Just Share

26 May 2023

The Honourable PMP Modise

Committee Chairperson

**Portfolio Committee on Forestry, Fisheries & the Environment**

For the attention of: Tyhileka Madubela

Committee Secretary

By email: tmadubela@parliament.gov.za

Dear Tyhileka

**Just Share's comments on the Climate Change Bill [B9-2022]**

1. Just Share is a non-profit shareholder activism organisation. We believe that responsible investment is necessary to create a just, inclusive and sustainable economy. We use engagement, advocacy and activism to drive urgent action to combat climate change and reduce inequality.

2. We stand by our 27 May 2022 submissions on the Climate Change Bill ("the Bill") and appreciate the opportunity to make additional written comment, as well as oral submissions to this Committee on 30 May 2023. In these submissions, we focus again on the need for effective penalties in the Bill. This need is even more urgent as more and more evidence emerges of how over a decade of anti-climate corporate lobbying has weakened – and continues to weaken – climate action, policy and legislation.

3. In these submissions, we will focus, in particular, on the argument successfully deployed by corporates that climate regulation must be delayed until there is "alignment" between carbon budgets and carbon tax. This tactic has been instrumental in ensuring multi-year delays in the implementation of an effective carbon tax and the promulgation of a robust Climate Change Act. There is no evidential basis to support this alignment argument. It should be rejected.

4. An important part of this prevalent corporate climate lobbying narrative is that corporates, despite their vested interests in preserving the status quo, are best placed to regulate themselves, and should be left alone to do so. In other words, mandatory measures and regulation are unnecessary; and, where these do exist, companies should be *incentivised* to comply, rather than penalised when they fail to do so.

5. However, what is overwhelmingly clear from the current dire state of the climate, is that, to date, **voluntary measures by governments and emitters to reduce greenhouse gas**

**(GHG) emissions, and low (if any) penalties for excessive emissions, have dismally failed to achieve their goal**. Global emissions continue to rise and the timeframe to take meaningful climate action to avoid the worst impacts of the climate crisis is rapidly narrowing.

6. It is imperative that effective climate change legislation – with meaningful consequences for non-compliance - be enacted without delay. The long-awaited Climate Change Act cannot afford to be weak on compliance and enforcement, particularly given the country's significant emissions and the severe climate risk it faces.

7. Below, we address the following:

- Why climate lobbying is a problem – disclosure is essential, and so is regulation.
- Why the Bill needs effective penalties – without consequences for non-compliance, the Bill cannot achieve its aims.
- Why there is no need to "align" carbon tax and carbon budgets - regulation and emission reductions are urgent and important, irrespective of this "alignment".

8. **What is climate lobbying and why is it problematic?**

8.1 Despite increasingly indisputable evidence of the effect of GHG emissions on the climate, and the urgent need to transition to low-carbon economies, globally, political leaders appear incapable of mobilising the necessary action to avoid the worst effects of climate change. One of the key reasons for this failure to act is corporate interference aimed at weakening and delaying climate action – otherwise known as negative corporate climate lobbying. In many instances, this manifests itself in high-level public positions of support for the Paris goals, but "closed-door undermining of climate action".

8.2 According to the Global Standard on Responsible Climate Lobbying:

> *The term 'corporate climate lobbying' refers to those activities carried out by corporations or their agents to directly or indirectly influence climate-significant policy decision-making by political or bureaucratic actors. Climate-significant policy refers to any environmental or non-environmental public policy with non-trivial implications – positive or negative – for realising the temperature goals of the Paris Agreement. Such lobbying – also commonly known as advocacy – can have a significant impact on the stringency and effectiveness of public climate policy. It is not only a matter of societal concern, but also an issue of material, financial, significance for corporations and their investors.*

8.3 Analysis shows that at least 636 fossil fuel lobbyists attended COP27 last year. The president of COP28 is Sultan Al Jaber, head of one of the world's largest oil and gas companies - the Abu Dhabi National Oil Company, which recently announced a plan to significantly expand its oil and gas production.

8.4 This week, 133 members of the United States (US) Congress and the European Parliament delivered a letter to US President Biden, President of the European Commission von der Leyen, United Nations (UN) Secretary General Guterres, and United Nations Framework Convention on Climate Change (UNFCCC) Executive Secretary Stiell, pointing out that "enacting policies that expose the influence of corporate polluters in UNFCCC meetings will help ensure that climate science takes precedence over climate delay and greenwashing".

8.5 The signatories call for the withdrawal of withdraw Sultan Al Jaber's appointment as COP28 president. The letter also requests that the UNFCCC require companies participating in COPs to submit an audited corporate political influencing statement that discloses climate-related lobbying, campaign contributions, and funding of trade associations and organisations active on energy and climate issues.

