

REPUBLIC OF SOUTH AFRICA

DRAFT SOUTH AFRICAN NATIONAL PETROLEUM COMPANY BILL, 2023

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. of) (The English text is the
official text of the Bill)*

(MINISTER OF MINERAL RESOURCES AND ENERGY)

[B — 2023]

BILL

To provide for the establishment of the South African National Petroleum Company; to provide for the objects and functions of the company; to provide for the constitution of its board and the management thereof; to provide for its finances; to provide for its chief executive officer and staff; to provide for transitional arrangements for transferring human resources and assets from the South African Gas Development Company (iGas), Strategic Fuel Fund (SFF) and Petroleum Oil and Gas Corporation of South Africa (PetroSA) to the South African National Petroleum Company and to provide for matters connected therewith.

PREAMBLE

ACKNOWLEDGING that South Africa's petroleum resources belong to the nation and the State is the custodian thereof;

RECOGNISING the need to optimise the nation's economic benefit from exploitation of petroleum and renewable energy resources;

BEING COMMITTED to the realisation of the nation's developmental imperatives through exploration and exploitation of petroleum and renewable resources to achieve industrialisation, infrastructure development, and security of energy supply, promote economic growth and social development, facilitate training and development capabilities of South Africans, and technology advancement in South Africans;

EMPHASISING government's role to accelerate socio-economic development for all the people of South Africa; and

AFFIRMING the State's obligation to protect the environment for the benefit of present and future generations while ensuring ecologically sustainable development of petroleum resources.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Definitions

1. In this Act, unless the context indicates otherwise—

"board" means the board of the Company established in terms of section 13 of this Act;

"CEF" means Central Energy Fund SOC Ltd, registration number 1976/001141/30, a state-owned company incorporated in accordance with the laws of the Republic of South Africa;

"Chief Executive Officer" means the person appointed in terms of section 21(1) of this Act as the Chief Executive Officer of the Company;

"Companies Act" means the Companies Act, 2008 (Act No. 71 of 2008) as amended;

"Company" means the South African National Petroleum Company established in terms of section 3;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"consolidation" means a combination of different business units or companies into a single, larger organisation;

“Department” means the Department of Mineral and Petroleum Resources ;

"employee" means an employee of the Company appointed in terms of section 23(1);

“energy” includes crude oil; petroleum; petroleum products and derivatives; natural gas in gaseous, liquefied (LNG) or solid (gas hydrates) states; biofuel; landfill gas and biogas; green and blue hydrogen and all forms of renewable energy to enable myriad social and economic benefits except for the direct production or generation of electricity;

“energy infrastructure” includes all infrastructure for the exploration, production, processing, transportation and storage of energy;

"financial year" means the financial year of the Company referred to in section 26(3);

"gas" means any naturally occurring mixture of hydrocarbons in gaseous state, principally methane with varying quantities of ethane, propane, butane and other gases used as fuel or feedstock excluding condensate, whether—

(a) pressurised to be transported and distributed through pipelines, lateral lines and spur line;

(b) compressed in special cylinders or vessels, to be efficiently transported or stored as compressed natural gas (CNG) by special trucks or ships; or

(c) liquefied using special facilities, to be efficiently transported as Liquefied Natural Gas (LNG);

"gas infrastructure" means facilities for gas gathering, processing, transportation and distribution, liquefaction, re-gasification, storage depot, retail stations and industries that use gas as feedstock;

"iGas" refers to the South African Gas Development Company SOC Limited, a subsidiary of CEF Group SOC Limited with registration number 2000/024548/30, and a company incorporated in accordance with the laws of the Republic of South Africa;

"Minister" means the Minister responsible for Mineral and Petroleum biResources ;

"Organ of State" means "Organ of State" as defined in section 239 of the Constitution of the Republic of South Africa, 1996;

"person" means an individual, corporation, company or trust;

"petroleum" means petroleum as defined in the Upstream Petroleum Resources Development Act;

