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MEMORANDUM

INTRODUCTION:

1. I have been briefed to comment on the latest iteration of the Mineral and Petroleum Resources Development Amendment Bill version B D – 2013 ("**Amendment Bill**"). Parliament has issued an invitation for public submissions in respect of the Amendment Bill. This memorandum is intended to be used as such a submission.

2. This memorandum will provide comments on the Amendment Bill in two parts:

2.1. In Part A of this memorandum some major issues which result from the proposed amendments in the Amendment Bill will be analysed and the implications thereof for the mining industry will be examined;

2.2. In Part B of this memorandum comment will be made on the drafting of the Amendment Bill and will identify any contradictions, ambiguities or grammatical ineptitudes in the Draft Bill and, where applicable, corrections will be proposed.

THE HISTORY OF THE AMENDMENT BILL

3. The Amendment Bill is intended to amend the provisions of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) ("**MPRDA**"). The MPRDA became effective on 1 May 2004. The MPRDA was amended by the Minerals and

Energy Laws Amendment Act, 2005[1] and the Mineral and Petroleum Resources Development Amendment Act, 2008 (Act 49 of 2008) ("**2008 Act").** Most of the provisions of the 2008 Act became effective on 7 June 2013. The amendments relating to environmental issues relevant to prospecting and mining introduced by the 2008 Act, arguably, came into operation in December 2014. A few of the amendments provided for in the 2008 Act have still not been put into operation. Some of the amendments introduced and proposed by the 2008 Act are relevant for purposes of this memorandum.

4. The Amendment Bill was, as contemplated in section 44 of the Constitution of the Republic of South Africa, 1996 ("**Constitution**"), assented to by the House of Assembly in April 2014. However, rather than signing the Bill into an Act as contemplated in section 79(1) of the Constitution, the President expressed certain reservations about the constitutionality of the Amendment Bill and referred it back to the National Assembly for reconsideration.

5. In a statement issued by the Presidency it was stated that:

> *"... the amended legislation elevated the Codes of Good Practice for the South African Mineral Industry, the Housing and Living Condition Standards for the minerals industry and the Amended Broad Based Economic Charter for South African mining and minerals industry to the status of national legislation. However, in terms of section 74 of the Amended Act[2] the Minister[3] was given the power to amend or repeal these instruments as and when the need arose, effectively by-passing the constitutionally mandated procedures for the amendment of legislation."*

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1 These amendments are not relevant for purposes of this memorandum.
2 That is a reference to the Amendment Bill.
3 This is a reference to the Minister of Mineral Resources.

In the same statement the Presidency also stated:

> *"that the MPRDA was also likely unconstitutional as amended sections 26(2B) and 26(3) appear to be inconsistent with South Africa's obligations under the Multi-national Internal Trade Regulation Agreement, General Agreement of Trade and Tariffs (GATT)."*

6. The President also expressed the view that the National Council of Provinces and the provincial legislatures did not sufficiently facilitate public participation when passing the Amendment Bill as required by sections 72 and 118 of the Constitution. It stated

> *"the consultation period was highly compressed and there appears to have been insufficient notice of the public hearings held by the public legislatures."*

The President also believed that the Bill should have been referred to the National House of Traditional Leaders for its comments in terms of section 18 of the Traditional Leadership and Governance Framework Act, as the Bill impacted on customary law or the customs of traditional communities by allowing persons to enter upon land to conduct an investigation, after notifying and consulting with owner, occupier or person in control in terms of section 50 of the Act, and ignored the consent principle in customary law, while amending the definition of "community" in section 1 of the Amendment Act.

7. Parliament disagreed with the first two issues raised by the President namely whether the elevation of the codes and the mining charter to legislation and the question whether the provisions of the Amendment Bill are inconsistent with GATT caused the Amendment Bill to be unconstitutional. It did, however, refer the Amendment Bill back to the National Council of Provinces. The consultation process of the provincial legislatures has not been completed at the time of the drafting of this memorandum since the last public meetings in the Free State will take place on 23 March 2017. This

also shows that the last date stated by Parliament for comments on the Bill, being 22 March 2017, is inappropriate.

