

8 August 2018

The Director General  
Department of Environmental Affairs  
Private Bag X447  
Pretoria  
0001  
For the attention of Ms Dineo Ngobeni

## COMMENTS ON THE DRAFT CLIMATE CHANGE BILL

BUSA welcomes the opportunity to comment on the Draft Climate Change Bill. BUSA requests a bi-lateral engagement with the Department on the Bill. BUSA further expects a “comment and response” document based on this round of consultation before finalisation of the revised Bill. Finally, given the extensive amendments required on the Bill, BUSA requests that the revised Draft Bill is published for further comment before submission to parliament.

### BACKGROUND

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA’s function is to ensure that business plays a constructive role in the country’s economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As a principal representative of business in South Africa, BUSA represents the views of its members in several national structures and bodies, both statutory and non-statutory. BUSA also represents businesses’ interests in the National Economic Development and Labour Council (NEDLAC).

### INTRODUCTION

While BUSA acknowledges that some of our comments have been incorporated, there are still key issues that need to be addressed and which are raised again in this submission.

In general, any legislative instrument in respect of climate change is expected to build on the National Climate Change Response White Paper which is the foundation for climate change management in South Africa. The current Draft still does not adequately build on the White Paper



and needs significant revision in order align to as well as exclude provisions of NEMA as indicated in this submission.

BUSA has several critical challenges with the Draft Bill as written. Therefore, in addition to our comments below, BUSA includes for consideration - Annexure 1: Proposed Amendments to the Draft Climate Change Bill, and Annexure 2: Proposal for the establishment of a Presidential Climate Change Response Coordinating Commission.

## GENERAL

### REGULATORY CERTAINTY

BUSA notes that the Draft Climate Change Bill does not sufficiently build on the National Climate Change Response White Paper. In our view the legislative framework is intended and required to:

- be used to give appropriate regulatory effect to the White Paper and in so doing, ensure a holistic and aligned approach to climate change management;
- domesticate South Africa's international obligations in terms of the United Nations Framework Convention on Climate Change (UNFCCC) and its instruments;
- provide clear guidance to organs of state and stakeholders as to their obligations in terms of a climate change response in line with the Constitutional requirements, including the rule of law; and
- provide certainty and clarity on processes to be adopted in implementing all the different regulatory mechanisms, inclusive of adequate consultation and inter-governmental engagement.

Legislative uncertainty is a key impediment to investment in the country which South Africa, particularly in the current climate, can ill afford. The President's commitment to encouraging investment and employment opportunities ought to be a key consideration in driving both the content and regulatory structure of any legislation and has not in our view been factored into the Draft Climate Change Bill.

BUSA is concerned that as currently framed and in the absence of the requisite detail, the Draft Bill is too vague to ensure the necessary regulatory certainty not only to enable compliance and implementation but moreover, to ensure investment certainty and enable business planning and strategy. The need for legislative certainty is defined by the imperative to avoid vagueness which requires that laws must be written in a clear and accessible manner such that an average person is able to determine their obligations and the consequences for not meeting those obligations. Where these obligations and consequences are postponed indefinitely in the Bill, the required certainty is not achieved.

The draft Bill remains largely restricted to empowering the Minister with discretionary powers, without clearly articulating the full scope and consequences of the exercise of this discretion. It is noted that the National Framework is intended to provide the necessary detail however, for the reasons articulated below, the Bill should be the sole vehicle to regulate climate change matters, with appropriate supporting regulations as is already contemplated. It was previously contemplated and discussed that many of the aspects to be addressed via these broad and vague



legal instruments would be addressed via appropriate regulations. However, the Bill itself needs to provide sufficient information to ensure that the contents of the regulations does not come as a surprise when they are published.

As previously submitted BUSA is of the opinion that the information which is necessary to give substance is already available to the Department and should have been considered and appropriately applied in developing the Bill. Rather, it appears that key documents have not been considered in the drafting. The documents referred to are as follows:

- The Integrated Mitigation System including the methodologies contained therein;
- Alignment of the carbon budget with the proposed carbon tax;
- The Long-Term Adaptation Scenarios and Adaptation Strategy; and
- The National Climate Change Response White Paper.
- Text of Paris Agreement.

It is understood that government wishes to “mainstream” climate change considerations into all policies, legislation and programmes of other government departments. BUSA supports this goal but believes that, as currently framed, insufficient attention has been paid to the Constitutional challenges posed by encroaching on the competencies of national, provincial and municipal spheres of government, particularly in relation to planning.

As currently drafted, conflict is considered likely. The Intergovernmental Relations Act seeks in the first instance to avoid conflict in preference to addressing it once conflict has arisen. The inclusion of the trumping provision (Chapter 1, Section 5 of the Draft Bill) is not supported and BUSA argues that for legal certainty, the potential areas of conflict be addressed before finalising the Bill.

