OUTA

ORGANISATION UNDOING TAX ABUSE

May 2021

OUTA comment on the Special Appropriations Bill

Submission by the Organisation Undoing Tax Abuse to the Standing Committee on Appropriations (National Assembly)

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1 INTRODUCTION

1.1 The Organisation Undoing Tax Abuse NPC ("**OUTA**") hereby makes submissions in respect of the Special Appropriation Bill [B5-2021] ("**Special Appropriation Bill**"), which seeks to, among others, effect an adjustment to an appropriation of money "*to the vote of Public Enterprises*".[1]

1.2 In particular, OUTA wishes to make submissions in relation to section 3, as read with Vote 10 of the Schedule, of the Special Appropriation Bill, which provides as follows –

> "*(1) Adjustments to an appropriation of money from the National Revenue Fund to the vote of Public Enterprises in the 2020/21 financial year, are set out in the Schedule.*
>
> *(2) The Minister of Finance may, on request of the Minister of Public Enterprises, approve any portion of an amount referred to in the Schedule for a subsidiary of South African Airways SOC Ltd (SAA) for use by another subsidiary of SAA, referred to in the Schedule, to address urgent funding needs.*
>
> *(3) The approval of the use of funds in terms of subsection (2) must be disclosed in the National Treasury's next quarterly report to the relevant Parliamentary Committees.*
>
> *(4) Despite the effective date of this Act, the appropriation for the subsidiaries and expenditure thereof, must be regarded as an appropriation and expenditure for the 2020/21 financial year.*"

[1] See section 3 of the Special Appropriation Bill.

1.3 OUTA's interest in the Special Appropriation Bill stems from its primary objective to act in the public interest by ensuring –

1.3.1 the protection and advancement of the Constitution of the Republic of South Africa, 1996 ("**Constitution**");

1.3.2 the promotion of effective protocols and enforceable taxation policies, which are free from unlawful squandering, maladministration and corruption;

1.3.3 that scarce resources, which were previously approved and committed for a particular purpose by the Government of the Republic of South Africa ("**Government**"), are not reallocated for another purpose without following due process;

1.3.4 the protection and advancement of the Companies Act, No 71 of 2008 ("**Companies Act**"), which requires strict implementation of and adherence to the adopted business rescue plan ("**Business Rescue Plan**") of South African Airways SOC Limited ("**SAA**"), and the protection afforded thereunder to all affected persons, including creditors; and

1.3.5 the proper management of all major state-owned entities.

1.4 OUTA, representing taxpayers who foot the bill of state-owned entities through paying their taxes, have a direct interest in how state-owned entities are run. Importantly, it is in the interests of justice that the public interest is both advanced and protected where funds under the administration and control of the Government are used to "*bail out*" state-owned entities. This particularly being the case where Government seeks to "*bail out*" indirectly owned state-owned entities without following the same processes which were followed in relation to directly state-owned entities.

1.5 Notwithstanding OUTA's stated position that the failed SOE of SAA should not be receiving ongoing bailouts (for a business rescue process or otherwise) in the first place, the purpose of OUTA's submissions on the Special Appropriation Bill is to ensure that the approved Business Rescue Plan of SAA is implemented in accordance with its terms, which were approved by the creditors of SAA on or about 14 July 2020. This will ensure that the legal protection afforded to the Business Rescue Plan under section 152(4) of the Companies Act is meaningfully protected by Parliament and not subverted by the Special Appropriation Bill.

1.6 In this regard, we particularly note that the Special Appropriation Bill seeks to authorise the diversion of R2.7 billion allocated to SAA under the Business Rescue Plan to SAA's subsidiaries, as "*purportedly*" authorised under the Business Rescue Plan.

1.7 For the reasons set out below, OUTA submits that the Business Rescue Plan does not authorise the diversion of R2.7 billion and that section 3, read with Vote 10 of the Schedule, of the Special Appropriation Bill is not consistent with –

1.7.1 the Constitution;

1.7.2 the Companies Act;

1.7.3 the Public Finance Management Act, No 1 of 1999 ("**PFMA**"); and

1.7.4 the Business Rescue Plan,

and, accordingly, is against public policy.