"PetroSA" refers to the Petroleum Oil and Gas Corporation of South Africa SOC Limited, a subsidiary of CEF Group SOC Limited with registration number 1970/008130/30, and a company incorporated in accordance with the laws of the Republic of South Africa;

"prescribed" means prescribed by regulation;

"Public Finance Management Act" means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"Public Service Act" means the Public Service Act 1994 (proclamation no.103 of 1994);

"renewable energy" includes energy harnessed and produced from sources such as the sun, water and wind that are naturally replenished through investment in appropriate technologies and infrastructure;

"SFF" refers to the Strategic Fuel Fund Association, a subsidiary of CEF Group SOC Limited with registration number 1964/010277/08, and a non-profit company incorporated in accordance with the laws of the Republic of South Africa;

"this Act" includes the regulations made thereunder; and

"Upstream Petroleum Resources Development Act" means the Upstream Petroleum Resources Development Act, 2021

Objects of Act

- 2.** The objects of this Act are to provide for the—
- (a) establishment of the South African National Petroleum Company;
 - (b) governance of the South African National Petroleum Company; and
 - (c) consolidation and transfer of assets to the Company as contemplated in section 12 of this Act in line with the relevant legislation.

Establishment of Company

- 3.** The South African National Petroleum Company is hereby established as a juristic person to be incorporated in accordance with the Companies Act.

Legal status of Company

- 4.** The Company is a national public entity as defined in section 1 of the Public Finance Management Act.

Share Capital of Company

- 5.** (1) The Minister is the state sole shareholder representative of the Company.

(2) The rights attached to the shares in the Company, must be exercised by the Minister.

Objects of Company

6. The objects of the Company are to—

(a) be the State's energy champion and facilitator of energy infrastructure across the energy value chain with functions including, but not limited to the following:

- (i) Management of the State's exploration and production rights, interests acquired and exercised in terms of the Upstream Petroleum Resources Development Act, and interests preceding this Act or the common law, on behalf of the State;
- (ii) ensuring that petroleum resources are developed in a sustainable manner while promoting justifiable social and economic development to the best interest of the people of South Africa;
- (iii) providing for storage and distribution of petroleum products;
- (iv) undertaking commercial aspects of petroleum in the upstream, midstream and downstream operations including but not limited to aggregation, marketing and trading;
- (v) providing for the acquisition, generation, manufacture, marketing or distribution of energy.

(b) be financially sustainable and independent and carry out its business, operations and activities in a sustainable manner whilst pursuing opportunities through legally acceptable business practices;

- (c) ensure national energy security to support economic development and growth;
- (d) support South Africa's just energy transition; and
- (e) contribute to greater social development and prosperity.

Cooperative agreements

7. The Company may conclude a cooperation agreement with any organ of state to—

- (a) ensure effective management of the operations of the Company;
- (b) ensure effective overseeing of the operations of the Company;
- (c) coordinate performance of the functions of the Company provided for in section 8;
- (d) minimise duplication of functions and procedures between the Company and other organ of state that the Company has concluded a cooperation agreement with; and
- (e) promote consistency in the performance of functions of the Company and that of other organ of state that the Company has concluded a cooperation agreement with.

Functions of Company

8. The functions of the Company are to—

- (a) ensure that the objects of the company are achieved, to

hold exploration and petroleum rights, and reconnaissance permits, in terms of the Upstream Petroleum Resources Development Act;

