



# Who we are & what we do

The Offshore Petroleum Association of South Africa (OPASA) was officially launched in May 1999.

OPASA provides a forum for formal and informal discussion and information exchange, practical co-operation, and joint liaison with the State on specific issues.

**Prime objective:** to co-operate with the State and all stakeholders in promoting health, safety, and sound environmental practices.

Activities in which OPASA is involved in include: general public awareness of the offshore petroleum industry, promoting compliance with good oilfield practices, promoting care of the environment, liaison with interested and affected parties, pooling of resources for emergency response, industry dialogue with the State and co-operation on operational.



**SLIDE (i)**

**OFFSHORE PETROLEUM ASSOCIATION OF SOUTH AFRICA**

**(OPASA)**

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**Oral submissions to the National Assembly Parliamentary Portfolio Committee on Mineral Resources and Energy on the Upstream Petroleum Resources Development Bill B13-2021: Hearings on 18 November 2022**

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**Topics**

- 1 Transitional Provisions
- 2 Administrative Procedures
- 3 Overlapping competences
- 4 Black Economic Empowerment
- 5 State Participation
- 6 Licensing mechanisms (rights and permits)
- 7 Acceptance by Petroleum Agency of competitive licensing round applications
- 8 Foreign Company incorporation
- 9 Review of Petroleum right terms
- 10 Appraisal of Discovery and Declaration of Commerciality
- 11 Postponement of development
- 12 Manner of conducting production operations
- 13 Third Party Access
- 14 Constitutionality
- 15 Parts A and B of OPASA's written submissions

## **SLIDE (ii)**

### **Introduction**

OPASA and its Members thank the draughtspersons who prepared the Bill, for all their work on a most comprehensive and carefully drafted Bill.

A very innovative and positive feature is the inclusion of a petroleum right which regulates both exploration and production.

However, any replacement Bill necessarily creates a level of uncertainty and instability in its departure from an existing Act with which investors have familiarity.

This Bill is no exception insofar as the existing exploration rights held by OPASA Members and production rights held under pending applications are concerned, a negative feature being that the conversion mechanism in regard to which creates a new opportunity for interference by third parties, jeopardising the security of tenure which is an object of the Bill.

The Bill also creates the need for a multiplicity of administrative decisions at every step of a project, and in that regard deviates from the system for prospecting and mining of minerals, and which create a fertile ground for interference by third parties since the principles of administrative justice in the Promotion of Administrative Justice Act, 2000 require notice to and consultation with third parties, again jeopardising security of tenure.

OPASA will touch on these issues in the first and second topics below.

## **SLIDE 1**

### **1 Transitional Provisions**

(Written submissions, Part A, paragraph 7)

#### **1.1 The Bill**

- (1) Provides for conversions of exploration rights and production rights into petroleum rights (items 8, 9 and 10)
- (2) Exploration Rights in respect of which a production right application has been lodged remain in force (item 3(2), schedule 1)
- (3) Terms and conditions of converted production rights are subject to necessary changes (item 10(4))

#### **1.2 The Issues**

- (1) Conversion instead of continuance of exploration rights and production rights is contrary to security of tenure (clause 2(h) and item 2(a)) giving new opportunity for third parties to interfere: conversion is an administrative action to which sections 3 and/or 4 of the Promotion of Administrative Justice Act, 2000 apply requiring the Petroleum Agency to notify and consult with third parties giving them an opportunity to submit representations, and to notify them of the decision including their rights of internal appeal and/or judicial review: the Committee and the Minister might wish to reconsider, particularly since the Minister has applied for leave to appeal against the Wild Coast review judgment<sup>1</sup>
- (2) The standard exploration right contains (usually in clause 30) a stability provision regarding changes in legislation.
- (3) Item 8(2)(b) provides for lapsing of exploration rights if not converted and conflicts with item 3(2) on pending production right applications which provides for continuance of the relevant exploration right
- (4) Necessary changes to terms and conditions of converted production rights (item 10(4)) conflict with the terms and conditions annexed to the exploration right (item 8(9))

#### **1.3 The Requests**

- (1) Preservation of existing rights is of paramount importance to OPASA given that many members hold exploration rights in respect of some of which they have applied for renewals or for production rights. It is in the national interest that security and continuity of tenure of such rights and pending applications be preserved, failing which the result will be disinvestment as has happened in the Wild Coast Cases
  - (a) Existing exploration rights and production rights should continue as heretofore and be governed by the MPRDA
  - (b) Given the above, OPASA requests the Committee also to have recourse to Part B, paragraph 112 of OPASA's written submissions as if incorporated here
- (2) Item 8(2)(b) should be subordinated to item 3(2)
- (3) Reference to necessary changes to terms and conditions should be deleted

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<sup>1</sup> Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others, ECM 3491/2021, 1 September 2022 (on appeal)

## **SLIDE 2**

### **2 Administrative Procedures**

(Written submissions, Part A, paragraph 9)