8. It is not clear whether the Amendment Bill was referred back to the National House of Traditional Leaders.

PART A: MAJOR ISSUES RAISED BY THE PROPOSED AMENDMENTS IN THE AMENDMENT BILL

Introduction:

9. This memorandum does not deal with or comment on those amendments in the Amendment Bill that relate to petroleum.

10. The following themes will be dealt with in this Part A of this memorandum:

10.1. The amendments that provide for the regulation of the mining of an "associated mineral".

10.2. The amendments relevant to the concept of "beneficiation";

10.3. The amendments to the definition of “community” and the introduction of references to that concept into several provisions of the MPRDA;

10.4. The replacement of the “Minerals and Mining Development Board” that was established in terms of section 57 of the MPRDA with the “Ministerial Advisory Council” which, the Amendment Bill proposes to be established in terms of section 56A of the MPRDA together with the introduction of a new body which will be known as the “Regional Mining Development and Environmental Committee” which it is proposed shall be established in terms of section 10A of the MPRDA;

10.5. The amendments to section 11 of the MPRDA with regard to the ministerial consent required for the transfer and encumbrance of prospecting and mining rights;

10.6. The inappropriate inclusion of the concept “gasification” in the definition in section 1 of the MPRDA of the concept “mine” when used as a verb;

10.7. The amendments made to the MPRDA with the view of including stockpiles created before 2004 into the regulatory regime of the MPRDA;

10.8. The amendments introduced into the definition of “this Act” in section 1 of the MPRDA so as to include the Codes of Good Practice for the South African Minerals Industry, the Housing and Living Condition Standards for the Mining Industry (that will jointly be referred to as the "**Codes**") and Mining Charter into that concept and to allow for the amendment of the Codes and the Mining Charter by the Minister as and when required;

10.9. The replacement of the "first come first serve" principle in section 9 of the MPRDA with a system in terms of which the Minister may invite applications for rights;

10.10. The amendment of the provisions relating to the internal appeal process in section 96 of the MPRDA together with the proposed amendments of several other provisions of the MPRDA designed to suspend the execution of rights which were granted pending the finalisation of internal appeals;

10.11. The amendment to the definition of “Historically Disadvantaged Persons”;

10.12. Amendments made to the MPRDA with regard to the issuance of a closure certificate in terms of section 43 thereof;

10.13. The inappropriate references in the Amendment Bill to the "Amended Broad Based Socio Economic Charter for the South African Mining and Minerals Industry"; and

10.14. The amendments which aim to regulate the date on which a person becomes the holder of a right granted in terms of the MPRDA and the date on which such a right becomes effective.

The amendments that provide for the regulation of mining of an "associated mineral":

11. The Amendment Bill introduces a definition of the concept “associated mineral” into section 1 of the MPRDA and proposes a process whereby the mining of such an associated mineral can be regulated. This is done by:

11.1. Clause 1(a) of the Amendment Bill which proposes to insert a new definition of the concept “associated mineral” into section 1 of the MPRDA; and

11.2. Clause 75(c) of the Amendment Bill which proposes that two new sections, namely sections 102(3) and 102(4) be inserted into the MPRDA which provides for a process to amend a mining right to provide for the mining of an identified “associated mineral".

12. These amendments were necessitated because the common-law position with regard to the mining of mixed minerals as set out by the Supreme Court of Appeal in *Trojan*

Exploration Co Pty Limited v Rustenburg Platinum Mines Limited[4] were not properly catered for by the introduction of the MPRDA.

12.1. The *Trojan* judgement held that, regardless as to who extracted a mineral from the earth, ownership of the mineral, once loosened from the earth, vested in the common-law holder of the mineral right in respect of such a mineral. This common-law principle could no longer prevail since the concept of common law mineral rights was abolished by the MPRDA and replaced with the mining rights granted by the Minister of Mineral Resources.

12.2. Ownership of a mineral, once loosened from the earth, is, therefore, in terms of the MPRDA, vested in the holder of a mining right. The holder of a mining right, therefore, becomes the owner of only those minerals described in its mining right. It does not become the owner of any other mineral that it mines together with the mineral in respect of which it holds a mining right and which it has to mine of necessity together with the mineral in respect of which it holds a mining right.