1.8 OUTA expands in detail on its overarching submission in the body of this document which is structured as follows –

1.8.1 Business Rescue of SAA;

1.8.2 Special Appropriation Bill;

1.8.3 Companies Act Requirements;

1.8.4 Appropriation of Funds from the National Revenue Fund; and

1.8.5 Concluding Remarks.

1.9 Please be advised that OUTA, in addition to the submissions addressed herein, intends on making oral representations to the Standing Committee on Appropriations ("**SCOA**") at the public hearing scheduled for **28 May 2021**.

2 BUSINESS RESCUE OF SAA

2.1 On 5 December 2019, and due to the financially distressed position which SAA found itself in, the board of directors of SAA resolved that SAA voluntarily commence business rescue proceedings under section 129 of the Companies Act.[2]

2.2 Pursuant to the above, the joint business rescue practitioners ("**Practitioners**") were appointed and published SAA's Business Rescue Plan on 16 June 2020, which sets out how SAA will be rescued in a manner that maximises the likelihood of SAA continuing in existence on a solvent basis.

2.3 On 14 July 2020, following consultations between the Practitioners and SAA's "*affected persons*", the Business Rescue Plan was adopted in terms of section 152 of the Companies Act.

2.4 For purposes of these submissions, the relevant provisions of the Business Rescue Plan are summarised below –

2.4.1 in order to return SAA to a state of solvency, so that it can continue in existence, the Business Rescue Plan contemplates the proposed restructuring of SAA's

[2] The board of directors of SAA were legally bound to either (i) place SAA under voluntary business rescue; or (ii) issue a notice under section 129(7) of the Companies Act setting out its reasons for not placing SAA under business rescue. Please refer to sections 128 and 129 of the Companies Act.

affairs, business, debts, property, other liabilities and equity ("**Proposed Restructuring**");[3]

2.4.2 paragraphs 28.1 and 28.2 of the Business Rescue Plan record Government's support for SAA's business rescue proceedings, through which it is hoped that SAA will become a viable and sustainable national flag carrier;

2.4.3 to achieve this, paragraph 28 of the Business Rescue Plan proposes that Government commits itself to providing funding for, among others, the repayment of SAA's lenders, the Proposed Restructuring and retrenchment costs; and

2.4.4 in terms of paragraph 42.1.5 of the Business Rescue Plan, and as required in terms of section 150(2)(c)(i)(aa) of the Companies Act, the Business Rescue Plan will come into operation once there is confirmation of "*Government's support and commitment to providing the requisite funding for the various commitments stipulated in paragraph 28*", which confirmation and support is to be evidenced by way of a letter of support to that effect being delivered by the Government ("**Letter of Support**").

2.5 On 23 July 2020, the Practitioners published the "*SAA Business Rescue Condition Fulfilment Report*" in terms of which they confirmed that Government had provided the Letter of Support on 15 July 2020.

2.6 In light of the Letter of Support, Government confirmed its commitment to funding the costs ("**Restructuring Costs**") listed under paragraph 28, which costs are as follows -

2.6.1 the Proposed Restructuring, starting with initial working capital injection estimated at approximately R2.8 billion (split between post-commencement

[3] Please refer to paragraph 25.2 of the Business Rescue Plan.

creditors of approximately R800 million and restarting costs of approximately R2 billion);

2.6.2 retrenchment costs of approximately R2.2 billion;

2.6.3 payment to "*SAA Lenders*" in an amount of approximately R16.4 billion;[4]

2.6.4 un-flown ticket liabilities of approximately R3 billion;

2.6.5 payment of a "*General Concurrent Creditors Dividend*" in the amount of approximately R600 million;

2.6.6 payment of "*Lessors*" in the amount of approximately R1.7 billion, which is equivalent to 6 months' rental payments less any letters of credit and/or cash deposits held by the Lessors; and

2.6.7 supporting SAA during the post ramp up period "*until SAA is profitable and self-sustaining*".

2.7 To meet its further funding commitments in terms of the Business Rescue Plan, on 20 January 2021, Government allocated an amount of approximately R10.5 billion to SAA for the implementation of the Business Rescue Plan.[5]

2.8 SAA exited business rescue on 30 April 2021.

2.9 According to National Treasury, R7.8 billion of the allocated R10.5 billion was transferred to SAA during the 2020/2021 financial year. There is therefore a balance of R2.7 billion still payable by Government to SAA for the implementation of the Business Rescue Plan.