- (b) manage and control the State's participation and interests, including the country's share of petroleum received in kind as provided for in the Upstream Petroleum Resources Development Act;
- (c) manage and control, on behalf of the State, any other interests acquired and exercised by the Company as provided for in the Upstream Petroleum Resource Development Act ;
- (d) manage the State's strategic crude oil stockpile and commercialise crude oil storage facilities;
- (e) acquire, by agreement, and hold equity rights or interests in any undertaking, enterprise or project related to exploration or production operations in terms of the Upstream Petroleum Resources Development Act;
- (f) carry out its business, operations and activities, whether as a principal agent, contractor or otherwise, and either alone or in conjunction with any other person;
- (g) purchase, hire, possess or otherwise acquire movable and immovable property and let, encumber or dispose of such property;
- (h) maximise the State's economic benefit from the exploitation of petroleum resources to ensure energy security, industrialisation and infrastructure development;
- (i) contribute to socio-economic development of the country;
- (j) investigate and propose new upstream, midstream and downstream investment joint ventures locally and internationally;

- (k) develop in depth expertise in the petroleum industry, including facilitating skills development and training for South Africans through collaboration with partners;
- (l) manage the State's upstream petroleum exploration, production rights and pursue carried interest in line with the Upstream Petroleum Resources Development Act and various forms of legally and commercially acceptable modalities to safeguard national energy interests;
- (m) be a developer, operator and owner of major energy infrastructure across the energy value chain for market entry and transmission and to pursue Liquefied Natural Gas (LNG) regasification, Gas transmission through various forms of legally and commercially acceptable practices;
- (n) be a developer, operator and owner of major refined product infrastructure for market entry and transfer, with trading and distribution for refined product storage;
- (o) champion the aggregation of energy products to ensure security of energy supply; and
- (p) perform any other function as the Minister may direct in support of security of energy supply and economic development.

Determination of Company's rights by Minister

9. The Minister may, for the purpose of ensuring security of energy supply, determine the Company's rights over petroleum, upstream, midstream and downstream value chain.

Exercise of powers of Company outside Republic

10. (1) The Company may undertake various investments and strategic joint partnerships to support national economic imperatives and security of energy supply across the energy value chain outside the Republic of South Africa in terms of relevant laws.

(2) The Company may only undertake the activities referred to in subsection (1)—

- (a) with the approval of the Minister following a request made by the Company; or
- (b) pursuant to a determination made by the Minister.

Establishment of subsidiary companies

11. (1) For purposes of achieving the objects of the Company, the board may, subject to the Public Finance Management Act and with the approval of the Minister acting with the concurrence of the Minister of Finance, establish one or more subsidiary companies which must be incorporated in terms of the Companies Act.

(2) A subsidiary company may perform such functions as the board may delegate to it, subject to such conditions as the board may impose.

(3) The Minister may approve the establishment of a subsidiary company only if the subsidiary company poses no financial or other risk to the Company.

Transfer and consolidation of assets and rights to Company

12. (1) All assets and rights issued or held or deemed to have been issued or held by iGas, PetroSA and SFF or as a result of joint ventures in terms of any legislation may, with the written concurrence of the Minister responsible for that organ of state or as agreed by the parties, be consolidated and transferred to the Company.

(2) The transfer and consolidation referred to in subsection (1) must comply with relevant legislation, where applicable.

Composition of Board

13. (1) The board consists of ten members, who must reflect the gender and racial composition of the country, appointed by the Minister.

(2) The board consists of—

- (a) the chairperson and vice chairperson.
- (b) the Chief Executive Officer by virtue of holding that office;
- (c) the Chief Financial Officer of the Company by virtue of holding that office;
- (d) five other persons with appropriate skills and expertise in the energy, petroleum, legal, finance and mining disciplines; and
- (e) two representatives from the Department with appropriate experience in the energy, petroleum and mining disciplines.

Powers and duties of the board

14. (1) Subject to section 66(1) of the Companies Act , the business or affairs of the company must be managed by the board, which has the authority to exercise all powers and perform functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides.