12.3. The result is that, from a legal perspective, a holder a right to one mineral ("the principal mineral") who, of necessity, mines another mineral which occurs in association with the principal mineral ("the by-product") does not become the owner of the by-product since he does not hold a mining right in respect of the by-product.

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4 1996(4) SA 499A at 524I to J and 534G.

12.4. The MPRDA lacks provisions that regulates the ownership of minerals which are mined (or loosened from the earth by anyone or any natural force) where the right to mine that mineral has not been awarded to any person by way of a mining right.

12.5. This, clearly, is an unacceptable situation.

13. The introduction of the amendments proposed by the Amendment Bill which sought to resolve the problem set out above should, therefore, be welcomed.

14. Unfortunately, the amendments proposed by the Amendment Bill do not solve the problem referred to above adequately. Not only is the drafting of the proposed new sections 102(3) and (4) inadequate, but certain practical problems will arise should the proposed amendments be introduced in its present form. These problems are the following:

14.1. Despite an adequate definition of "associated mineral" proposed in clause 1(a) of the Amendment Bill, the draftsperson of the proposed section 102(3) of the MPRDA repeated the description of what is defined to be an "associated mineral" in different wording than the defined concept. Although the proposed section 102(3) refers to a mineral which "... *must of necessity be mined with the first-mentioned mineral* ..." it neglects to refer to the requirement in the proposed definition of "associated mineral" that an associated mineral must occur "... *in <u>mineralogical association with</u>*,(our emphasis) *and <u>in the same core deposit</u>* (our emphasis) *as the primary mineral*...". The proposed definition of "associated mineral" also refers to a mineral which "... is physically impossible to mine ... without also mining the mineral associated therewith ...". These different

descriptions of what is meant by an “associated mineral" is contradictory and creates confusion.

14.2. It is not clear why the proposed section 102(3) refers to a “right holder”. Surely the correct reference is to the holder of a mining right.

14.3. It is also not clear why the proposed section 102(3) is limited to the actions of the holder of a mining right and does not include a reference to the holder of a mining permit which may encounter the same problem with regard to the mining of associated minerals.

14.4. The proposed sections 102(3) and (4) both refer to a declaration. The right of the holder of a mining right to mine and dispose of the associated mineral is subject to the proviso that the holder “declares such associated mineral”. Nothing is stated with regard to the manner or the time when such a declaration should be made. Surely, in order to give practical effect to what is intended by the proposed provisions, the concept of an undefined declaration should rather be replaced with a requirement that the holder must give written notice to the Minister (or the Regional Manager) of the occurrence of an associated mineral.

14.5. Reference to “any other mineral discovered in the mining process” widens the area of application of the proposed section 102(3) beyond that of an associated mineral. It means that the provisions of the proposed section 102(3) would also apply should the holder mine a different mineral which does not necessarily occur in association with the primary mineral or has to be mined of necessity together with a primary mineral. This extension is unnecessary since the holder does not have to mine this

"other mineral" and can apply in the normal manner for a right in respect of such an "other mineral".

14.6. The proposed section 102(3) does not adequately address the ownership issue referred to in paragraph 12 above.

14.6.1. Although the proposed section 102(3) authorises the mining and disposal of the associated mineral provided that the occurrence of such an associated mineral is declared, it does not deal with the ownership of the associated mineral which was mined before the declaration was made and before the mining right was amended to include the associated mineral.

14.6.2. Provision should, therefore, be made for the authority to mine the associated mineral retrospectively.

14.7. It is also difficult to understand how a right in respect of an associate mineral can be granted to third party when the association mineral can only be mined together with the mineral in respect of which the holder already holds a mining right.

14.7.1. There is, in any event, no need for such a provision.

14.7.2. The failure of the holder of a mining right to ensure that it obtains a right to mine the associated mineral will prejudice the holder of the mining right since it will not become the owner of the associated mineral and would, therefore, not be able to pass ownership of the associated mineral should it dispose of the associated mineral.

14.7.3. Failure by the holder of the mining right to obtain a right to mine the associated mineral would also be an offence since the holder would be mining a mineral without the necessary mining right in contravention of section 5A(b) which prohibits the mining of any mineral without a mining right or mining permit.

