10) A new clause 9(2A) akin to clause 8(3) should be inserted to the effect that the exploration right remains valid until the conversion is granted or refused.

(11) Item 9(4) should provide for the Minister to grant a conversion within a stipulated period such as the later of 180 days of the lodgement of the application for conversion, or the date of grant, where applicable, of an amended or new environmental authorisation, and provision should be made for written notification of such conversion to the applicant within 14 days of such conversion.

(12) In item 9(7), the reference to item 8(6) is not correct and should be a reference to item 8(8) and 8(9).

(13) A new item 8(14) should be inserted to provide for notarial execution of a converted petroleum right and that such right must be lodged within 90 days from date of notarial execution thereof at the Mineral and Petroleum Titles Registration Office.

112.6

(1) In item 10(1), it is proposed that the production right continues to be in force until 180 days after the expiry if such expiry occurs before the five years, given the logistical challenges presented by Covid-19 that have made travel impossible notwithstanding that physical presence is required to deal with certain aspects of the work programme. To that end, it is suggested that in the second line, after "until" be inserted "180 days after".

(2) Item 10(3) should provide for the Minister to grant a conversion within a stipulated period such as later of 180 days of the lodgement of the application for conversion, or the date of grant, where applicable, of an amended or new environmental authorisation, and provision should be made for written notification of such conversion to the applicant within 14 days of such conversion.

(3) In item 10(4), reference is made to the terms and conditions being "subject to the necessary changes", which conflicts with item 8(9). In any event, the reference to necessary changes introduces an element of uncertainty, is undesirable, and should be deleted.

(4) In item 10(5), the reference to section 58 should be a reference to section 62.

(5) Item 10(6) should provide for notarial execution of a converted petroleum right and that such right must be lodged within 90 days from date of notarial execution thereof at the Mineral and Petroleum Titles Registration Office

113 **Schedule 2**

113.1 The figure "2" needs to be inserted after the word "Schedule".

113.2 Most of the amendments in the third column of Schedule 2, and to which reference is made in clause 110, affect the residual provisions in what will then be the Mineral Resources Development Act, 2002, and therefore affect the minerals industry rather than the upstream petroleum industry, of which OPASA is a part, so that comments will be raised mainly only when there are items in the third column of Schedule 2 which as such affect OPASA.

113.3 In item 1(m), the definition of "holder" should contain a reference to a reconnaissance permission.

113.4 In item 1(n), its deletion of paragraphs (b) and (c) of the definition of "mineral" is not correct since those paragraphs should be retained, so that item 1(n) should be deleted.

(1) Paragraph (b) of the definition of "mineral" should be retained, failing which petroleum would be a mineral, and would remain governed by the MPRDA.

(2) Paragraph (c) of the definition of "mineral" should be retained since peat should remain excluded as a mineral in the MPRDA, and (although not relevant to OPASA) should also be excluded in the definition of petroleum in clause 1 of the Bill.

113.5 Item 1(o) should be amended so as not to delete the definition of "petroleum" in the MPRDA, but rather to replace it to provide therein that: "petroleum has the meaning as defined in section 1 of the Upstream Petroleum Resources Development Act, 2022". The reasons for this are that:

(1) The definition of petroleum in the MPRDA needs to be retained for use in paragraph (b) of the definition of mineral in the MPRDA.

(2) The exclusion of petroleum from the MPRDA and the inclusion of petroleum in the Bill will only work if they are reciprocal.

113.6 Item 1(p) appears twice.

113.7 Item 1(s) needs to be amended to retain (with necessary amendments) the definition of reconnaissance operation in the MPRDA which is necessary for the reconnaissance permissions which remain applicable in sections 13 to 15 of the MPRDA.

113.8 In item 2:

(1) "sovernity" is misspelt in new paragraph (a).

(2) In the new paragraph (d), fourth line, after "mineral" delete the comma.

(3) In the new paragraph (g), second line, "exploration" should be deleted.

113.9 In item 3, in the new section 3(2)(a), fifth line, "reconnaissance permit" should be deleted.

113.10 In item 5:

(1) In the new section 5A(a), first line, after "mining" insert "or".

(2) In the new section 5A(b), fourth line, delete "reconnaissance permit".

113.11 In item 6, in the new section 38A(1), fourth and fifth lines, before "prospecting" insert "reconnaissance".

113.12 In relation to item 7:

(1) Although not related to petroleum, it is suggested that it would be opportune also to substitute section 38B(1) to correct the incorrect first reference to NEMA therein, to be a reference "before 8 December 2014" (which is the date when environmental regulation of mining shifted from the MPRDA to NEMA) so that the substituted section 38A(1) would correctly read:

> *"(1) An environmental management plan or environmental management programme approved in terms of this Act before 8 December 2014 shall be deemed to have been approved and an environmental authorisation to have been issued in terms of the National Environmental Management Act, 1998."*;

(2) In the new section 38B(2):

(a) In the third line, before "prospecting" insert "reconnaissance,".

(b) In the fourth line, "is" should be "are".

113.13 A new item 8A should be inserted so as to delete the words "reconnaissance permit" in section 49(1)(b) of the MPRDA.

113.14 A new item 15A should be inserted, amending section 96(1)(b) of the MPRDA so as to delete the words "or the designated agency".

113.15 In item 17:

(1) In the new section 102(1), third line, "reconnaissance permit" needs to be deleted.

(2) In the sixth line, before "mining" insert "or".

(3) In the sixth and following lines, delete "environmental management programme or an environmental authorisation issued in terms of the National Environmental Management Act, 1998, as the case may be" since amendments thereof are dealt with in section 24N(6) of NEMA and in Chapter 5 of the Environmental Impact Assessment Regulations, 2014 made in terms of NEMA.

113.16 In item 18, in the new section 104(4), fifth line, "permit" should be deleted and replaced with "permission".

113.17 In item 19, in the new long title, the word "resources" needs to be retained.

113.18 In item 22, at the end, perhaps a reference to the Upstream Petroleum Resources Development Act, 2022, also needs to be made so that the last two lines of item 22 would read:

> *"must be construed as references to the Mineral Resources Development Act, 2002 (Act No. 28 of 2002) and to the Upstream Petroleum Resources Development Act, 2022 (Act No. ___ of 2022).".*

Request to make oral submissions

In accordance with the invitation to do so, OPASA requests the opportunity to make oral submissions to the Parliamentary Portfolio Committee.

Conclusion

OPASA again thanks the Parliamentary Portfolio Committee for the opportunity to have lodged these written submissions and tenders its assistance to the Committee.

Chairperson

29 July 2022