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4 In terms of the 2020 Budget Speech, Government allocated an amount of approximately R16.4 billion to SAA to repay its lenders, whose debts were secured by way of Government Guarantee (please refer to paragraph 14.6.3.1 of the Business Rescue Plan). As such, at the date of publication of the Business Rescue Plan, Government had already complied with its commitment listed in paragraph 2.6.3.

5 Please refer to Part 10 of the Schedule to the Second Adjustments Appropriation Act, No 21 of 2020.

2.10 What is clear is that, on 20 May 2021, Mango Airlines SOC Limited ("**Mango Airlines**") continues to sell tickets to the public, this despite having previously said that it would suspend operations from 1 May 2021 and may enter business rescue proceedings. It appears as if the board of Mango Airlines continues to sell tickets to consumers despite its financially precarious position, because it is confident that it will get "*bailed out*" by the South African taxpayers, and the passing of the Special Appropriation Bill is "*a fait accompli".*

3 SPECIAL APPROPRIATION BILL

3.1 On 24 February 2021, the Minister of Finance tabled the Special Appropriation Bill in terms of which the outstanding balance of R2.7 billion is to be allocated to SAA for the "*Implementation of the business rescue plan*".[6] Contrary to paragraph 28 of the Business Rescue Plan, however, the Special Appropriation Bill now seeks to re-allocate the funding originally intended for **SAA** to its subsidiaries, the legal basis of which is unclear. In particular, the Schedule of the Special Appropriation Bill notes that the R2.7 billion allocated to SAA will be utilised as follows –

3.1.1 as to South African Airways Technical SOC Limited, R1.663 billion;

3.1.2 as to Mango Airlines, R819 million; and

3.1.3 as to Air Chefs SOC Limited, R218 million,

("**Subsidiaries**").

3.2 The Special Appropriation Bill suggests that the outstanding R2.7 billion will only be allocated to SAA on condition (or with the intention) that it is subsequently divided and transferred to the Subsidiaries, and under the guise that such

6 Please refer to Vote 10 of the Schedule to the Special Appropriation Bill.

allocation is a part of the Restructuring Costs necessary for the implementation of the Business Rescue Plan.

3.3 However, paragraph 28 of the Business Rescue Plan, which comprehensively lists the Restructuring Costs for which Government funding has been committed, does not contemplate that any portion of the R10.5 billion be transferred to the Subsidiaries at all.

3.4 For the purpose of these submissions, the only relevant reference to the Subsidiaries in the Business Rescue Plan is in paragraph 14.6.10, in terms of which it is merely *proposed* that the Subsidiaries be capitalised through SAA's subscription of ordinary shares in the Subsidiaries to ensure their financial stability post the implementation of the Business Rescue Plan –

> "*14.6.10.2 Subsidiaries have been engaging with the Government in relation to their funding, recapitalisation and restart, but the process would be as follows:*
>
> *14.6.10.2.1 the capitalisation of SAA Technical, Air Chefs and Mango through subscription by the Company of ordinary shares in these entities to ensure financial stability* ***post the implementation of the Business Rescue Plan.***"

3.5 It is apparent from public documents that Government has been vacillating between various proposed mechanisms to procure that the funds allocated to SAA are channelled to the Subsidiaries. Furthermore, OUTA has noted that Government has issued contradictory statements on whether such funds need to flow through SAA to the Subsidiaries, or to the Subsidiaries directly, for example -

3.5.1 the Department of Public Enterprises "*requested that a mechanism be found to transfer a portion of SAA's business rescue funding to SAA's subsidiaries*";[7]

3.5.2 a summary of a Standing Committee on Public Accounts ("**SCOPA**") meeting held on 25 March 2021 suggests that SAA will serve as a "*conduit*", in that the R2.7 billion will be transferred from the National Revenue Fund to SAA, and then SAA will transfer the R2.7 billion to the Subsidiaries;

3.5.3 a summary of a SCOPA meeting held on 04 May 2021 notes that R2.7 billion allocated to SAA should be "*unearmarked…in order to distribute the allocation to SAA's subsidiaries"* and that the *"R2.7 billion has been reallocated to SAA subsidiaries*"; and

3.5.4 a summary of a SCOPA meeting held on 05 May 2021 notes that R2.7 billion allocated to SAA has been "*reprioritised for South African Airways (SAA) to implement the business rescue plan*".