#### **2.1 The Bill**

- (1) Multiplicity of administrative decisions
- (2) No periods for decisions to be taken
- (3) No provision for ministerial extensions of provisions binding applicants or holders
- (4) Two-appeal system to the Director-General and thence to the Minister within 30 days of appellant becoming aware (clause 99)

#### **2.2 The Issues**

- (1) The Bill requires a multiplicity of administrative decisions throughout the life of a project. This allows for constant intervention by third parties (compare the Wild Coast judgments) since in terms of sections 3 and/or 4 of the Promotion of Administrative Justice Act, 2000, the Petroleum Agency and/or the applicant has to give notice to and consult with third parties and invite them to make representations, and ultimately to give them notice of the relevant decision and of their right to lodge internal appeals and/or judicial reviews. As proved to be the case in the Wild Coast judgments, this is contrary to the object of security of tenure in clause 2(h) of the Bill
- (2) Other issues as above

#### **2.3 The Requests**

- (1) Reduction of number of necessary administrative decisions
- (2) All clauses, or a general clause, should provide for decisions to be taken within a stipulated period
- (3) Provision should be made for ministerial extensions or condonations of periods binding applicants or holders (compare section 43C, National Environmental Management Act, 1998)
- (4) Appeals only to the Minister and within 30 days of the decision (compare Wild Coast judgment)

## **SLIDE 3**

### **3 Overlapping competences**

(Written submissions, Part A, paragraph 16)

#### **3.1 The Bill**

Various clauses (examples of which are in paragraphs 16.2 to 16.6 of OPASA's written submissions) fall within competences of other organs of State, namely:

- (1) mine health and safety
- (2) geoscience Information
- (3) environmental matters
- (4) determination of tariffs
- (5) Money Bills

#### **3.2 The Issue**

Overlapping competences, or competences not vested in the Petroleum Agency

#### **3.3 The Request**

Overlapping competences or *ultra vires* competences should be removed

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## **SLIDE 4**

### **4 Black Economic Empowerment**

(Written Submissions, Part A, paragraph 3, and Oceans Economy HDSA Presentation)

#### **4.1 Participation of black persons (clause 31)**

(1) *The Bill*

- (a) Minimum of 10% of black person participating interest in petroleum rights
- (b) Possibility of one extension of up to two years for black person participation (clause 31(6))

(2) *The Issue*

Even after extension, no black person investor may exist

(3) *The Requests*

- (a) Provision for extensions from time to time
- (b) Insertion of Petroleum Agency discretion for extensions of longer than two years

#### **4.2 Exit of Black Persons (clause 33)**

(1) *The Bill*

Recognition on exit is subject to provisos including vesting of 50% of “net value”

(2) *The Issues*

- (a) Similar provisos in Mining Charter, 2018 were set aside<sup>2</sup>
- (b) Reference to recognition on exit only during production phase
- (c) Meaning of “net value”

(3) *The Requests*

- (a) Deletion of provisos
- (b) Reference to recognition on exit also during exploration phase
- (c) Clarification of the meaning of “net value”: compare Code of Good Mining Practice

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<sup>2</sup> *Minerals Council South Africa v Minister of Mineral Resources and Energy & Others* 2022 (1) SA 535 (GP)



## **SLIDE 5**

### **5 State Participation**

(Written submissions, Part A, paragraph 4, and Oceans Economy HDSA Presentation)

#### **5.1 The Bill**

The State Petroleum Company is entitled to fixed 20% carried interest (Clause 34(2))

#### **5.2 The Issue**

A fixed 20% may sterilise prospects, contrary to the objects in clause 2

#### **5.3 The Request**

State participation should be up to 20%

## **SLIDE 6**

### **6 Licensing mechanisms (rights and permits)**

(Written submissions, part A, paragraph1)

#### **6.1 Application system**

(1) *The Bill*

Provides only for licensing rounds (clauses 13, 15 and 37)

(2) *The Issue*

Should additionally provide for voluntary applications (as in sections 74, 76, 79 and 83, MPRDA)

(3) *The Request*

Provision should be made additionally for voluntary applications (as in clauses 16(5) and 38 of the Bill for reconnaissance permits)

#### **6.2 Notarial execution of permits and rights**

(1) *The Bill*

(a) Notarial execution is required within 30 days with one extension of 30 days, failing which the permit, right, renewal or amendment lapses (clause 42)

(b) Appeal prevents notarial execution

(2) *The Issues*

(a) The period for notarial execution is too short for obtaining diagrams, powers of attorney, and resolutions (regarding diagrams see Regulation 41, Mining Titles Registration Act, 1967)

(b) This requirement is contrary to security of tenure (clause 2(h)): notarial execution is a mere formality towards registration in favour of the holder

(c) There is no apparent nexus between appeal and prevention of notarial execution

(3) *The Requests*

(a) A longer period, and multiple extensions, should be provided

(b) Lapsing be deleted in favour of the ministerial power to cancel (clause 88)

(c) Appeal should not prevent notarial execution

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## **SLIDE 7**

### **7 Acceptance by Petroleum Agency of competitive licensing round applications**

(Written submissions, Part A, paragraph 12)