8.6 Corporates engaged in negative climate lobbying are motivated by the need to protect their profits in a world that increasingly recognises that their products are the primary cause of harm to the environment, livelihoods, and human health and well-being. For some businesses, climate action threatens their relevance and therefore their survival, which explains the lengths their representatives will go to prevent – or at least delay – a transition to low-carbon energy systems.

8.7 Independent research demonstrates that, in South Africa, obstructive corporate climate policy engagement is delaying ambitious climate policy and putting the country's climate goals in jeopardy. Fossil fuel companies have significant influence over government climate policy – directly and through industry associations like Business Unity South Africa (BUSA), the Minerals Council of South Africa, and the Energy Council of South Africa. Since there is also limited transparency in the policy-making process, "policy capture" (steering policymaking away from the public interest in favour of a specific interest group or individual) is also acute.

8.8 When corporate lobbying is inconsistent with global climate goals, this presents regulatory, reputational and legal risks to companies and investors. It also presents systemic risks to the South African economy, as delays in implementation of the Paris Agreement increase the physical risks of climate change, exacerbate energy instability, and hinder South Africa's standing in the global economic community, impairing the country's access to transition financing and introducing uncertainty and volatility into investment portfolios.

8.9 Institutional investors across the globe have clarified their expectations in relation to investee companies' engagement on climate policy, emphasising the importance of transparency and reporting on direct and indirect climate-related lobbying. The *2022 Global Standard on Responsible Climate Lobbying* (referenced above) sets out the need for companies to publish a detailed analysis of their policy positions and advocacy on climate change, and that of their industry associations, to ensure alignment with the 1.5°C goal of the Paris Agreement.

8.10 Additionally, the JSE has provided guidance for corporate disclosure on climate change and sustainability. On lobbying activities, the guidance requires listed companies, among other

things, to assess and report on the alignment of industry associations of which the company is a member with the objectives of the Paris Agreement and, more broadly, to identify the significant issues that are the focus of the company's participation in public policy development and lobbying, including within any of its industry associations.

8.11 Apart from this new non-binding JSE guidance, lobbying in South Africa is completely unregulated. Companies do not disclose climate-related lobbying information and fossil fuel companies have refused to table shareholder-proposed resolutions on climate lobbying. This **lack of regulation and disclosure have allowed certain companies and their industry association representatives to employ various tactics to undermine South Africa's climate change response for over a decade**. A particularly effective approach has been to capture the narrative of the just transition.

8.12 Co-opting the just transition

8.12.1 As climate action increasingly becomes a national priority and the urgent need to transition becomes harder to ignore, the concept of a "just transition" has taken hold and, in some quarters, been misappropriated.

8.12.2 The just transition concept originated in the labour movement in the 1970s, when labour and environmental justice organisations collaborated to advocate for a transition to sustainable, low-carbon economies that prioritised social inclusion and workers' rights. Since then, just transition frameworks have slowly but surely been introduced into global political discourse, with its increasing emphasis on shifting equitably to low-carbon economies through social inclusion and poverty eradication.

8.12.3 However, a large section of South African business, led by the fossil fuel industry and its representatives, and by some government departments, have in recent years **co-opted the concept of justice in the transition to delay action**. They have done so by ignoring the devastating social and economic impacts of climate change, and of failing to tackle it, and instead creating a false dichotomy between economic growth, poverty alleviation and development, on one hand, and the transition to low-carbon technologies and renewable energy systems, on the other.

8.12.4 This narrative is presented repeatedly to delay and weaken climate-related regulation, such as the Bill and the Carbon Tax Act No. 15 of 2019 (CTA). In the 2022 "joint position on carbon tax", organised business, including BUSA and Business Leadership South Africa, argue that the just transition requires the implementation of a carbon tax "at a pace and rate aligned to a developing economy that takes into account the challenges in South Africa including low economic growth, energy security and high unemployment" in order to "avoid just transition impacts earlier than planned and to avoid unintended and adverse consequences to an already fragile economy." This view ignores the impacts of failing to transition timeously, and side-steps the fact that a carbon tax is

intended to ensure that the costs of GHG emissions are paid for by the polluters, and not by society more broadly.

8.12.5 The concept of the just transition is thereby reduced to one used to **delay real environmental and social justice for as long as possible for the benefit of the fossil fuel industry and its shareholders**. The goal of this strategy is to focus attention on what stands to be lost in the transition (e.g., jobs in the coal sector) and away from the society-wide benefits of climate action (creating new, clean jobs, providing cheap, distributed renewable energy, and limiting climate impacts).