(2) The board must—

- (a) submit to the Minister an annual work programme, a budget, an annual report and an audited financial statement;
 - (b) approve items of income and expenditure in the budget;
 - (c) subject to the guidelines or directives issued by the Minister, act as conciliator or appoint arbitrators in the settlement of disputes or claims affecting the Company and in general, take appropriate action of a legal nature for safeguarding the Company's interests;
 - (d) recommend to the Minister the formation of affiliate or subsidiary Companies;
 - (e) administer the rights and powers vested in the Company by this Act; and
 - (f) perform any other act, not inconsistent with this Act or any other law as may be expedient or necessary for the achievement of the objects of the Company.
- (3) The board may in consultation with the Minister issue policy directions to the Company in respect of the performance of its functions under this Act.

Term of office of members of board

15. (1) A member or alternate member of the board, except the Chief Executive Officer and the Chief Financial Officer, holds office for such period as the Minister may determine at the time of his or her appointment, which period may not exceed three years.

(2) A person whose term of office as member or alternate member of the board has expired is eligible for reappointment for one additional term not exceeding three years.

(3) If a member or an alternate member of the board for any reason vacates his or her office, the Minister must appoint another person in the place of such member or alternate member for the unexpired period of his or her term of office.

Meetings of board

16. (1) The chairperson or, in his or her absence, the deputy chairperson of the board presides over the meetings of the board.

(2) The board meets at such times and places determined by itself, but the first meeting of the board must be held at a time and place determined by the chairperson.

(3) The meetings of the board must be held on written notice to the members and the notice must state the agenda for the meeting.

(4) The notice must be delivered to each member of the Board at least seven days prior to the meeting unless a majority of the members of the board decide to waive the requirements in respect of the seven days period.

(5) Minutes of the meetings of the board must be kept by the Company Secretary appointed for that purpose, and must be signed by the chairperson and kept in the custody of the Company Secretary.

(6) The chairperson may at any time or must at the request of not less than two thirds of the members of the board in office at the time, convene a special meeting of the board, and must determine the time and place of the meeting.

(7) The quorum for a meeting of the board is the majority of its members present at the meeting.

(8) The board may adopt rules not inconsistent with this Act for the proper conduct of its meetings.

Committees of board

17. (1) The board may establish a committee or committees, which must, subject to the directions of the board, during the periods between meetings of the board, perform such functions of the board as the board may determine from time to time.

(2) Except to the extent that the Memorandum of Incorporation of a company, or a resolution establishing a committee, provides otherwise-

(a) A committee consists of any members of the board as the board may determine.

(3) Each committee must appoint its own chairperson from amongst its members.

(4) If the chairperson of a committee is absent, the members present must elect another member of the committee to chair the meeting of the committee whilst ensuring the quorum is in place.

(5) The board is not discharged from responsibility for the performance of a function entrusted to a committee in terms of this section.

(6) The board may vary or set aside a recommendation of the committee.

Disqualification of persons to be members of board

18. A person is disqualified to be member of the board if he or she—

- (a) is prohibited in terms of any public regulation to be a director of the company;
- (b) has been removed from an office of trust, on the grounds of misconduct involving dishonesty;
- (c) is an unrehabilitated insolvent;
- (d) was declared a delinquent after an application was lodge in terms of section 162 of the Companies Act; or
- (e) has been convicted of an offence and has been sentenced therefore to imprisonment without the option of a fine as provided for in section 69(8) of the Companies Act.

Vacation of office by members of board

19. (1) A member of the board must vacate his or her office if he or she—

- (a) becomes disqualified as contemplated in section 18 or, in the case of an official in the service of the State appointed in terms of the Public Service Act ceases to be such an official;
- (b) becomes incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time;
- (b) has been absent for more than two consecutive meetings of the board without notice to the board;
- (c) tenders his or her resignation, in writing, to the Minister; or
- (d) is removed from the office by the Minister in terms of subsection (2).