Appropriate co-operative governance processes and structures, which already exist, should be used and consideration should be given to establishing specific institutional arrangements through this Bill instead of providing for a discretionary power that already exists in NEMA.

Importantly, the White Paper clearly articulates an integrated approach where a range of policy and legislative instruments work together to achieve emission reductions. BUSA is therefore still deeply disappointed to note that there has still been no attempt to align the carbon budget and carbon tax instruments, as is currently proposed in the Department’s Integrated Mitigation System report, despite numerous commitments from the Department and National Treasury to do so, this is explored further in the “Misalignment and Duplication with Other Legislation” section below. BUSA is adamant that this alignment must be concluded before the finalisation of either this Bill or the revised Carbon Tax Bill.

## **SPECIFIC ENVIRONMENTAL MANAGEMENT ACT**

BUSA is supportive of a Specific Environmental Management Act (SEMA) with exclusions as several NEMA provisions do not apply within a climate change context. While the Thabametsi Case sets a precedent that climate change must be considered within the ambit of “environment”, the holistic management of climate change and its impact extends beyond pure environmental issues.



Notwithstanding the above, statements were made at the Gauteng Provincial public stakeholder engagement that a decision on whether the Bill is a SEMA or a stand-alone Act outside of the provisions of NEMA has not been taken.

Even more concerning is that there are instances in the Draft Bill where reference is made to NEMA and its provisions which creates legal ambiguity and further uncertainty given the inclusion of certain clauses and exclusion of others. For example, NEMAQA states that “*This Act must be read with any applicable provisions of the National Environment Management Act*”. – there is no such statement in the Draft Bill. However, Section 3. (a) states that “*the interpretation and application of this Act must be guided by the national environmental management principles set out in section 2 of the National Environmental Management Act*”.

A SEMA would offer sufficient flexibility to deal with the significant complexities of climate change management. In BUSA’s view it is imperative that a decision on whether the Bill is a SEMA, or a standalone Act be made prior to finalisation of the Bill, as it affects the manner in which the Bill is drafted in a number of ways. For example, if it is a SEMA, specific exclusions of provisions which do not apply within a climate change context need to be included; if it is not a SEMA then provisions in NEMA which would be helpful, like alternative dispute resolution mechanisms need to be specifically included.

Based on legal opinion BUSA believes that the following sections of NEMA do not apply:

- Application of the NEMA duty of care (Section 28) as it specifically relates to the context of environmental pollution which cannot apply in the case of an exceedance of a carbon budget. The DEA comment and response document clearly indicates that a special provision is intended for a carbon tax to be applied as the penalty of exceedance of a carbon budget, which does not lend itself to this particular provision as is intended by NEMA.
- Application of NEMA criminal offences for exceedance of carbon budget (see below in this submission); and
- Compliance and enforcement risks (section 31, 32 and 33 of NEMA) as it relates to exceedance of carbon budgets that are intended to be penalised through the application of a carbon tax where a choice has been given to the entity on whether to pay the carbon tax or undertake mitigation, which cannot be further penalised when such a choice is actioned.

## **INTERNATIONAL COMMITMENTS**

Throughout the document, reference is made to South Africa’s international obligations in a very vague and undefined manner.

A primary objective of the Bill must be to ensure the implementation of the Nationally Determined Contribution (NDC), particularly within the framework provided by the Paris Agreement to which South Africa subscribes. In general, the Bill appears to be written outside of the context of the Paris Agreement. In particular, the Bill fails to recognise the role of the non-state actors in the implementation of the NDC, for which the Paris Agreement makes specific provision.

This Bill focusses entirely on a command and control approach, which results in the collaborative approach envisaged by the Paris Agreement being ignored. It is completely unacceptable to



propose a unilateral approach to setting the limits contemplated for carbon budgets and SETS, which will have a significant impact on the economy and individual businesses, without any reference to the affected parties.

Publication of a Bill, which does not recognise the roles of non-state actors in a national environment where the President has called on all citizens to be part of the solution, reflects a staggering rejection by a government department of the vision articulated by the President.

The Bill must make clearer references to South Africa's international obligations under the Paris Agreement (see proposal in Annexure 1).

### **NATIONAL ENVIRONMENTALLY SUSTAINABLE FRAMEWORK (CHAPTER 2, SECTION 6)**

BUSA is opposed to relegating substantive portions of the Bill to future documents and regulations. Business does not support this approach in principle as it makes it almost impossible to evaluate the impact and effect of the Bill. In BUSA's view, this high-level drafting approach results in uncertainty and vagueness which, in order to comply with the Rule of Law enshrined in the constitution must be avoided to ensure certainty as to what is required for those that are bound to perform in terms of the legislation. The enabling power to develop yet another framework, particularly when the Draft Bill is framework legislation is not supported. The Climate Change Bill is a key piece of legislation that has been long awaited and requiring a further framework to be developed within 2-years will only further delay implementation of the Climate Change Bill

Furthermore, incorporating a Framework in the climate change context was not considered or discussed previously. The National Air Quality Management Framework is but one of three regulatory layers which applies in the air quality context, and given our experience in this instance, a Framework is likely to result in legal uncertainty, particularly with regards to the legal status of its provisions, regulatory duplication and conflicting obligations. In the development of new legislation and regulatory mechanisms, it is critical to consider the shortcomings of and challenges resulting from other legislation, particularly similar framework legislation. A Framework, in our view, is not required and introduces unnecessary complexity and uncertainty in the climate change space.