3.6 In addition, SAA's briefing presentation to SCOA dated 14 May 2021 suggests that "*the funding for subsidiaries was approved as part of R10.5 billion, but not yet disbursed*" and that "[t]*his funding is urgently required for restructuring to align reduced business, settle unpaid salaries and creditors.*" There are no public documents that reflect this "*approval*" for the use of R2.7 billion for the Subsidiaries. The media statement of Minister of Public Enterprises dated 29 October 2020 records "[t]*he Minister of Public Enterprises has welcomed government's commitment to provide R10.5 billion to be used to finalise the Business Rescue Plan ("BRP") and the structuring of South African Airways (SAA).*" Nowhere in this media release or any other public document is reference made to funding to the Subsidiaries being part of the R10.5 billion.

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7 https://www.iol.co.za/business-report/economy/saa-subsidiaries-get-r27bn-funding-lifeline-3b7a7992-6463-48f3-9f46-797af1ad4f5f.

3.7 Notwithstanding Government's various statements relating to the "*approval*" of the re-allocation, as well as the manner in which the re-allocation is to occur, it is OUTA's submission that there is no legal basis to re-allocate the funds as proposed in the Special Appropriation Bill, for the following reasons –

3.7.1 the Business Rescue Plan came into operation on the fulfilment of the condition that Government commits to providing funding, as referred to in paragraph 2.5 above, exclusively for the purposes of meeting the Restructuring Costs;[8]

3.7.2 Government duly complied with this condition, and committed the required funding for the Restructuring Costs. Government did not provide any commitment in respect of the costs for the recapitalisation of the Subsidiaries;

3.7.3 the costs mentioned as being necessary for the recapitalisation of the Subsidiaries are not costs which are necessary for the implementation of the Business Rescue Plan. They are merely included in the Business Rescue Plan for the purpose of providing context to the financial position of the Subsidiaries; and

3.7.4 should Government fail to comply with its commitment to allocate the entire R10.5 billion towards the Restructuring Costs, it would result in the Business Rescue Plan not being fully implementable in accordance with its terms (as set out in Part C of the Business Rescue Plan), which would prejudice the successful restructure of SAA and the position of the affected persons who approved the Business Rescue Plan.

3.8 Accordingly, the Special Appropriation Bill, to the extent that it is not consistent with the Business Rescue Plan, should not be passed.

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[8] Please refer to paragraph 42.1.5 of the Business Rescue Plan.

3.9 In light of the above –

3.9.1 the Business Rescue Plan does not sanction the redistribution of funds earmarked for SAA to the Subsidiaries, otherwise there would be no need to "*find a mechanism*" to transfer the funds to the Subsidiaries. The provisions of the Business Rescue Plan make it clear that all the required funding (of R10.5 billion) allocated by Government must necessarily be transferred to SAA, in order to meet the Restructuring Costs;

3.9.2 the Special Appropriation Bill purports to re-channel funds earmarked for SAA directly to the Subsidiaries or via SAA, without the Subsidiaries following due process, and in contravention of section 152(4) of the Companies Act – these Subsidiaries are not in business rescue. If the Subsidiaries are financially distressed, they ought to be in business rescue (or have advised affected persons why they are not) and their appointed business rescue practitioners should follow the processes contemplated in the Companies Act and the PFMA. If they are not financially distressed, it becomes difficult to see why they need Government funding; and

3.9.3 the outstanding funding of R2.7 billion must accordingly be transferred to SAA strictly for the purposes of –

3.9.3.1 post-commencement creditors; and

3.9.3.2 restarting costs,[9]

as approved in terms of the Business Rescue Plan.

[9] It must be noted that the restarting costs are further specifically set out in paragraph 29 of the Business Rescue Plan, and refers to the costs required for SAA to recommence domestic travel. Similarly, these costs do not include reference to recapitalising the Subsidiaries.

4 COMPANIES ACT REQUIREMENTS

4.1 As noted above, there is a conflict between the provisions of section 152(4) of the Companies Act and the Special Appropriation Bill. We expand on this below.

4.2 Section 152(4) of the Companies Act sets out the legal nature of the Business Rescue Plan once adopted by providing as follows –

> "*(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person –*
>
> *(a) was present at the meeting;*
>
> *(b) voted in favour of adoption of the plan; or*
>
> *(c) in the case of creditors, had proven their claims against the company.*"

4.3 This provision is often referred to as a "*cram-down*" provision in other jurisdictions, as it binds not only the company to the provisions of the approved Business Rescue Plan, but also the creditors and holders of the issued security of the company.[10] Accordingly, the Business Rescue Plan **became binding** on **SAA** and the **Government** upon its adoption.