(2) The Minister may remove or suspend a member of the board from office—

- (a) if the member has neglected, or been derelict in the performance of the functions of director; or
- (b) if the member has engaged in an activity that may undermine the integrity of the board, which activity may include—
 - (i) an activity with regard to a matter in respect of which that member has a financial or personal interest and with regard to which the member is subject to an investigation, hearing or decision;
 - (ii) making private use of, or profiting from, any information obtained as a result of performing his or her functions as a member of the board; or

- (iii) divulging information referred to in subparagraph (ii) to a third party, except as required by or under this Act or the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

Remuneration of members of board

20. A member of the board, or a member of a committee of the board, who is not in the full-time employment of the State, must be paid such remuneration as the Minister, with the concurrence of the Minister of Finance, may determine.

Appointment of Chief Executive Officer of Company

21. (1) The board must, with the concurrence of the Minister, appoint a fit and proper person with suitable qualifications as Chief Executive Officer of the Company.

(2) A person may not be appointed as or remain Chief Executive Officer if he or she is disqualified in terms of section 18.

(3) The Chief Executive Officer is appointed for a period not exceeding five years and may be reappointed at the expiry of his or her term of office for one additional term of five years.

(4) The board, with the concurrence of the Minister, may remove or suspend the Chief Executive Officer from office—

- (a) if the Chief Executive Officer fails to perform the functions of his or her office efficiently; and

(b) if the Chief Executive Officer has neglected or been derelict in the performance of their functions.

(6) If the Chief Executive Officer is for any reason unable to perform any of his or her functions for a period exceeding one month, the chairperson of the board must appoint an employee of the Company to act as Chief Executive Officer until the Chief Executive Officer is able to resume the performance of his or her functions.

(7) An acting Chief Executive Officer may exercise all powers and must perform all the duties of the Chief Executive Officer as delegated by the board.

(8) If the Chief Executive Officer is for any reason unable to resume the performance of his or her functions as contemplated in subsection (6) resulting in the position becoming vacant, the board must embark on a new appointment process.

Appointment of Chief Financial Officer of Company

22. (1) Subject to subsection (3), the Chief Executive Officer must, in consultation with the board, appoint a Chief Financial Officer.

(2) A person is disqualified from being appointed as or remaining Chief Financial Officer if he or she is disqualified as contemplated in section 18.

(3) (a) The Chief Financial Officer holds office for a period not exceeding five years.

(b) The Chief Financial Officer may be reappointed upon the expiry of the term of his or her office for one additional term of five years.

(c) The terms and conditions of service of the Chief Financial Officer are determined by the board and approved by the Minister.

(4) The board may remove or suspend the Chief Financial Officer from office—

(a) if the Chief Financial Officer fails to perform the functions of his or her office;

(b) if, due to a physical or mental illness or disability, the Chief Financial Officer becomes incapable of performing the functions of that office or performs them inefficiently; or

(c) on account of serious misconduct.

(5) If the Chief Financial Officer is for any reason unable to perform any of his or her functions for a period exceeding one month, the chairperson of the board must appoint an employee of the Company to act as Chief Financial Officer until the Chief Financial Officer is able to resume the performance of his or her functions.

(6) An acting Chief Financial Officer may exercise all powers and must perform all the duties of the Chief Financial Officer as delegated by the board.

(7) If the Chief Financial Officer is for any reason unable to resume the performance of his or her functions as contemplated in subsection (5) resulting in the position becoming vacant, the Chief Executive Officer must embark on a new appointment process.

Appointment of staff of Company

23. (1) The Chief Executive Officer must, appoint members of the executive and other employees of the Company as are necessary to perform the

work arising from or connected with the Company's functions for such period and on such conditions as the board may determine.

(2) The employees must be paid remuneration, allowances and benefits as may be approved by the board from time to time.

Funds of Company

24. (1) The funds of the Company consist of —

- (a) moneys that accrue as a result of exploration and production operations or activities;
- (b) any other money received from any other source with the approval of the Minister;
- (c) any money provided for under the Upstream Resource Development Act;
- (d) income received from technical, commercial, engineering or any other related services, rendered by the Company to external parties; and
- (e) funding sourced from lending institutions or government.