8.13 In paragraph 10 below, we address another false narrative employed by corporates to weaken and delay climate policy and legislation; and, in particular, the Bill and the CTA: that carbon budgets and carbon tax need to be aligned.

## 9 The Bill requires effective penalties, including for exceeding a carbon budget

9.1 As set out in our previous submissions, the current Bill provides **no timelines** for the Minister of Environment, Forestry and Fisheries ("the Minister") **to publish the list of activities** and GHG emission thresholds in terms of section 23. These thresholds must be used to identify companies: to be assigned a carbon budget; and required to submit GHG mitigation plans to the Minister.

9.2 When allocating carbon budgets, the Minister must, among other things, consider the alignment of the carbon budgets with the national GHG emissions trajectory (section 24(2)). There is **no timeframe for the trajectory to be determined** in terms of section 21, despite the importance of this trajectory to the Bill's entire mitigation architecture.[1]

9.3 In terms of section 24(3), carbon budgets must have a duration of at least three successive five-year periods and must specify the maximum amount of GHG emissions that may be emitted during the first five-year period.

9.4 In terms of section 24(4), a company which has been allocated a carbon budget must prepare and submit to the Minister, for approval, a GHG mitigation plan; which must: describe the mitigation measures that the company proposes to implement in order to remain within the allocated carbon budget; and comply with the content requirements of such plans as may be prescribed. **The failure to submit a GHG mitigation plan is the only offence in the Bill** (in terms of section 32). On conviction, the offender is liable to the s49B(2) of the National Environmental Management Act, 1998 (NEMA) penalties. For a first offence, this is a fine not exceeding R5 million and/or to imprisonment for a period not exceeding five years; and in the

[1] It is also extremely problematic that the interim trajectory is the outdated and wholly-inadequate 2015 Nationally Determined Contribution (NDC) "peak, plateau and decline" trajectory, rather than the 2021 updated NDC, which is much more ambitious (despite this, only the lower limit of the range (of $CO_2$-eq) is consistent with South Africa's fair share of GHG emissions for a 1.5°C global pathway: https://cer.org.za/news/cabinets-more-ambitious-climate-target-a-step-in-right-direction).

case of a second or subsequent conviction, a fine not exceeding R10 million and/or imprisonment for a period not exceeding 10 years.

9.5 A company allocated a carbon budget must, in terms of section 24(6):

9.5.1 implement the approved GHG mitigation plan;
9.5.2 monitor annual implementation of the plan in accordance with the prescribed methodology;
9.5.3 evaluate progress on the allocated carbon budget; and
9.5.4 annually report on the progress against the allocated carbon budget to the Minister in the manner prescribed.

9.6 In the event that annual reporting on progress against the carbon budget indicates that the company has failed, is failing, or will fail to comply with the allocated carbon budget, it must provide a description of measures it will implement in order to remain within the allocated carbon budget. But **no provision has been made for how to address the situation where the company "has failed" to comply with the budget, and no penalty is attached to this failure**.

9.7 In addition, the Bill makes **no provision for any consequences for a failure to "implement" the plan** - which appears to create the unacceptable result that simply submitting the plan is good enough to avoid committing an offence. It is clearly meaningless to penalise the failure to submit such plan, but not the failure to implement it. **Nor is any penalty attached to a failure to report, monitor or effect remedial action if there is non-compliance with the GHG mitigation plan**. These failures should attract personal director liability and the potential revocation of licences.

9.8 As set out in our previous submissions, the NEMA penalty provided for the solitary offence in the Bill (the failure to prepare and submit a GHG mitigation plan) – of a fine of R5 million and/or five years' imprisonment (for a first conviction) is wholly inadequate to be a proper deterrent.

9.9 It is also **unacceptable that no penalty is attached to exceeding a carbon budget**. Instead, the Bill provides that the Minister may make regulations, *inter alia*, in relation to the management of climate change response, including the determination, review, revision, compliance with and enforcement of an allocated carbon budget, amendment and cancellation of a carbon budget allocation, the content, implementation and operation of a GHG mitigation plan, and all matters related thereto. Such regulations **may** provide that any person who contravenes them commits an offence and will be liable, upon conviction, to the penalties contemplated in section 49B(2) of the NEMA. In other words, such regulations, and their content, are discretionary. The Minister is not obliged, in terms of the Bill's current wording, to make regulations to provide any penalty for failure to comply with a carbon budget.