4.4 The Special Appropriation Bill, in seeking to divert funds allocated to SAA to its Subsidiaries, which is not sanctioned under the Business Rescue Plan, will subvert the requirements of section 152(4). SCOA's attention is drawn to the case of

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[10] See *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd* 13/12406, 10 May 2013 (GSJ) paras 72–74; *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* [2014] 3 All SA 500 (WCC) para 77.

Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) and Another.[11] The Court *in casu* held that –

> "*If the plan is adopted it becomes binding on the company and on each of its creditors and every holder of its securities, whether or not such persons were present at the meeting and voted in favour of the adoption of the plan or not, and in the case of creditors, whether they proved their claims against the company or not. Thereafter, the* [Companies] *Act requires the company under the direction of the business rescue practitioner to take all necessary steps to implement the plan as adopted*."
>
> [Own emphasis.]

4.5 The business rescue plan in the *Booysen*-case provided the business rescue practitioner with a right to unilaterally amend the approved plan. In this regard, the Court held that this would be a clear circumvention of the business rescue process set out in the Companies Act, **which is to be discharged as per the business rescue plan**, and that this would inevitably compromise creditors' claims to their prejudice, **thereby exposing the whole process to uncertainty and possible corruption**. In particular, the Court stated that –

> "*In the circumstances, the whole scheme of these provisions is such that, there is, to my mind, no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan. By doing so, he would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. Insofar as second respondent thus sought in terms of the provisions of clause 2.4 of the plan to reserve to himself the right to amend the plan, such a right could, at best, only have been a right*

[11] [2017] 1 All SA 862 (WCC) paras 66-67.

to amend the proposed ie draft plan prior to its adoption by the creditors in meeting, and not thereafter. Any other interpretation would make nonsense of the process provided for in the Act whereby control over the rescue proceedings is to be exercised by democratic majority vote of the creditors and affected parties, and would allow the business rescue practitioner to unilaterally reduce or compromise creditors' claims to their prejudice (or even perhaps to increase certain claims at the expense of others), thereby exposing the whole process to uncertainty and possible corruption." [our emphasis]

4.6 OUTA submits that, whilst the Special Appropriation Bill, if assented to by the President, would be an Act of Parliament, the effect thereof would be akin to subverting the business rescue plan as in the *Booysen*-case by providing Government with a mechanism to "*amend*" the Business Rescue Plan after its adoption, which will prejudice all SAA's affected persons and cannot be what the legislative authority intended upon promulgation of the Companies Act.

4.7 This point was picked up by the chairperson of the "*SAA Business Rescue Update*" meeting with the Minister and Deputy Minister on 25 March 2021. During discussions in these meetings, the chairperson specifically asked why, if this R2.7 billion had been allocated to the Subsidiaries in the Business Rescue Plan, it was now necessary to seek a "*special appropriation*". Indeed, this is the question that needs to be answered by Government. The fact is that the full R10.5 billion was approved by Government for SAA and **not** for its Subsidiaries.

4.8 Due to this conflict between the provisions of the Companies Act and the Special Appropriation Bill, the provisions of section 5 of the Companies Act must be noted. Under section 5(4) of the Companies Act, if there is an inconsistency between any provisions of the Companies Act and a provision of any other national legislation –

4.8.1 the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second;

4.8.2 to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, any applicable provision of the –

4.8.2.1 Auditing Profession Act, No 26 of 2005;

4.8.2.2 Labour Relations Act, No 66 of 1995;

4.8.2.3 Promotion of Access to Information Act, No 2 of 2000;

4.8.2.4 Promotion of Administrative Justice Act, No 3 of 2000;

4.8.2.5 PFMA;

4.8.2.6 Financial Markets Act, No 19 of 2012;

4.8.2.7 Banks Act, No 94 of 1990

4.8.2.8 Local Government: Municipal Finance Management Act, No 56 of 2003; or

4.8.2.9 section 8 of the National Payment System Act, No 78 of 1998,

prevail in the case of an inconsistency involving any of them; and

4.8.3 the provisions of the Companies Act prevail in any other case.