15. Although, therefore, the introduction of a regulatory regime with regard to associated minerals is necessary and should be welcomed, the problems set out above should be addressed in the proposed amendments introduced by the Amendment Bill. To that end the following wording of clause 75(c) of the Amendment Bill is proposed:

> *"(c) by the addition after sub-section (2) of the following sub-sections:*
>
> *'(3)..any holder of a mining right or mining permit, mining any mineral in terms of such a right or permit may, while mining such mineral, also mine and dispose of any associated mineral provided that the holder of such a right or permit, as the case may be, gives written notice of such an associated mineral to the Minister within the prescribed period after becoming aware that it is mining the associated mineral.*
>
> *(4) The holder contemplated in sub-section (3) must within 60 days from the date of the notice referred to in sub-section (3) apply, in terms of sub-section (1) for an amendment of its right to include the right to mine the associated mineral.*
>
> *(5) A holder who complies with the provisions of sub-sections (3) and (4) shall be, when its amended right is registered in terms of the Mining Titles Registration Act, 1967 (Act No 16 of 1967) deemed to have had a limited real right in respect of the associated mineral as contemplated in section 5 from the effective date of such mining right or mining permit."*

Amendments relevant to beneficiation:

16. The introduction of new provisions with regard to beneficiation of a mineral or a "mineral product" occurs throughout the amendments proposed in the Amendment Bill and includes:

16.1. The deletion of the current definition of "beneficiation" which was inserted into the MPRDA by section 1(a) of the 2008 Act and will be substituted by clause 1(b) of the Amendment Bill;

16.2. The introduction, by clause 1(h) of the Amendment Bill, of a new definition of "designated minerals" into the MPRDA;

16.3. The inclusion, by clause 2 of the Amendment Bill, of the phrase "development of downstream beneficiation industries" as one of the objectives of the MPRDA in section 2(e) of the MPRDA which is amended;

16.4. The extensive amendment, by clause 21 of the Amendment Bill, of section 26 of the MPRDA which provides for mineral beneficiation;

16.5. The peremptory requirement, introduced by clause 44 of the Amendment Bill, that the Ministerial Advisory Council, established in terms of the proposed new section 56A of the MPRDA, to advise, in accordance with the provisions of the newly inserted section 56B(c), the Minister on "the terms and conditions applicable to beneficiation as contemplated in section 26";

16.6. The insertion, by clause 1(q) of the Amendment Bill, of a definition of the concept "mine gate price" into section 1 of the MPRDA;

16.7. The introduction of a peremptory requirement that the Minister must take into consideration the provisions of section 26 when;

16.7.1. Granting a mining right as contemplated in section 23(2) of the MPRDA as amended by clause 18(c) of the Amendment Bill; and

16.7.2. the Minister considers whether to renew a mining right, as contemplated in the newly inserted section 26(2A), which was introduced into the MPRDA by clause 19(c) of the Amendment Bill;

16.8. The introduction of the power of the Minister to make regulations with regard to the "determination of terms and conditions applicable to beneficiation of mineral resources as contemplated in section 26" introduced into the MPRDA as section 107(jA) by clause 77(c) of the Amendment Bill.

17. The new proposed regulatory regime in respect of beneficiation in the proposed amended section 26 of the MPRDA can, broadly, be divided into two interventions:

17.1. Firstly, the Minister is required –

17.1.1. to initiate or promote the beneficiation of mineral resources for various purposes described in the amended sections 26(1)(a), (b) and (c) of the MPRDA; and

17.1.2. to publish conditions required to ensure security of supply for local beneficiation in "the prescribed manner" as provided for in the amended section 26(2) of the MPRDA.

17.2. Secondly, the introduction of several invasive provisions in the proposed new sections 26(2B) and (3) which limit the rights of holders of mining rights from freely dealing with and disposing of the minerals it mines.

18. The intervention described in paragraph 17.1 above with regard to the steps that the Minister is required to take to initiate or promote beneficiation and to publish conditions

required to ensure security of supply for local beneficiation lacks sufficient specificity to be able to comment thereon.

18.1. Comment on this intervention will follow once the Minister has announced his or her steps to initiate or promote beneficiation and has published the conditions required to ensure security of supply for local beneficiation.

18.2. It should, however, be noted that the provisions following paragraphs (a), (b) and (c) of the proposed section 26(2) are ambiguous.