The time constraints the Department faces and the need to publish a Climate Change Bill as soon as possible is recognised, however BUSA reiterates its support for the development of a more detailed Climate Change Bill accompanied by supporting regulations.

In addition to the Framework, it is contemplated that multiple other mechanisms and plans, programmes and strategies will still be developed, which exacerbates the already unsatisfactory vagueness of the legislation.

### **INSTITUTIONAL ARRANGEMENTS AND COORDINATION (CHAPTER 2, SECTION 8)**

Inter-ministerial committees are generally established by the President for specific purposes and are generally temporary in nature. BUSA does not believe that it is appropriate for such a committee to be established by statute. If such a high-level coordinating structure is really required, consideration should be given to using the model of the Presidential Infrastructure Coordinating Commission, which is established by statute (See Annexure 2 for BUSA's proposal on the establishment of a Presidential Climate Change Coordinating Committee).

BUSA believes that it is not correct to assume that **all** aspects of climate change are part of the function of environmental affairs. The assumption results in under the jurisdiction of the Department of Environmental Affairs in a manner, which contemplates the DEA essentially assuming overall responsibility of the national climate change response as contemplated in the Bill and consequently imposing obligations on other departments and spheres of government. BUSA suggests redrafting, see the proposal in Annexure 1.

## THE ROLE OF PROVINCIAL AND LOCAL GOVERNMENT (CHAPTER 3)

### Challenges

The Bill envisages a substantial role for provincial and local government authorities. This is evident from the outset as one of the objectives of the Act is stated to:

*“2. (a) provide for the coordinated and integrated response to climate change and its impacts by all spheres of government in accordance with the principles of cooperative governance”.*

A coordinated approach whereby climate change considerations are streamlined into the functions of each sphere of government is supported, however BUSA cautions against assigning roles best performed at the level of national government to provincial and local authorities as these spheres of government do not have the necessary authority to administer them and may lack the capacity to do so. The Cooperative Governance and Traditional Affairs (COGTA) Minister Dr Zweli Mkhize stated in Parliament in May 2018 that<sup>1</sup>:

- 31% of the country's municipalities "remain dysfunctional or distressed"
- 31% are "almost dysfunctional"
- 31% are "reasonably functional"
- 7% are "well-functioning"

In the face of this admission, it is deeply concerning that additional critical functions for local government are contemplated in Draft legislation which is best managed at national level.

While we acknowledge the importance for government to work in an integrated manner, one should be mindful of the fact that province and local government's areas of executive competence arise not only from an assignment from national government, but also directly from the Constitution itself. Where assignment of functions is provided for, regard should be given to the nature of those functions, the suitability of the relevant sphere of government to effectively administer that task as well as their capacity to do so.

### ***Provincial government***

Section 125 of the Constitution states that the executive authority of a province vests in the Premier and his Executive Council, who has the inherent authority to implement all national legislation falling within the functional areas listed in Schedule 4 or 5 of the Constitution. The province also has the authority to implement national legislation dealing with functional areas outside of schedule 4 or 5, provided those functions have been assigned to provincial government by an Act of Parliament and such an assignment is only permissible to the extent that the province has the administrative capacity to assume effective responsibility.

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<sup>1</sup> <https://www.news24.com/SouthAfrica/News/mkhize-87-municipalities-dysfunctional-require-urgent-intervention-20180515>



It is also important to consider that many of the functions referred to in the Schedule to the Bill are not listed either in Schedule 4 or 5 of the Constitution and are therefore sole national competencies.

### ***Functional areas***

The term “functional areas” normally refers to the constitutional allocation of powers to different spheres of Government. The list in the Schedule to the Bill appears to comprise the names of different departments not functional areas as contemplated in the Constitution. In addition, the Bill appears to contemplate allocating functions to the different spheres of government without reference to the allocation of functional areas by the Constitution. For example, functions allocated to the Departments of Energy, Water and sanitation, National Treasury and Mineral Resources are national competencies and cannot therefore be allocated to the provincial or municipal spheres as is contemplated in this Bill.

The intention of the Bill is understood to be mainstreaming climate change into the activities of all government activities. In BUSA’s view the best way to do this is to integrate relevant climate change considerations into the policy and planning activities of departments.