4.9 Having regard to the above, it is submitted that the Companies Act, which requires strict implementation of the Business Rescue Plan under section 152(4), and the Special Appropriation Bill, which seeks to circumvent the Business Rescue Plan by "*amending*" the Business Rescue Plan after adoption, cannot be applied concurrently. The Special Appropriation Bill also does not fall within any of the categories of legislation contemplated under paragraph 4.8.2. Accordingly, the provisions of section 152(4) of Companies Act must prevail and the Business

Rescue Plan must be implemented strictly in accordance with its terms as approved.

4.10 Moreover, it is submitted that the Companies Act must be interpreted and applied in a manner that gives effect to section 7 of the Companies Act which requires, in particular, that the purpose of the Companies Act is, among other things, to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

4.11 Should the Special Appropriation Bill be passed, contrary to the Companies Act, this will unduly prejudice the interests of all SAA's affected persons, including its creditors, and of the general public, as there will be no legal certainty regarding the legitimacy of business rescue proceedings under the Companies Act. This will ultimately put the entire business rescue of SAA at risk.

4.12 If Government wanted to allocate funding to the Subsidiaries, it is submitted that, so as to ensure that the control over the business rescue proceedings of SAA remains to be exercised by a democratic vote of the creditors and affected parties (as required under the Companies Act and affirmed in the *Booysen*-case), the Business Rescue Plan should have made express reference to the reallocation of the R2.7 billion to the Subsidiaries **prior to adoption** of the Business Rescue Plan, and that the Business Recue Plan should have been adopted on this basis. As noted by Sher AJ in the *Booysen*-case, any other interpretation would make nonsense of the process provided for in the Companies Act.

5 APPROPRIATION OF FUNDS FROM THE NATIONAL REVENUE FUND

5.1 Section 213 of the Constitution establishes the National Revenue Fund ("**Fund**") and provides that money may only be withdrawn from the Fund in one of 2 ways: first, by way of an appropriation through an Act of Parliament; second, as a direct

charge against the Fund, when it is provided for in the Constitution or an Act of Parliament.

5.2 Regarding the first, a Bill that provides for the appropriation of money from the Fund is referred to in the Constitution as a "Money Bill". Section 77 of the Constitution provides that "*[a]ll money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament*".

5.3 The Act of Parliament that gives effect to section 77 of the Constitution is the Money Bills and Related Matters Act, No 9 of 2009 (as amended) ("**Money Bills Act**"). In terms of the Money Bills Act, Parliament is empowered to amend/adjust Money Bills that are tabled in Parliament.

5.4 In terms of the PFMA, as part of his power to manage the budget preparation process, the Minister of Finance has the exclusive competence to introduce Money Bills. The PFMA, read with the Money Bills Act, provides for 2 occasions wherein money can be appropriated from the Fund by an Act of Parliament: the first is through an Appropriation Bill, pursuant to the tabling of the annual budget for the financial year,[12] and the second is an Adjustment Appropriation Bill pursuant to the tabling of an adjustment budget.[13]

5.5 There is no limit as to number of adjustment budgets or Adjustment Appropriation Bills that the Minister of Finance may introduce in a financial year. In that regard section 30(1) confirms that the "*Minister may table an adjustments budget in the National Assembly as and when necessary*". **However**, there is a limit as to when, or rather under what conditions, the Minister may introduce an adjustment budget

12 Section 27 of the PFMA read with section 7 of the Money Bills Act.
13 Section 30 of the PFMA read with section 12 of the Money Bills Act.

and Adjustment Appropriation Bill. In that regard section 30(2) of the PFMA prescribes that a national adjustment budget may only provide for –

"*(a) adjustments required due to significant and unforeseeable economic and financial events affecting the fiscal targets set by the annual budget;*

(b) unforeseeable and unavoidable expenditure recommended by the national executive or any committee of Cabinet members to whom this task has been assigned;

(c) any expenditure in terms of section 16;

(d) money to be appropriated for expenditure already announced by the Minister during the tabling of the annual budget;

(e) the shifting of funds between and within votes or to follow the transfer of functions in terms of section 42;

(f) the utilisation of savings under a main division of a vote for the defrayment of excess expenditure under another main division of the same vote in terms of section 43; and

(g) the roll-over of unspent funds from the preceding financial year."

5.6 For the avoidance of doubt, emergency funding sought through section 16 of the PFMA for instance would still be considered to be an adjustment budget and the Special Appropriation Bill, irrespective of the terminology used, will be considered to be an Adjustment Appropriation Bill.