18.2.1. It provides that the Minister must "publish such conditions required to ensure security of supply for local beneficiation in the prescribed manner".

18.2.2. The term "prescribed" is defined in section 1 of the MPRDA to mean prescribed by regulation.

18.2.3. It is not clear what must be done in the prescribed manner. Must the publication of the conditions take place in a prescribed manner or must the conditions which the Minister is going to publish be formulated in a prescribed manner?

18.2.4. If it is the publication that must take place in a prescribed manner, then this provision is superfluous. It should then merely require that the Minister must prescribe the conditions required to ensure the security of supply for local beneficiation.

18.2.5. It is also unlikely that it was intended that the Minister's discretion to formulate the condition should be curtailed by prescribing the way in which these conditions must be determined or formulated.

18.3. It follows that the words "in the prescribed manner" are superfluous and should be deleted from the proposed section 26(2).

19. The second intervention, referred to in paragraph 17.2 above, which limits the rights of holders of mining rights and mining permits will clearly have a detrimental effect on the holders of mining rights and mining permits since it will reduce the revenue that can be generated by the holder of a mining right by limiting the price at which it can sell a part of its production as well as the quantity of its production that it may sell at a market price. It is submitted that this intervention constitutes an expropriation of the property of the holder of a mining right and is unconstitutional. The following comments are apposite:

19.1. The introduction of sections 26(2B) and 26(3) into the MPRDA was one of the reasons why the President referred the Amendment Bill back to the National Assembly since it was regarded to be inconsistent with South Africa’s obligations under GATT because these proposed new provisions appeared to impose quantative restrictions on exports in contravention of GATT which may lead to challenges in international tribunals.

19.1.1. The National Assembly has dismissed this reservation by the President. It is submitted that the National Assembly did so incorrectly.

19.1.2. In a recent judgement of the Supreme Court of Appeal, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* (Helen Suzman Foundation and Other as amici curiae)[5] it was once again stressed that the State is bound by its international obligations such as the Rome Statute and that it was obliged to cooperate with the international criminal court to arrest and surrender to that court persons in respect of which the international criminal court had issued an arrest warrant and a request for assistance.

19.1.3. The Constitution provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa.

19.1.4. The legislature would, therefore, be acting in contravention of the provisions of the Constitution should it pass legislation which contravenes South Africa's obligations under GATT.

19.2. The definition of the term "mine gate price" inserted into the MPRDA by the Amendment Bill is flawed since it does not provide with any clarity how a "mine gate price" will be determined.

19.2.1. A price is something which is determined by agreement.

19.2.2. In the proposed definition it is provided that a mine gate price is the price of the mineral "at the time that the mineral or mineral product leaves the area of the mine or the mine processing site". This description of the time at which a

5 2016 [2 ALL SA 365 (SCA)].

mine gate price is to be determined does not necessarily mean that the mineral has been sold and that a price has actually been determined.

19.2.3. It is common practice by mining companies to remove minerals from the "area of the mine"[6] or, after processing, from the processing plant and then to stockpile or store the mineral or mineral product for sale in the future.

19.2.4. It follows that at the time when such a mineral or mineral product leaves the mining area or the processing plant there has not necessarily been an agreement to sell or dispose of the mineral and that the price of the mineral or mineral product cannot be determined.

19.2.5. The proposed definition assumes that a mineral or a mineral product would be transported to a "beneficiator". This is not necessarily the case. Some integrated mining companies beneficiate a mineral on the mining site and the mineral or mineral product does not require any further beneficiation by the end user who can merely use the mineral or mineral product in the manufacturing of a finished product without further beneficiation.

19.2.6. Nowhere in the proposed amended MPRDA is the meaning of the word "beneficiator" defined.

19.2.6.1. Arguably a beneficiator would be a person that beneficiates a mineral or mineral product.

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6 One assumes that the draftsperson is here referring to the mining area defined in a mining right.

19.2.6.2. If the proposed amendment to the definition of “beneficiation” in clause 1(b) of the Amendment Bill is accepted in its present form, a beneficiator would be a person that transforms or adds value or conducts downstream beneficiation of a mineral or a mineral product to a higher value product over baselines to be determined by the Minister

19.2.6.3. The meaning of the term "beneficiator" can, therefore, not be determined before the Minister has determined the so-called “baseline”.