In order to ensure adherence to the Constitutional allocation of functions it is proposed that the Bill clearly confirm responsibility for ensuring compliance with international commitments in respect of climate change as residing with the Department of Environmental Affairs. This does not mean that climate change should be equated with environment as compliance with international agreements in this regard, requires clearly articulated joint responsibilities to address both mitigation and adaptation, key elements of which need to be mainstreamed into the activities of other departments.

A tiered approach to these responsibilities should start at national level.

It may also be useful to identify relevant national departments on the basis of a clear identification of sectors that have sectoral responsibility for adaptation and mitigation separately as follows:

- Mitigation

The IPCC categorises emitting sectors into four broad categories as follows:

- Energy
- Industrial process and product use;
- Agriculture, Forestry and Land use; and
- Waste

Although overall responsibility for regulating the emissions from these sectors rests with the Department of Environmental Affairs, policy and planning in respect of these sectors falls under the jurisdiction of the following departments:

- Department of Energy
- Department of Trade and Industry
- Department of Agriculture, Forestry and Fisheries
- Department on Environmental Affairs

- Adaptation

Sectors that are required to ensure that they adapt to potential domestic impacts of climate change are those that have responsibility for infrastructure and therefore need to ensure the resilience of the infrastructure for which they are responsible are:

- Department of Energy (energy policy and planning)
- Department of Transport (transport planning)
- Department of Agriculture, Forestry and Fisheries (Agricultural and Forestry policy)
- Department of Rural Development and Land Reform (Spatial planning)
- Department of Water and Sanitation (Wastewater and Water infrastructure, water resource management)
- Department of Environmental Affairs (Waste management infrastructure, biodiversity)
- Department of (Disease vector control)

The reality is that mainstreaming of climate change requires that climate change issues relevant to the Minister response for the functions listed must be integrated into existing instruments and except in the case of the setting of sectoral targets must not result in the need for additional administrative burdens to be placed on departments. Mainstreaming does not mean that the provincial and municipal spheres of Government must duplicate the work done by national.

It is deeply concerning that particularly municipalities are insisting on being allocated powers for which there is no constitutional mandate. This cannot be allowed.

It is proposed that the schedule be amended as set out below:

## **SCHEDULE**

- Energy
- Transport
- Trade and Industry
- Mineral Resources
- Agriculture
- Forestry
- Rural Development
- Water and Sanitation
- Biodiversity
- Health

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Climate change is not a functional area listed in either schedule 4 or 5 of the Constitution. Air pollution is listed as a local government function for which provincial and national government has concurrent legislative competence and the environment is listed as an area of exclusive



national and provincial competency. Given the fact that Thabametsi clearly concluded that climate change falls within the ambit of “environment” and that global warming is not in fact an air pollution issue, BUSA submits that climate change cannot be managed in a similar way to air pollution. While the devastating effects of climate change must be addressed, greenhouse gases emissions do not result in localised air pollution impacts such as health issues and cannot be managed as and equated to air pollution.

Finally, the Constitution allocates planning functions to each sphere of government in relation to policy that is appropriately implemented at that sphere of government. While the Constitution does not contain a definition for either national, provincial or municipal planning, we would argue that the transition of entire sectors of the economy to a lower carbon trajectory is a task that necessitates a coordinated national planning approach and hence must be implemented by the national executive, in collaboration with the affected sectors.

BUSA therefore proposes that the Bill should not make provision for the assignment of any functions under the Bill to a province as there is a dire need for national consistency across provincial boundaries where any regulatory instrument is aimed at a whole sector or sub-sector of the economy. BUSA further proposes that the role of provincial government be limited to mainstreaming climate change considerations into its own provincial planning, specifically adaptation considerations, and with reference to functional areas listed in schedule 4 or 5. This role is by no means insignificant as the province will still be charged with administering climate change mechanisms under the Act at it relates to indigenous forests, certain agricultural and environmental matters and provincial rural and urban development to name a few.

BUSA recognises that the environment is a concurrent power and that provision therefore needs to be made to allow MECs to develop provincial instruments. However, experience has shown that this increases the regulatory burden significantly without necessarily achieving enhanced environmental outcomes. This challenge has previously been recognised by the legislature in that provision has been made in some SEMAs for provincial instruments only to be developed by an MEC in concurrence with the Minister.

BUSA therefore proposes that wording, which was previously proposed and has not been included along the following lines:

*“Any MEC, exercising a power in terms of this Act, may only do so with the concurrence of the Minister.”*

Provision should also be made for appropriate consultation with other government departments which regulate sectors which are to be impacted by this legislation.

### **Local government**

The comments above are equally applicable to the assignment of functions under the Act to local government.

Section 156 of the Constitution provides that:



*“(4) The national government and provincial governments must assign to a municipality, by agreement and subject to conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –  
(a) that matter would most effectively be administered locally; and  
(b) the municipality has the capacity to administer it.”*

BUSA supports the recommendation in section 9(3) to conduct a climate change needs assessment within the municipality and to identify measures and mechanisms to manage and implement a climate change response, specifically adaptation measures.

