Regulatory submission

30 January 2024

# Comments on the Climate Change Bill [B9B-2022] (Select Committee on Land Reform, Environment, Mineral Resources & Energy)

Just Share

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Mr Asgar Bawa

Committee Secretary

**Select Committee on Land Reform, Environment, Mineral Resources & Energy**

By email: abawa@parliament.gov.za

Dear Mr Bawa

**Comments on the Climate Change Bill [B9B-2022]**

Just Share is 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.

Just Share **supports the urgent adoption of a Climate Change Act**. It is imperative that effective climate change legislation – with meaningful consequences for non-compliance - be enacted without delay. The long-awaited Climate Change Act and its supporting and subordinate legislation cannot afford to be weak on compliance and enforcement, particularly given South Africa's significant emissions and the severe climate risk it faces.

As set out in our previous comments on the Bill, we remain concerned that the failure to comply with a carbon budget and/or a greenhouse gas (GHG) mitigation plan attracts no penalty in the Bill.

The Climate Change Bill requires the Minister to make regulations addressing, *inter alia*, "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 greenhouse gas mitigation plan, and all matters related thereto**" (our emphasis). The Department of Forestry, Fisheries and the Environment (DFFE) is undertaking a project to develop the Carbon Budget and Mitigation Plans Regulations. It is currently unclear whether these regulations will include penalties for non-compliance with carbon budgets/GHG mitigation plans.

We are aware that the intention is to amend the Carbon Tax Act to introduce excess tax for exceedances of the carbon budget. This will be administered by National Treasury and not DFFE. This tax consequence is essential, but does not go nearly far enough to address the dire consequences of non-compliance with these crucial mitigation aspects of the Bill. In addition, precedent demonstrates that corporates will lobby to keep this tax as low as possible, and its implementation as late as possible.

Unless there are significant penalties attached to violation of a carbon budget and/or GHG mitigation plan, corporates will simply "budget" for any excess carbon tax (particularly if this is not set at a rate

that will disincentivise non-compliance) and emit in excess of their budgets. This would severely limit the prospects of the Climate Change Act achieving its objects.

**Excess carbon tax proposed for exceedances of carbon budgets**

It was announced in the Budget 2022 that: "*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*".

We are advised by National Treasury that:

- Due to delays with the enactment of the Climate Change Bill, the alignment of the mandatory carbon budgets and tax was postponed until the mandatory budgets are implemented and the carbon budget allowance extended by two years until 31 December 2024.
- The legislative amendment to give effect to this announcement was included in the 2023 Taxation Laws Amendment Bill which is under consideration by Parliament.

We understand that, once the Climate Change Act is enacted and associated regulations finalised, the necessary amendments will be made to the Carbon Tax Act to give effect to the 2022 policy announcement for further public consultation.

This two year extension of the carbon budget allowance is in addition to multiple other allowances and delays in relation to carbon tax.

**Anti-climate lobbying**

Independent research demonstrates that, in South Africa, obstructive corporate climate policy engagement is putting the country's climate goals in jeopardy. To date, the fossil fuel industry and its associations have played a major role in delaying ambitious climate policy and legislation like the Climate Change Act and the Carbon Tax Act. The lack of lobbying regulation and the lack of voluntary lobbying disclosure have significantly aided these efforts.

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. 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.

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.

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 GHG emissions, and low (if any) penalties for excessive emissions, have dismally failed to achieve their goa**l. 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.

*Lobbying against increased carbon tax*

In September 2022, the Energy Council of South Africa, Minerals Council South Africa, Business Leadership South Africa (BLSA), Business Unity South Africa (BUSA), the South African Petroleum Industry Association (SAPIA), and Energy Intensive Users Group (EIUG) called for, amongst other things: government to consider a higher carbon price only "post 2035"; a delay in annual carbon tax increases until "at least 2030"; and the retention and increase of tax-free allowances for big emitters.

Although this clear anti-climate lobbying tactic was roundly rejected by National Treasury, which called organised business out for their "lack of vision" and "lack of leadership", there is no doubt that all further efforts to increase carbon tax will continue to be vigorously opposed. It is also worth mentioning that, even with the increases made to the carbon tax, the current tax rate remains far too small to create the necessary incentivisation to encourage a just transition to a low-carbon economy and to ensure that the "polluter pays".

As set out above, unless significant penalties are attached to the failure to comply with a carbon budget and/or GHG mitigation plan, juristic persons to whom carbon budgets have been allocated will simply "budget" for any excess tax rate (or other fine), and exceed their budgets. The costs of non-compliance have to exceed the benefits, in order to avoid the Climate Change Act being toothless. This contravention should also be made a criminal offence 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.

**DFFE responses to comments regarding the need for penalties in the Climate Change Act**

It appears from DFFE's response to comments on the Bill that "to avoid double penalization… National Treasury will outline in the Carbon Tax legislation the carbon tax accounting mechanism that shall be used to penalise non-compliance against carbon budgets. Research work done by DFFE and [National Treasury] clearly shows that the carbon Budgeting and the carbon tax systems have to work in an integrated way in order to enforce the compliance with respect to Carbon Budgets". DFFE also indicates that it is developing an Administrative Penalties Bill that will apply to the National Environmental Management Act and all the Specific Environmental Management Acts (of which the Climate Change Act will be one).

It is incorrect that penalising the violation of carbon budgets/GHG mitigation plans through administrative and/or criminal penalties in addition to taxation of excess emissions amounts to unacceptable "double penalisation". Nor will penalising this violation in addition to levying additional tax mean that there is not "integration" between the Climate Change Act and Carbon Tax Act. Since

the current wording in the Climate Change Act in relation to non-compliance with GHG mitigation plans fails to clearly make compliance with carbon budgets/GHG mitigation plans a positive obligation,[1] there is also no clear indication that DFFE will enforce and sanction any non-compliance through administrative penalties to be introduced through the Administrative Penalties Bill.

As indicated above, it is not clear whether the Carbon Budget and Mitigation Plans Regulations will include penalties for non-compliance with carbon budgets/GHG mitigation plans.

**Conclusion**

Failure to comply with a carbon budget is an egregious contravention, with significant consequences for climate action. This should be made 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. Administrative penalties should also apply.

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.

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.

**We call upon the Committee to advocate for the introduction of meaningful penalties and other compliance and enforcement provisions to ensure that the Climate Change Act is not only effective, but constitutional. If this is not done in the Act itself, these must be included in the Carbon Budget and Mitigation Plans Regulations.**

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.

Please let us know should you require clarity on any aspect of these comments.

[1] In terms of section 24(6), a company allocated a carbon budget must, *inter alia*, evaluate its progress on the budget and annually report to the Minister on this process. If "such reporting indicates that the person has failed, is failing or will fail to comply with the allocated carbon budget," the company must "provide a description of measures the person will implement in order to remain within the allocated carbon budget". In any words, the Bill does not make explicit that compliance with the carbon budget is required nor provide any consequences for non-compliance apart from an opportunity for the company to describe how it will remain within the budget. As we have stated before, this also does not make sense in circumstances where a company has **already failed** to comply ("has failed") – which implies that the period of the carbon budget has expired, which would make measures to remain within the budget redundant.

Yours faithfully
**JUST SHARE**

Per:

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