19.2.6.4. Furthermore, the proposed definition of "beneficiation" is so wide that a beneficiator, arguably, includes the person who buys refined gold from a mining company and makes gold watches or jewellery. Assuming that the refined gold sold to a watchmaker or a jeweller has been refined by or on behalf of the holder of a mining right beyond the “baselines” for gold which had been determined by the Minister, can the watchmaker or jeweller be described as a “beneficiator” although it does not transform, add value, or beneficiate a mineral to a higher value product over a baseline which the Minister had determined? If not, how is a mine gate price determined in the event of a sale of refined gold by a holder of a mining right to a watchmaker or a jeweller?

19.2.7. Having regard to the proposed section 26(2B) where the defined term “mine gate price” is used, the meaning of the definition of that concept becomes even more obscure.

19.2.7.1. As pointed out earlier, the word “price” assumes the existence of some type of an agreement.

19.2.7.2. However, in the proposed section 26(2B), the holder of a mining right is required to offer a prescribed percentage of its production in prescribed quantities, qualities and timelines to local beneficiators "at the mine gate price or agreed price".

19.2.7.3. It would seem, therefore, that a "mine gate price" must have been somehow predetermined without any agreement having been concluded.

19.3. It is submitted, therefore, that the provisions of the proposed amendments introduced by the Amendment Bill are vague and contradictory to the extent that it is not possible to determine a "mine gate price" with any certainty.

19.4. It is also clear that the draftsperson of the provisions of the proposed section 26(2B) did not properly consider the practical implications of that provision.

19.4.1. Assuming that it is possible to determine exactly who a beneficiator may be, it is clear that the proposed provisions with regard to beneficiation in the Amended MPRDA will not regulate the further conduct of a beneficiator once it has purchased a mineral from the holder of a mining right. There is nothing in the amended provisions which would prevent the beneficiator who purchased a mineral from the holder of a mining right, one assumes at a reduced price, to on sell that mineral to another person at a profit without further beneficiating the mineral which it had purchased.

19.4.2. To regulate the downstream beneficiation of minerals to ensure that the minerals offered to the local beneficiators in the manner contemplated in the proposed section 26(2B) does in fact result in more local beneficiation but will

require an extensive regulatory process to also regulate the manner in which local beneficiators conduct downstream beneficiation. An example of this type of regulation is the Precious Metals Act, 2005[7] which regulates both the producer of precious metals[8] and the downstream beneficiators[9] and users[10] and criminalises the possession of unwrought precious metals by persons who are not producers or licenced beneficiators or jewellers. It is submitted that without such a regulatory regime the proposed amendments will probably have a limited effect on the beneficiation of the minerals which the Minister may declare to be "designated minerals".

19.5. It follows that, from a practical perspective, the proposed amendments with regard to beneficiation will probably give rise to all types of practices transferring the benefit that can be earned from the mining of a mineral from holders of mining rights to those who hold themselves out as local beneficiators.

20. It is also submitted that the proposed section 26(2B) would empower the Minister to expropriate the property or the rights of the holder of a mining right within the meaning of sections 25(2) and (3) of the Constitution.

20.1. A holder of a mining right acquires, in terms of section 5(1) of the MPRDA, a "... limited real right in respect of the mineral ... to which such a right relates". This limited real right vests, at the moment when the mineral is separated from the earth

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7 Act 37 of 2005.

8 Which are defined to mean a person who holds a permit or right to prospect for or mine precious metals in terms of the MPRDA

9 Who must obtain a beneficiation licence

10 Such as jewellers.

through the mining process, a real right in the form of ownership of the mineral in respect of which the mining right relates.

20.2. In the proposed section 26(2B) the Minister is empowered to limit the right of ownership of the holder of the mining right which would, normally, entail the right to sell all the minerals belonging to it at the best price that it can achieve in the market. The Minister is now empowered to determine that a percentage of the minerals that the holder owns has to be offered to local beneficiators at a price which is described as the "mine gate price". On the assumption that this price is determinable (which as explained above, is doubtful) the owner of the minerals can no longer exercise its right as owner of the minerals to sell those minerals at the best possible price.