9.10 Failure to comply with a carbon budget is an egregious contravention, with significant consequences for climate action. It is **unacceptable to defer consequences of violating carbon budgets to potential future regulations that might be made by the Minister at an undetermined point in the future**. The **Bill should make this an offence, and exceeding a carbon budget should be clearly linked to the requirement to pay additional carbon tax on excess emissions.** But this cannot be the only penalty provision for non-compliance with carbon budgets. Provision should also be clearly made for personal director liability and for authorisations to be revoked when there is non-compliance with a carbon budget.

9.11 Unless significant penalties are attached to this failure, juristic persons to whom carbon budgets have been allocated will simply "budget" for the excess tax rate (if any) or other fine, and exceed their budgets. **The costs of non-compliance have to exceed the benefits, in order to avoid the Bill being toothless**. This problem is exacerbated by the provision made in the Bill for an emitter to apply for the carbon budget to be cancelled or revised "under prescribed circumstances" (section 24(7)(b); especially since such circumstances are not prescribed in the Bill.

9.12 Penalties should also be introduced in the Bill; for example: for providing false and/or misleading information under the Bill; for failing to comply with a sectoral emission target (section 22); and for failing to comply with plans to phase out or phase down synthetic GHGs (section 25). These contraventions should also be listed as offences and/or be subject to administrative penalties (which avoid many of the main constraints of criminal enforcement), and the consequences of non-compliance must be significant.

9.13 Offenders of the Bill are corporate entities, and **substantial benefits can accrue to an offender that contravenes its provisions – and have, indeed, accrued to corporate entities which have never, to date, been penalised for their GHG emissions**, apart from paying a low carbon tax. Therefore, to serve as a sufficient deterrent, penalties should be much higher than those currently contemplated in the Bill. For instance, these could be linked to a meaningful percentage of the activity's commercial value; such as a percentage of annual turnover or exports.

## 10. There is no need to align carbon budgets and carbon tax

10.1 Extensive lobbying on the carbon tax has significantly delayed and weakened the tax. This lobbying continues today, despite the fact that the tax is low, that phase 1 of the tax has been extended by a further three years, and that the most recent amendments to the tax (strenuously opposed by organised business) are still far below what is required to incentivise meaningful climate action.

10.2 One of the arguments by industry relates to the so-called need to align carbon budgets and carbon tax. Organised business argues:[2]

> *Optimal policy coherence and alignment will create greater business confidence and investment opportunity. In this regard, the carbon budget and the carbon tax have been tabled as two different instruments adopted by the Department of Forestry Fisheries and Environment (DFFE) and the National Treasury (NT). Although these policy instruments have the same objectives of enabling a national transition to a low carbon economy, they have varying rates of emission penalties without integration and lack associated mitigation mechanisms and enabling incentives that will allow business to sustainably achieve such legislated targets. We believe a holistic framework of penalties, incentives, and mitigation is critical to mitigating the risk of non-compliance and de-industrialisation of our economy, as businesses, and the country will not be able to transition sustainably. Business thus calls for more comprehensive engagement with government and a more empirical-based assessment of economic and social consequences of policy misalignment. Business cautions that obligations borne from the Climate Change Bill should not undermine and curtail rights derived from already granted licenses (sic), authorisations and permits, it is therefore imperative that comprehensive policy and legislative alignment is undertaken.*

10.3 Although difficult to ascertain, it appears that the argument is that carbon budgets allocated by the Department of Forestry, Fisheries and the Environment (DFFE) (as described above) and the carbon tax implemented by National Treasury in terms of the CTA should have "integrated" or "aligned": penalties, "mitigation mechanisms", and "enabling incentives".

10.4 It is unclear what business has in mind in relation to "enabling incentives" to comply with a carbon budget, but there is no reason why these would have to be "integrated" or "aligned" with carbon tax. Paying less tax is obviously a strong incentive in circumstances when a carbon tax is set at a rate related to GHG emission reductions commensurate with the best available climate science. There is strong consensus that taxing carbon emissions is a powerful tool to change behaviour by altering economic incentives.[3]

10.5 Of course "mitigation mechanisms" would be linked in that both carbon budgets and carbon tax are related to the size of an company's GHG emissions: reduced emissions mean that compliance with the carbon budget is easier and less tax is payable. Again, mitigation of GHG emissions can and should happen independently in the carbon budget and carbon tax processes. No "alignment" is required.

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[2] The 27 October 2022 correspondence to this Committee from "organised business" entitled "Joint position on the pivotal need for the Climate Change Bill".