(2) The Company must utilise its funds to pay the expenses incurred in the performance of its functions under this Act.

(3) The Chief Executive Officer must—

- (a) open an account in the name of the Company with an institution registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990); and
- (b) deposit into the account all moneys received in terms of subsection (1).

(4) The Chief Executive Officer may invest, on behalf of the Company, any money received in terms of subsection (1) which is not required for

immediate use with any institution determined by the board and approved by the Minister with the concurrence of the Minister of Finance.

(5) The Company may use interest derived from the investment referred to in subsection (4) to pay expenses in connection with the performance of its functions.

(6) The Company may, when it considers it necessary, with the approval of the Minister acting with the concurrence of the Minister of Finance—

(a) authorise the establishment of reserve funds; and

(b) deposit such funds in the account opened in terms of subsection (3)(a).

(7) The Company must in each financial year, on or before a date determined by the Minister, submit a statement of its income and estimated expenditure for the following financial year to the Minister for approval.

Government advances and grants

25. (1) The Minister of Finance may from time to time approve advances and grants to the Company out of money provided for that purpose.

(2) Subject to applicable legislation, the Minister of Finance may approve special levies to provide funds for the Company during the first five years after the establishment of the Company.

Reporting by Company

26. (1) The board must in accordance with the Public Finance Management Act, prepare and submit to the Minister an annual report on the

performance of the Company under this Act, including any other matters that may be prescribed.

(2) The board must submit the annual report referred to in subsection (1) to the Minister within three months after the end of the financial year concerned.

(3) The Minister must table the annual report submitted to him or her in terms of subsection (1) in Parliament in accordance with the Public Finance Management Act.

Delegation and assignment of powers

27. (1) The board may, subject to such conditions as the board may determine, in writing—

- (a) delegate to the chairperson, deputy chairperson, or any other member of the board, including the Chief Executive Officer, or any other employee of the Company or to a committee established under section 17, any power conferred upon the board by or under this Act; or
- (b) authorise the chairperson, deputy chairperson or any other member of the board, including the Chief Executive Officer, or any other employee of the Company or a committee established under section 17, to perform any duty assigned to the board by or under this Act.

(2) The Chief Executive Officer may, subject to such conditions as he or she may determine and with the approval of the board, in writing—

- (a) delegate to an employee of the Company any power conferred upon the Chief Executive Officer by or under this Act in his or her capacity as Chief Executive Officer; or
- (b) authorize an employee of the Company to perform any duty assigned to the Chief Executive Officer by or under this Act in his or her capacity as Chief Executive Officer.

(3) The board or the Chief Executive Officer may at any time—

- (a) withdraw a delegation or authorisation made in terms of subsection (1) or (2);
- or
- (b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1) or (2).

(4) The board and the Chief Executive Officer are not absolved or exempted from any duty delegated or assigned in terms of subsection (1) or (2).

Regulations

28. The Minister may, by notice in the *Gazette*, make regulations regarding—

- (a) any matter that is permitted or required to be prescribed in terms of this Act;
- (b) the process to be followed before the lodgment by the Company of an application for exploration and production rights and reconnaissance permit or renewals thereof in terms of the Upstream Petroleum Resources Development Act; and

- (c) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

Transitional provisions and savings

29. (1) Every person who is in the service of iGas, PetroSA and SFF on the date this Act takes effect must be transferred to the service of the Company.

(2) All assets, rights, liabilities and obligations which, on the date this Act takes effect vest in the entities referred to in subsection (1), pass to the Company.

Short title and Commencement

30 (1) This Act is called the South African National Petroleum Company Act, 2023 and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN NATIONAL PETROLEUM COMPANY BILL, 2024 .