5.7 The Special Appropriation Bill is for all intents and purposes an Adjustment Appropriation Bill. Accordingly, it can only be introduced if one of the 7 circumstances quoted in paragraph 5.5 arises. In this regard –

5.7.1 the preamble to the Special Appropriation Bill records that its purpose is to, among other things, "*effect an adjustment to an appropriation of money to the vote of Public Enterprises*", and section 3(1) reaffirms the aforesaid. However, section 3(2) creates confusion, because it provides that the "*Minister of Finance may, on request of the Minister of Public Enterprises, approve any portion of an amount referred to in the Schedule for a subsidiary of South African Airways SOC Ltd (SAA) for use by another subsidiary of SAA, referred to in the Schedule, to address urgent funding needs*";

5.7.2 it is not clear on what basis the Minister of Finance seeks to approve that any portion of the amount referred to in the Schedule be used by the Subsidiaries of SAA **at all,** let alone allow for amounts allocated to one Subsidiary of SAA to be used by another Subsidiary of SAA; and

5.7.3 even if the Bill was amended to read that the "*Minister of Finance may, on request of the Minister of Public Enterprises approve any portion of an amount referred to in the Schedule for* ***South African Airways SOC Ltd (SAA) or any subsidiary of SAA*** *~~a subsidiary of South African Airways SOC Ltd (SAA)~~ for use by another subsidiary of SAA, referred to in the Schedule, to address urgent funding needs*"; an adjustment "*to address urgent funding needs*" does not fall squarely within one of the 7 empowering circumstances set out under section 30 of the PFMA. This contrasts with section 1 and 2 of the Special Appropriation Bill, which sections clearly state that they are adjustments pursuant to section 16 of the PFMA (being emergency funding).

5.8 In the absence of a direct reference to an empowering provision in section 30 of the PFMA, section 3 of the Special Appropriation Bill is vague and overbroad and if passed in its current form, would be susceptible to judicial review independently, alternatively, in addition to the grounds in these submissions.

6 CONCLUDING REMARKS

6.1 The purpose of this submission is to bring to the attention of SCOA that section 3 of the Special Appropriation Bill is, in OUTA's view, contrary to law for the reasons set out above. As highlighted, OUTA is of the view that the Business Rescue Plan must be implemented strictly in accordance with its terms and that the R2.7 billion allocated to SAA be utilised in terms thereof. The Subsidiaries should follow due process under the PFMA should they require funding from the Government and should not endeavour to abuse Parliamentary processes to usurp funds required for the successful rescue of SAA, which should balance the rights of all stakeholders.

6.2 In summary, OUTA highlights the following –

6.2.1 the Business Rescue Plan does not authorise the diversion of the R2.7 billion allocated to SAA to its Subsidiaries;

6.2.2 in accordance with section 152(4) of the Companies Act, the Business Rescue Plan is binding on SAA and the Government and must strictly be implemented in accordance with its terms;

6.2.3 section 3 of the Special Appropriation Bill appears to be invalid under section 5(4) of the Companies Act as it contravenes section 152(4) of the Companies Act; and

6.2.4 section 3 of the Special Appropriation Bill further appears to be vague and overbroad in the absence of a specific empowering provision under the PFMA.

6.3 If the Bill is passed in its current form, it is susceptible to judicial review on any one of the grounds set out in these submissions.

6.4 In addressing these concerns, OUTA proposes that section 3 be removed from the Special Appropriation Bill and for the appropriation as contemplated under Part 10

of the Schedule to the Second Adjustments Appropriation Act, No 21 of 2020 remain as is, to effectively implement the approved Business Rescue Plan. The Minister of Finance, the Minister of Public Enterprises and SAA must follow a separate process in accordance with the PFMA and such related legislation to determine the need for funding to the Subsidiaries, or fundamentally whether such Subsidiaries must be liquidated – considering the strain on SAA's continued sustainability. This process, OUTA submits, must be open to public scrutiny for Government to make an informed decision on the continued sustainability of the Subsidiaries and ultimately its strain on the national fiscus (albeit through SAA).

6.5 OUTA will be available to elaborate on this submission during the further public participation meetings to be held in relation to the Special Appropriation Bill.

6.6 OUTA trusts that its submission will be of assistance in preparing a revised iteration of the Special Appropriation Bill.