[3] See, for example: See for eg: https://www.oecd.org/tax/tax-and-environment.htm; https://carbonpricingdashboard.worldbank.org/what-carbonpricing#:~:text=Instead%20of%20dictating%20who%20should,and%20paying%20for%20their%20emissions; https://openknowledge.worldbank.org/handle/10986/37455; https://www.imf.org/en/Publications/fandd/issues/2021/09/five-things-toknow-about-carbon-pricing-parry

10.6 Insofar as alignment of penalties are concerned, as set out above, there are no penalties applicable in the current Bill for non-compliance with the carbon budget, so this argument by organised business also does not make sense. In any event, even if there were penalties for non-compliance – as we argue there very clearly should be – there is again no basis for any alignment or integration arguments to hinder or delay implementation of carbon tax or carbon budgets. In any event, to avoid paying penalties and/or excess carbon tax, companies need only comply with their carbon budgets.

10.7 Although the Bill is not yet an Act, DFFE has advised us that it has already allocated mandatory carbon budgets. Once the Climate Change Act is enacted, these mandatory budgets will apply from January 2023.[4]

10.8 This was also stated by the National Treasury in the Budget Review 2022:

> *Penalising emissions exceeding mandatory carbon budgets. The mandatory carbon budgeting system comes into effect on 1 January 2023, at which time the carbon budget allowance of 5 per cent will fall away. To address concerns about double penalties for companies under the carbon tax and carbon budgets, it is proposed that a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill is enacted.*[5]

10.9 In relation to timing alignment, we understand from National Treasury that the filing of carbon tax returns and payment of tax liability occurs 6-months after the end of the tax period. This means that the 2023 tax filing will be done in July 2024, which should provide ample time for the Climate Change Act to be enacted and mandatory budgets, effective from January 2023, to be implemented.[6]

10.10 Organised business also argues that no existing authorisations can be impacted by a Climate Change Act. These untenable arguments demonstrate very starkly how industry intends to continue "business-as-usual" emissions for as long as possible, unless doing so is adequately disincentivised, including with a stringent carbon tax and significant penalties.

10.11 The argument regarding policy integration and alignment is regularly made by business and gives the impression of being sensible and practical. However, on interrogation, there is simply no reason for either the carbon budgets or the carbon tax to be delayed. In fact, mandatory carbon budgets will apply from January 2023, as soon as the Climate Change Act is promulgated, and the National Treasury roundly rejected the call by organised business that increases in the tax should be delayed, calling them out for their "lack of vision" and "lack of leadership".

[4] Personal correspondence between the author and Jongikhaya Witi.
[5] P 48.
[6] Personal correspondence between the author and Sharlin Hemraj.

10.12 This is just another example of the prevalent lobbying narrative that has served to delay climate action and preserve existing interests.

## 11. Conclusion

11.1 A threat-multiplier, climate change will exacerbate and intensify the country's already significant socio-economic challenges, with radical implications not only for South Africa's prosperity and security, but for all aspects of life on earth. Poor and marginalised communities are the most vulnerable to, the least resilient to, and the least responsible for, climate change, making rapid mitigation and adaptation measures in a country like South Africa all the more urgent.

11.2 What is glaringly obvious from the failure to reduce GHG emissions and the dire impacts of climate change is that voluntary actions and undertakings have dismally failed to ensure adequate levels of protection from climate chaos. Robust regulation is essential and urgent, and polluters must be strongly disincentivised from continuing their emissions.

11.3 The Committee has gone to great lengths to invite meaningful public participation on the Bill. This is commendable and the Climate Change Act has the potential to be transformational in the development of an effective climate change response and a just transition. It is crucial that this work not be undone by a lack of meaningful compliance and enforcement provisions.

11.4 Years of skilful corporate lobbying have created and reinforced harmful and false arguments that serve to avoid and delay climate action and to preserve the status quo. It is also crucial that the Bill no longer be a victim of these tactics.

11.5 This lobbying is by companies that have been aware of the imperative to decarbonise their operations for decades, but have consistently failed to take the requisite action at the pace required to reduce emissions in line with climate science. If the government allows industry to strongarm it into continuous delays to meaningful, robust regulation, these companies will continue to take advantage of this to delay operational changes, which will mean that the costs of their emissions will continue to be offloaded onto the rest of society.

11.6 For the reasons set out above, the Bill clearly does not go far enough to ensure accountability for those who contribute significantly to and/or exacerbate the impacts of the climate crisis.

11.7 We call upon the Committee to introduce meaningful penalties and other compliance and enforcement provisions to ensure that the Bill is not only effective, but constitutional.

11.8 As the Committee will know, failing to take more significant steps to reduce emissions in the short and medium term, will require steeper and deeper emission reduction cuts in future, with more severe consequences for our economy and the majority of people in South Africa.

12. Please contact us should you seek clarity on any aspect of these submissions.

Yours faithfully
**JUST SHARE**

Per: 

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