20.3. Since item 12 in schedule II to the MPRDA provides that any person that can prove that its property has been expropriated in terms of the MPRDA may claim compensation from the State, it follows that, should any holder of a mining right whose minerals had to be sold in accordance with the provisions of the proposed section 26(2B) can show that it suffered a reduction of its income, the State will be obliged to compensate that holder. It follows that, in any event, the State will probably be held liable to finance its efforts to promote beneficiation by way of the provisions of the proposed section 26(2B).

21. The prohibition in the proposed section 26(3) against the export of designated minerals was identified by the President as being in contravention of the provisions of GATT since it imposes quantitative restrictions on exports which are prohibited by GATT. I have dealt with this issue in paragraph 19.1 above. The Amendment Bill has introduced

a definition of the term “designated minerals” into section 1 of the MPRDA. The restrictions provided for in the proposed sections 26(2B) and 26(3) only relate to “designated minerals”.

21.1. The term designated minerals is also used in the newly proposed definition of “security of supply”. That definition refers to an “... orderly supply of designated minerals or mineral products”.

21.2. That description differs from what is defined as "designated minerals" since the definition of “designated minerals” does not refer to “mineral products” but only to “minerals”.

21.3. This contradictory provisions create a difficulty in interpreting the amended provisions of section 26(2) which requires the Minister to publish “... conditions required to ensure security of supply for local beneficiation ...”.

21.4. Since the definition of “security of supply” goes wider than “designated minerals” it is possible that the Minister’s obligation under the proposed section 26(2) does not only relate to the conditions with regard to designated minerals but also refers to mineral products which are not necessarily “designated minerals”.

21.5. To remove this ambiguity it is suggested that the reference to “mineral products” be removed from the definition of “security of supply”.

22. It is submitted, therefore, that the second intervention with regard to the promotion of beneficiation referred to in paragraph 17.2 above is ill conceived, impractical, and unconstitutional and should be omitted from the Amendment Bill.

23. A further indirect intervention is introduced by clause 23 of the Amendment Bill which proposes the amendment of section 28(2) of the MPRDA.

23.1. This amendment is probably intended to be able to enforce the amended provisions of section 26 of the MPRDA.

23.2. The proposed amendment introduces the requirement that –

23.2.1. the manager of any mineral or any mineral product processing plant; and

23.2.2. any "... agent, purchaser or seller of any mineral or mineral product operating as part of or separately from a mine ..."

must submit, to the Director-General, prescribed returns with accurate and correct information and data and audited financial reports or financial statements reflecting the balance sheet and profit and loss of such a person.

23.3. This proposed amendment would draw into the net of the MPRDA many persons who are not prospectors or miners and includes downstream businesses that have little to do with mining or beneficiation.

23.3.1. The provision is overbroad and places a regulatory regime in place which has a wide effect beyond the mining industry.

23.3.2. It is noted that although section 28(1) of the MPRDA restricts the obligation to keep proper records of mining activities and proper financial records in connection with the mining activities to the holder of a mining right or a mining permit, the draftsperson of the Amendment Bill saw fit to place an

obligation to submit information to the Director-General on several other persons who are not holders of any rights and who are not conducting mining activities.

23.3.3. Clearly the impact of this proposed provision will depend on the type of information that will be prescribed in accordance with section 28(2)(a). At the moment regulation 15 of the MPRDA Regulations merely provides that the information must be forwarded as set out in forms to be provided by the Department for that purpose. The nature of the information required and which may in the future be required is, therefore, at this stage, not known.

23.3.4. Further comments will be made with regard to this proposed amendment once the regulations which will define the nature of the information that must be submitted to the Director-General have been drafted.

Amendments to the definition of "community" and insertion thereof into the MPRDA:

24. Several of the amendments proposed by the Amendment Bill deal with the concept "community" as it appeared in the MPRDA. These amendments are:

24.1. In accordance with clause 1(d) of the Amendment Bill, the deletion of the existing definition of "community" in the MPRDA and the substitution thereof of the new definition.