However, this does not require a separate policy as required by section 9, as such a policy will likely be drafted by consultants at a great expense only to collect dust. Instead, climate change adaptation and response considerations should be mainstreamed into the development of municipalities’ Integrated Development Plans (IDPs) and Spatial Development Frameworks (SDFs). This would ensure that the work done by identifying climate change risks is actually undertaken.

BUSA does not support the provision for any function relating to the regulatory, monitoring and evaluation or reporting of greenhouse gases, to be assigned to municipalities or provinces. It would be inappropriate for the administration of budgets or targets to be assigned to municipalities or provinces as these need to be applied uniformly across municipal and provincial boundaries. These functions are most effectively carried out at a national level. As such the section in the Bill making provision for the assignment of functions should be removed.

## **SUPPORT MECHANISMS (CHAPTER 5, SECTION 13)**

### **Carbon Budgets**

DEA and their consultants have been engaging for some time now with companies who will require carbon budgets. The learnings and outcome of these projects should be incorporated into the Climate Change Bill. The Integrated Mitigation System included recommendations for various alternative mechanisms such as offsets, energy efficiency (discussed in more detail below) and carbon trading schemes to be used to meet the carbon budget. There were also recommendations to align the Carbon Tax and Carbon Budget.

The draft Climate Change Bill does not appear to allow for this flexibility and should be reworded to make the requirements around the mitigation plan less prescriptive. As commented to DEA in previous engagements, business and economic conditions mean that a detailed mitigation plan cannot be put in place for the full five period of the Carbon budget and a company held responsible to implement exactly that plan. Companies require flexibility to adjust and make use of cost-efficient alternatives as they become available. The aim should be that the company is required to achieve the Carbon Budget and how they do it remains the ambit of their control.

Section 13(4) states that the Minister must allocate carbon budgets. There are no provisions included in the Bill that acknowledge that companies must be consulted. Carbon Budgets impose direct limitations on private sector entities and places substantial obligations on them. It is therefore inconceivable that these obligations can be imposed in the absence of the parties most affected.

## **Mitigation from energy efficiency as a carbon budget allowance**

Energy efficiency or energy saving is one of the lowest cost options for reducing energy consumption. The potential for improved energy utilisation through reducing the energy intensity (thus reducing greenhouse gas emissions) of companies, and decoupling economic growth from energy demand, should not be discouraged by climate change legislation or regulations, but be supported instead.

Under the proposed carbon budget indirect emission reductions are not recognised but form an important part of non-state action towards the decarbonisation of the country through:

- Enhancing energy security by making better use of existing and new generation capacity.
- Improving South Africa's global competitiveness through reduced energy input cost.
- Decoupling growth in energy consumption (and GHG emissions) from growth in GDP.
- Improving global competitiveness will, in turn, contribute to job creation.

The current mechanisms for supporting energy efficiency includes either offsets under the proposed carbon tax (only for savings outside the taxable activity) or 12L tax rebates. The offsets that can be used under the proposed carbon tax will be based on international carbon standards (CDM, VCS and Gold Standard) and processed under the Carbon Offset Administration System managed by the DOE. The 12 L tax allowances are generated against SANS 50010 (Measurement and verification of energy savings) and processed under SANEDI (an agency under the DOE). Any new mechanism should demonstrate credibility and ensure that double claiming has not taken place.

For energy efficiency to qualify for an allowance under the carbon budget, a number of options can be explored. The fastest route towards implementation would be to use the existing infrastructure of 12L under SANEDI. The verification of compliance against SANS 50010 by SANEDI is a well-documented and traceable process concluding in the generation of a certificate for 12L tax rebate purposes. These verified saving could however also be used to generate a certificate for a carbon budget allowance. The system should restrict the issuance to allow only the generation of one certificate but would provide the flexibility to the owner of the savings which certificate they want to activate, tax rebate or carbon budget allowance.

Converting the energy savings to an emission saving would require the DOE and DEA to calculate and upload the annual grid emission factor for South Africa. This would ensure that a consistent emission factor is used by all energy saving projects, and support credibility in the annual emission saving calculation.

### **Advantages of using 12L**

- System, standards and competent persons already available as a functional system
- Avoids double claiming concerns
- Fast track implementation for a new allowance possible

### **Possible hurdles for using 12L**

- Annual update of the grid emission factor is essential and outside the control of the private sector

## **PHASING DOWN/OUT OF SYNTHETIC GASES (CHAPTER 5, SECTION 14)**

The section proposes to treat all three synthetic gases in the same manner. The term “phase down” is preferred to “phase out”, as prohibition of the use of any gas is not contemplated under the UNFCCC. SF<sub>6</sub> and HFCs are purchased and used, therefore a phase down plan can be implemented for them and they could in time be replaced by technically viable and cost-effective alternatives. However, in South Africa, PFCs are a by-product of the Aluminium production process and are therefore process emissions that must be managed through operational means. Accordingly, they cannot be regulated in the same manner.