1. BACKGROUND

On the 10th of June 2020, the Cabinet, after being briefed on the ongoing work to rationalise all petroleum subsidiaries of the State that are owned by the Central Energy Fund (“CEF”), took a decision that the CEF must establish a single South African National Petroleum Company by merging the-

- (a) South African Gas Development Company SOC Limited (“iGas”);
- (b) Petroleum Oil and Gas Corporation of South Africa SOC Limited (“PetroSA”); and
- (c) Strategic Fuel Fund (“SFF”).

2. OBJECTS OF BILL

The main purpose of the Bill is to provide for the establishment of the South African National Petroleum Company (the “Company”) to actively participate in the exploration and production operations so as to ensure security of energy supply, to enter into and execute concession agreements with other governments including other strategic partners; to provide for the acquisition of an active participation in petroleum refining, storage, marketing, aggregation and trading of petroleum and petroleum products; to develop, participate, operate and acquire energy infrastructure, including but not limited to transmission pipeline and to deal with

matters incidental thereto; to provide for the objects and functions of the Company; to provide for the constitution of the board of the Company (the “Board”) and the management thereof; to provide for its finances; to provide for the appointment of the Chief Executive Officer, Chief Financial Officer and the staff of the Company; to provide for transitional arrangements of transferring human resources and assets from iGas, the SFF and PetroSA to the Company; and to provide for matters connected therewith.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1

Clause 1 of the Bill seeks to provide for definitions in order to assist in the interpretation of the Act.

3.2 Clause 2

Clause 2 of the Bill provides for the objects of the Act, which are to provide for the establishment of the Company, governance of the Company and the transfer and consolidation of assets to the Company.

3.3 Clause 3

Clause 3 of the Bill provides for the establishment of the Company as a juristic person to be incorporated in terms of the Companies Act, 2008 (Act No. 71 of 2008).

3.4 Clause 4

Clause 4 of the Bill provides for the legal status of the Company as a national public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

3.5 Clause 5

In terms of clause 5 of the Bill the Minister responsible for Mineral Resources and Energy (the “Minister”) is the State’s sole shareholder representative of the Company and exercises the rights attached to the shares in the Company.

3.6 Clause 6

Clause 6 of the Bill provides for the objects of the Company which are, amongst other things, to be the State’s energy champion and facilitator of energy infrastructure across the energy value chain, and to be financially sustainable and independent and carry out its business, operations and activities in a sustainable manner whilst pursuing opportunities through legally acceptable business practices.

3.7 Clause 7

Clause 7 of the Bill provides for the Company’s powers to conclude cooperation agreements with relevant organs of state in order to, amongst other things, ensure the effective management of the operations of the Company.

3.8 Clause 8

Clause 8 of the Bill provides for the functions of the Company which are, amongst other things, to hold exploration and petroleum rights, and reconnaissance permits in terms of the Upstream Petroleum Resources Development Act, and to manage and

control the State's participation and interests, including the State's share of petroleum received in kind as provided for in the Upstream Petroleum Resources Development Act.

3.9 Clause 9

Clause 9 of the Bill provides for the Minister's powers to determine the Company's rights over petroleum, upstream, midstream, and downstream value chain in order to ensure security of energy supply.

3.10 Clause 10

Clause 10 of the Bill empowers the Company to undertake various investments and strategic joint partnerships to support national economic imperatives and security of energy supply across the energy value chain outside the Republic of South Africa in terms of the relevant laws.

3.11 Clause 11

Clause 11 of the Bill provides for the establishment of subsidiary companies by the Board for the purpose of achieving the objects of the Company. The establishment of the subsidiary companies is, however, subject to approval by the Minister acting with the concurrence of the Minister of Finance.

3.12 Clause 12

Clause 12 of the Bill provides for the transfer and consolidation of all assets and rights issued or held by iGas, PetroSA and SFF to the Company.

3.13 Clause 13

Clause 13 of the Bill provides for the establishment and composition of the Board which is responsible for the management and control of the affairs of the Company.

3.14 Clause 14

Clause 14 of the Bill provides for the functions of the Board.

3.15 Clause 15

Clause 15 of the Bill provides for the term of office of members of the Board.