#### **7.1 The Bill**

The Petroleum Agency is empowered to accept one successful application in a competitive licencing round (clauses 17(2) and 18)

#### **7.2 The Issue**

- (1) The selection of the one successful application 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
- (2) Acceptance is different where open or voluntary applications occur because "*first come first served*" applies (clause 37) whereas in competitive licensing rounds there is a choice among multiple applicants

#### **7.3 The Request**

The Minister instead of the Petroleum Agency should decide on the acceptance of the successful application

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## **SLIDE 8**

### **8 Foreign Company incorporation**

(Written submissions Part A, paragraph 11)

#### **8.1 The Bill**

Grantees must be incorporated in South Africa (clauses 13(3) and (4))

#### **8.2 The Issue**

Many foreign holders are registered as external companies but not incorporated in South Africa (section 23, Companies Act, 2008)

#### **8.3 The Request**

Provide for incorporation, or registration as external company, in South Africa

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## **SLIDE 9**

### **9 Review of Petroleum right terms**

(Written submissions, Part A, paragraph 5.1)

#### **9.1 The Bill**

The Minister has the power to amend, and insert new, terms and conditions (clause 64)

#### **9.2 The Issues**

(1) Contrary to continuity of tenure (clause 2(h))

(2) Disincentive to investment

#### **9.3 The Requests**

(1) Clause 64 should be deleted

(2) The Bill should contain an empowering provision for stability agreements: compare:

(a) Tenth Schedule, Income Tax Act, 1962

(b) section 13, Mineral and Petroleum Resources Royalty Act, 2008

(c) standard clause 30 in exploration rights which is a stability provision in regard to changes in legislation

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## **SLIDE 10**

### 10 **Appraisal of Discovery and Declaration of Commerciality**

(Written submissions, Part A, paragraph 2)

#### 10.1 **The Bill**

Discovery requires appraisal unless an exemption is granted (for drilling other prospects, technical reasons, and non-defeat of objects) (clauses 54 and 57)

#### 10.2 **The Issue**

Appraisal is required after discovery (clause 54(2))

#### 10.3 **The Request**

Declaration of a commercial discovery should be allowed without appraisal

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## **SLIDE 11**

### 11 **Postponement of development**

(Written submissions, Part A, paragraph 13)

#### 11.1 **The Bill**

The Minister may in the national interest postpone development (clause 61(1))

#### 11.2 **The Issues**

- (1) Reference to the national interest is vague and therefore contrary to the rule of law (section 1(c), Constitution)
- (2) Severe negative consequences for the holder

#### 11.3 **The Requests**

- (1) The circumstances of the national interest should be set out
  - (2) The agreement of the holder should be required
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## **SLIDE 12**

### 12 **Manner of conducting production operations**

(Written submissions, Part A, paragraph 14)

#### 12.1 **The Bill**

The Petroleum Agency may direct increase or decrease of the rate of production (clause 65(2))

#### 12.2 **The Issue**

Contrary to:

- (1) security of tenure (clause 2(h))
- (2) investment
- (3) the production work programme

#### 12.3 **The Request**

Clause 65(2) should be deleted

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## **SLIDE 13**

### 13 **Third Party Access**

(Written submissions, Part A, paragraph 6)

#### 13.1 **The Bill**

The Petroleum Agency may:

- (1) direct use of facilities by third parties after consultation with the holder
- (2) determine tariffs and conditions
- (3) alter conditions

(clause 68)

#### 13.2 **The Issues**

- (1) Expropriation of use which is unconstitutional section 25 (Constitution) in not providing for compensation
- (2) No consent of the holder is required
- (3) Determination and alteration by the Petroleum Agency of tariffs and conditions

#### 13.3 **The Requests**

- (1) Clause 68 provide for compensation determined in terms of section 25 of the Constitution
  - (2) The consent of the holder should be required
  - (3) Tariffs and conditions should not be capable of determination or alteration by the Petroleum Agency
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## **SLIDE 14**

### **14     Constitutionality**

(Written submissions, Part A, paragraph 10)

#### **14.1   The Bill**

Various clauses may contravene the Constitution, 1996, examples of which are given in paragraphs 10.2, 10.3, 10.4, and 10.5 of OPASA's written submissions:

- (1)     Money Bill provisions (sections 73(2) and 77, Constitution)
- (2)     expropriation without compensation (section 25, Constitution)
- (3)     vagueness contrary to the rule of law (section 1(c), Constitution)
- (4)     contravention of international trade agreements (sections 7(2) and 233, Constitution)

#### **14.2   The Issue**

Unconstitutionality

#### **14.3   The Request**

Unconstitutional clauses should be removed

## **SLIDE 15**

### **15 Parts A and B of OPASA's written submissions**

- 15.1 The above oral submissions summarise some but not all of the Key Issues in Part A (Key Issues) of OPASA's written submissions. OPASA requests the Parliamentary Portfolio Committee to have recourse to the whole of Part A.
  - 15.2 OPASA requests the Parliamentary Portfolio Committee also to take into account Part B (Comments on Sequential Clauses) of OPASA's written submissions, which are too extensive to traverse in these oral submissions.
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