## **PRIVATE SECTOR PARTICIPATION (CHAPTER 6, SECTION 16 & 17)**

As mentioned above, the Bill does not reflect the importance of the role of non-state actors in addressing climate change. As currently framed, the private sector is wholly side-lined in a process that will affect it more than government. Carbon Budgets are all direct limitations on private sector entities and place substantial obligations on them. It is therefore inconceivable that these obligations can be imposed in the absence of the parties most affected. It is therefore recommended that specific consultation with affected persons be included in the Bill.

Our Constitution furthermore prescribes a system of participatory democracy whereby affected parties are entitled to be part and parcel of major decisions affecting them. As such it is unthinkable that carbon budgets can be made in the absence of those private sector entities who will have to give effect to it. Draft

BUSA would strongly urge the Department to reconfigure the institutional arrangements to make provision for SETS, SERPs and Carbon Budgets to be set following agreements reached at dedicated and inclusive sector councils, (please refer to Annexure 1).

## **MISALIGNMENT AND DUPLICATION WITH OTHER LEGISLATION**

### **Misalignment and Criminalisation (Chapter 6, Section 19)**

In July 2017, the Department hosted a public consultation on the Development of South Africa’s Post-2020 Climate Change Integrated Mitigation System, and more specifically a report created on DEA’s behalf by a service provider. The Report, citing international examples and best practice from abroad, recommended that the proposed carbon tax be used to enforce carbon budgets either by limiting the tax to entities which have exceeded their budgets, or imposing higher tax rates on entities who have exceeded their budgets.

Nowhere does this Bill incorporate either of those proposals as an enforcement mechanism for carbon budgets. It is noted that the DEA’s own comment and response document clearly indicates that *“not meeting the carbon budget, penalty is through the carbon tax – interface still to be finalised”* which has not been followed through in drafting the Climate Change Bill. Instead, the Bill imposes criminal liability for any entity who exceeds their budget. It is very concerning that the DEA would commission an evidence-based investigation into this matter only to ignore its recommendations entirely.

The introduction of specific criminal sanctions for failing to meet a carbon budget and presumably the same approach to criminalisation of other offences in line with the approach taken in NEMA is still not supported and is strongly opposed. BUSA has supported the Department’s proposal



for alignment of the carbon budget with the tax as outlined in the Post-2020 Climate Change Integrated Mitigation System but does support criminalisation for non-compliance with the budget. The current drafting does not reflect public assurances by both National Treasury and the Department that there will be no double penalty rather this introduces a third option that has never been consulted on.

Furthermore, based on legal opinion, criminalisation of offences as contemplated in this regard would be unique in the world. BUSA sees no reason for South Africa to have a legislative framework for climate change which is one of the most stringent in the world and is in direct contradiction to the need for development to address poverty, inequality and unemployment. The imposition of the carbon budget as well as a carbon tax already creates a unique situation. BUSA is therefore disappointed that government appears intent on proceeding with this legislation without conclusion on the alignment of these two instruments.

BUSA raised serious concerns regarding this issue at various levels including National Treasury and Parliament and continues to constructively engage with the Department on the alignment of the carbon budget with the tax post 2020. From an investment and policy certainty perspective this lack of alignment does not give reflect government's assurances that investment barriers will be addressed. It is also noted that this contradicts the socio-economic impact assessment report which indicates that the Draft Climate Change Bill will provide certainty to business and enable investment in the country.

It is understood that the Department and National Treasury have concluded the alignment mechanism, and therefore it is not understood why the Draft Bill makes no clear reference to a carbon tax as the penalty for exceedance of the carbon budget.

### **Duplication (Chapter 6, Section 21)**

Section 13 (9) (c) (i) places an obligation on entities subject to a carbon budget to "monitor its annual greenhouse gas emissions". Section 15 (1) (c) (i) then further permits the Minister to make regulations;

*"15 (1) (c) that will promote the effective monitoring, evaluation and assessment of national progress in relation to climate change matters, including in relation to climate change data and information, including-*

*(i) information relating to direct and indirect greenhouse gas emissions, including for the purposes of planning, analysis and monitoring; and to inform how the Republic may comply with any international obligations;"*

Qualifying business entities are already required to report on their greenhouse gas emissions in terms of Regulations promulgated in terms of the National Environmental Management: Air Quality Act, in March 2017. The transitional arrangements in Section 21 read with the provisions described above, appears to allow the Minister to impose a parallel system of reporting on substantially the same information, to the same Department. BUSA strongly urges the Department to reconsider this provision as it will place an immense, unnecessary burden on businesses and undermine the value of existing regulations.



An enabling power needs to be provided within this Act to allow for the compilation of the National GHG Inventory and the submission of GHG emission reports and mitigation plans and progress reports.

Provisions must be made in the Bill for the repeal of relevant sections of the National Air Quality Act.