3.16 Clause 16

Clause 16 of the Bill provides for the meetings of the Board and the process and procedure regarding the convening of such meetings.

3.17 Clause 17

Clause 17 of the Bill provides for the powers of the Board to establish committees to perform such functions of the Board as the Board may determine from time to time. It also provides for the composition of such committees.

3.18 Clause 18

Clause 18 of the Bill provides for the disqualification of persons to be members of the Board, that is, the instances in which a person would not be eligible to be appointed as a member of the Board.

3.19 Clause 19

Clause 19 of the Bill provides for the vacation of office by members of the Board.

3.20 Clause 20

Clause 20 of the Bill provides for the remuneration of members of the Board.

3.21 Clause 21

Clause 21 of the Bill provides for the appointment of the Chief Executive Officer of the Company.

3.22 Clause 22

Clause 22 of the Bill provides for the appointment of the Chief Financial Officer of the Company.

3.23 Clause 23

Clause 23 of the Bill provides for the appointment of staff (employees) of the Company.

3.24 Clause 24

Clause 24 of the Bill provides for the funds of the company which consist of the money that accrues to the Company as a result of exploration and production activities and money received from any other source with the approval the Minister. It also provides for the utilisation and investment of the Company's funds and the Company's power to establish reserve funds.

3.25 Clause 25

Clause 25 of the Bill provides that the Government may from time to time approve advances and grants to the Company out of money allocated by the Government for that purpose.

3.26 Clause 26

Clause 26 of the Bill provides for the Company's responsibility to prepare and submit to the Minister an annual report on the performance of the Company.

3.27 Clause 27

Clause 27 of the Bill provides for the powers of the Board and the Chief Executive Officer of the Company to delegate or assign their powers. It also provides that the Board and the Chief Executive Officer are not divested of any duty they delegate or assign to others.

3.28 Clause 28

Clause 28 of the Bill provides for the powers of the Minister to make regulations regarding any matter that is permitted or required to be prescribed.

3.29 Clause 29

Clause 29 of the Bill provides for transitional arrangements and savings.

3.30 Clause 30

Clause 30 of the Bill provides for the short title and commencement of the Act.

4. DEPARTMENTS AND PARTIES CONSULTED

The following State Owned Entities (SOEs) were consulted on the Bill: Central Energy Fund (CEF), PetroSA, Petroleum Agency of South Africa (PASA), iGas, and SFF.

5. FINANCIAL IMPLICATIONS FOR THE STATE

The Bill will not have any organisational and personnel implications for the Department and does not create any financial liabilities to the state.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Minerals and Energy are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution.

6.2 The State Law Advisers considered the tagging of the Bill in light of Chapter 4 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), which provides for procedures that Bills must follow in Parliament. Section 75 of the Constitution provides for the parliamentary procedure for ordinary Bills not affecting provinces. In terms of section 75(1) a Bill to which the procedure set out in section 74 or 76 does not apply, must be dealt with in accordance with the procedure established in that section.

6.3 In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*, the Constitutional Court ("the CC") had to consider the question of the proper test for the tagging of Bills and the application of that test to CLARA. The importance of tagging and how it should be determined is enunciated in the following paragraphs of the CC's judgment:

"[58] ... What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill "in substantial measure fall within a functional area listed in Schedule 4". This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This 'involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about'.

[59] There is an important difference between the 'pith and substance' test and the 'substantial measure' test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a

matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.

[61]

... .

[64] The purpose of tagging is therefore to determine the nature and extent of the input of provinces on the contents of legislation affecting them. Indeed, all the legislation mentioned in section 76(3) is legislation that substantially affects the interests of provinces.

[65]

....

[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification. [70]

[71] On the other hand, the 'substantial measure' test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3) (a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence." (Emphasis added.) (Footnotes omitted.)

6.4 It is submitted that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi- San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions that

directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.