## DETAILED COMMENTS

Please note that detailed comments on Chapter 2 onwards are addressed in tracked changes of the Bill. Please see “Annexure 1: BUSA Proposed Amendments to the Draft Climate Change Bill” in this respect.

	ISSUE	COMMENT	PROPOSAL
	<b>Preamble</b>	United Nations Convention on Combatting Climate Change is incorrectly referenced	Replace with United Nations Framework Convention on Climate Change
	<b>Chapter 1</b>		
	<b>Interpretation, Objects and Application</b>		
	<b>Definitions</b>		
1.	In this Act, unless the context indicates otherwise -		
	“ <b>adaptation</b> ” in relation to natural, human, social and ecological systems, means the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities; in relation to natural systems, the process of adjustment to actual climate and its effects;	This definition is not aligned with IPCC language in this regard.	IPCC – means adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities. Various types of adaptation can be distinguished, including anticipatory and reactive adaptation, private and public adaptation, and autonomous and planned adaptation
	“ <b>adaptive capacity</b> ” means the ability of a system to adapt to the impacts, cope with the consequences, minimise potential damages, or to take advantage of opportunities offered by climate change or climate variability;	Supported.	



	ISSUE	COMMENT	PROPOSAL
	" <b>carbon budget</b> " means a greenhouse gas emissions allowance allocated to a person in terms of section 13, over a defined time period;	Supported.	BUSA acknowledges inclusion from previous submission.
	" <b>climate change</b> " means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods;	Supported.	BUSA acknowledges inclusion from previous submission.
	" <b>Department</b> " means the national department responsible for environmental affairs;	Supported.	
	" <b>Disaster Management Act</b> " means the Disaster Management Act, 2002 (Act No. 57 of 2002);	Supported.	
	" <b>direct greenhouse gases emissions</b> " means emissions from sources that are owned or controlled by the person;	Supported.	
	" <b>ecosystem</b> " means a system of relationships between animals and plants and their environment;	Not Supported. Use NEMA definition	NEMA: means a dynamic system of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit
	" <b>environment</b> " has the meaning assigned to it in section 1 of the National Environmental Management Act;	Supported.	
	" <b>Functional Area</b> " means the functional areas listed in Schedule;	Supported.	

	ISSUE	COMMENT	PROPOSAL
	" <b>greenhouse gas</b> " means gaseous constituents of the global atmosphere, both natural and anthropogenic, that absorb and re -emit infrared radiation;	Supported.	
	" <b>Indirect greenhouse gases emissions</b> " means emissions that are a consequence of the activities of the reporting company, but occur at sources owned or controlled by another company;	Prefer greater clarity	Means emissions that are related to the reporting person's activities, but that are emitted from sources owned or controlled by another person
	" <b>IPCC</b> "	Omitted.	The Intergovernmental Panel on Climate Change (IPCC) is a United Nations body, founded in 1988, which evaluates climate change science.
	" <b>Mayor</b> " means an elected Mayor of a metropolitan, district or local municipality;	Supported.	
	" <b>MEC</b> " means the member of the Executive Council to whom the Premier has assigned responsibility for the environment;	Care required for proper syntax	" <b>MEC</b> " means the member of the Executive Council to whom <u>a</u> Premier has assigned responsibility for the environment.
	" <b>Minister</b> " means the Cabinet Minister responsible for environmental affairs;	Supported.	
	" <b>Ministerial Committee on Climate Change</b> " means the committee established in terms of section 8(1) responsible for the coordination of climate change responses within the Republic;	Definition does not conform to the mandate as included in Section 8 (1).	Align definition with Section 8(1).
	" <b>mitigation</b> " means a human intervention to reduce the emissions of greenhouse gases by sources or enhancing their removal from the atmosphere by sinks;	Supported.	

	ISSUE	COMMENT	PROPOSAL
	<p><b>"National Environmental Management Act"</b> means the National Environmental Management Act, 1998 (Act No. 107 of 1998);</p>	Supported.	
	<p><b>"national greenhouse gas inventory"</b> means the National Greenhouse Gas Inventory which catalogues all the emissions of greenhouse gases from all sectors in South Africa;</p>	Supported.	
	<p><b>"national greenhouse gas emissions trajectory"</b> means a benchmark against which the efficacy of greenhouse gas emissions reduction actions will be measured;</p>	Not entirely aligned with the NCCRP.	<p>The NCCRP section 6.4 refers to a "National GHG Emissions Trajectory <u>Range</u>, projected to 2050, to be used as the benchmark against which the efficacy of mitigation action will be measured." Include "Range" as per NCCRP.</p>
	<p><b>"organ of state"</b> has the meaning assigned to it in section 239 of the Constitution of the Republic of South Africa, 1996;</p>	Supported.	
	<p><b>"Paris Agreement"</b></p>	Omitted.	<p>The Paris Agreement builds upon the Convention and for the first time brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so. As such, it charts a new course in the global climate effort.</p> <p>The Paris Agreement central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels</p>

	ISSUE	COMMENT	PROPOSAL
			<p>and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Additionally, the agreement aims to strengthen the ability of countries to deal with the impacts of climate change. To reach these ambitious goals, appropriate financial flows, a new technology framework and an enhanced capacity building framework will be put in place, thus supporting action by developing countries and the most vulnerable countries, in line with their own national objectives. The Agreement also provides for enhanced transparency of action and support through a more robust transparency framework.</p>
	<p><b>"person"</b> means a natural person and includes a juristic person;</p>	<p>Supported with minor edit to align with NEMA</p>	<p><b>person</b> means <del>a natural person and includes</del> a juristic person.</p>
	<p><b>"prescribe"</b> means to prescribe by regulation;</p>	<p>Supported.</p>	
	<p><b>"Provincial Committee on Climate Change"</b> means the committees established in terms of section 8(9) responsible for the coordination of climate change responses within a province;</p>	<p>Not supported. Existing structures dealing with concurrent powers listed in Constitution are sufficient. Separate structure undermines stated requirement for mainstreaming climate change.</p>	<p>Delete.</p>
	<p><b>"regulation"</b> means a regulation made, and includes a notice issued, under this Act;</p>	<p>Supported.</p>	
	<p><b>"resilience"</b> means the ability of a social, economic or ecological system to absorb</p>	<p>Supported.</p>	

	ISSUE	COMMENT	PROPOSAL
	disturbances while retaining the same basic structure and ways of functioning, the capacity for self-organisation and the capacity to adapt to stress and change;		
	" <b>sector</b> " means a collective term for a group of activities with similar characteristics which either emit greenhouse gases or are vulnerable to climate change;	Sector is understood in different ways for mitigation and adaptation.	" <b>sector</b> " for mitigation means a collective term for a group of activities as defined by the IPCC as sources for GHG emissions.
			" <b>sector</b> " for adaptation means a collective term for a group of activities with similar characteristics which are vulnerable to climate change; Include a list of sectors. <ul style="list-style-type: none"> <li>• Water</li> <li>• Biodiversity</li> <li>• Agriculture</li> <li>• Forestry</li> <li>• Built environment</li> </ul>
	" <b>sector department</b> " means a department responsible for a Functional Area listed in Schedule;	Supported.	
	" <b>SETs</b> " means Sectoral Emission Targets which are greenhouse gas emission targets (?) allocated to an emitting sector or sub - sector over a defined time period;	Supported provided that the definition for an emitting sector is included as it is included in the definition but not itself defined.	GHG emitting sector is a sector as identified in the IPCC guidelines as a source of GHGs.
	" <b>SERP</b> " means a sector emission reduction plan required in terms of section 12(4) of this Act;	Supported provided additional comments on the mandate of the Committee is included.	

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	<p><b>"sub-sector"</b> means a further sub-division of a sector of the economy according to the activity or process that gives rise to greenhouse gas reporting requirements under this Act;</p>		<p>Link to definition of sector.</p>
	<p><b>"sustainable development"</b> has the meaning assigned to it in section 1 of the National Environmental Management Act;</p>	<p>Supported.</p>	
	<p><b>"synthetic greenhouse gas"</b> means a man-made greenhouse gases: hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulphur hexafluorides (SFs);</p>	<p>Not supported as it assumes other possible GHGs as well. This is not specific enough.</p>	<p>PFC are bi-product of a process – not made for a use. See General Comments.</p>
	<p><b>"this Act"</b> includes the Schedule to this Act, and any regulations or notices issued under this Act.</p>	<p>Supported.</p>	
	<p><b>"UNFCCC"</b></p>	<p>Omitted</p>	<p>The United Nations Framework Convention on Climate Change (UNFCCC or FCCC) is an international environmental treaty negotiated at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992. The UNFCCC's main aim is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interferences with the climate system.</p>
	<p><b>"vulnerability"</b> means the conditions determined by physical, social, economic</p>	<p>The definition of "vulnerability" is problematic. Firstly, it is unclear whether</p>	<p>UNFCCC - The degree to which a system is susceptible to, or unable to cope with,</p>

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	and environmental factors or processes, which increase the susceptibility of a system to the impact of hazards.	there are objective criteria which would indicate whether a system is susceptible or vulnerable to the impacts of hazard; and secondly, it is unclear what constitutes a “hazard” in the climate change context.	adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude and rate of climate variation to which a system is exposed, its sensitivity and its adaptive capacity.



## CONCLUSION

BUSA again thanks the Department for the opportunity to comment on the Draft Climate Change Bill. BUSA has several critical challenges with the Draft Bill as written and has accordingly submitted comprehensive comments through this document as well as the two annexures for consideration by the Department.

BUSA looks forward to further engagement with the Department on this Bill.