24.2. The introduction of the newly defined concept "community" into several sections of the MPRDA, including:

24.2.1. The introduction, by clause 6 of the Amendment Bill, of the word “communities” into section 10 of the MPRDA which deals with consultation with interested and affected parties.[11]

24.2.2. The insertion, by clause 11(c) of the Amendment Bill, of the concept "community" into section 16(4)(b) of the MPRDA which requires consultation with communities in the event of the acceptance of a prospecting right application.[12]

24.2.3. The insertion, by clause 17(e) of the Amendment Bill, of a new section 22(4)(c) of the MPRDA which requires an applicant for a mining right whose application has been accepted to consult with the community with regard to the social and labour plan.[13]

24.2.4. The amendment, by clause 18(d) of the Amendment Bill, of section 23(2A) of the MPRDA, which requires the Minister to impose conditions if the application for a mining right relates to land occupied by a community, from the present discretionary obligation to a peremptory obligation.[14]

24.2.5. The insertion, by clause 38(b) of the Amendment Bill, of a reference to a community in section 50(4)(a) of the MPRDA which deals with an investigation which may be directed by the Minister to establish if any mineral

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11 This amendment did not form part of the original Amendment Bill passed by Parliament in 2014 but was agreed to by the Portfolio Committee on Mineral Resources of the National Assembly.

12 This amendment did not form part of the original Amendment Bill passed by Parliament in 2014 but was agreed to by the Portfolio Committee on Mineral Resources of the National Assembly.

13 It is interesting to note that the legislature did not amend section 22(4)(b) which requires consultation with interested and affected parties by the insertion of a specific reference to communities as was done in the similar section 16(4)(b).

14 This amendment did not form part of the original Amendment Bill passed by Parliament in 2014 but was agreed to by the Portfolio Committee on Mineral Resources of the National Assembly.

occurs on land and the required notice and consultation with persons who owns, occupies or controls such land.[15]

25. Having regard to the provisions of the Local Government: Municipal Structures, 1998 (Act No 117 of 1998) it appears that all land in South Africa would fall in either a metropolitan municipality or a district municipality. There exists a third type of municipality referred to as a "local municipality" but all local municipalities fall within a district municipality. To provide that the coherent social group of persons must exist within a metropolitan municipality or a district municipality as the proposed amended definition suggests, is therefore, superfluous. [16]

26. The proposed amended definition of "community" deletes the following phrase that formed part of the original definition, namely –

> *"Provided that, where as a consequence of the provisions of this Act negotiation or consultation with the community is required, the community shall include the members or part of the community directly affect (sic.) by mining on land occupied by such members of the community."*

The deletion of this phrase means that there is no link created between mining activity and the particular area of land in respect of which a community exists. It is, therefore, not clear whether the defined concept "community" refers to a community that occupies or has an interest in land on which prospecting or mining activities are conducted or

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15 This amendment did not form part of the original Amendment Bill passed by Parliament in 2014 but was agreed to by the Portfolio Committee on Mineral Resources of the National Assembly.

16 The insertion of the words "metropolitan municipality" into the definition of "community" was effected by an amendment to the original text of the Amendment Bill which was passed by Parliament in April 2014 by way of an agreement by the Portfolio Committee on Mineral Resources of the National Assembly.

proposed, or whether the definition includes every community that exists in South Africa.

27. To exacerbate the problem referred to in the previous paragraph, the manner in which the word “community” is used in several of the sections of the MPRDA as amended by the Amendment Bill also does not create a link between the community and the prospecting or mining activities of an applicant or the holder of a prospecting or mining right. For instance:

27.1. The insertion, by clause 17(e) of the Amendment Bill, of an obligation which requires applicants for mining rights whose applications have been accepted in section 22(4)(c) of the Amended MPRDA “... to consult with the community and relevant structures regarding the prescribed social and labour plan” without specifying which community the applicant for the mining right should consult with;

27.2. The insertion, by clause 38(b) of the Amendment Bill, of a reference to a community in the proposed amendment of section 50(4)(a) of the MPRDA which requires notice and consultation, by a person who conducts an investigation contemplated in that section, with “... the owner, occupier, person in control of such land or community ...”. This proposed amendment is vague.

27.2.1. Without qualification, the reference to a community in the quoted passage fails to specify which community must be given notice or consulted with.

27.2.2. Since the word “or” immediately before the word "community" denote an alternative to the other persons listed in the quoted phrase, the present wording

implies that the community need not be an owner, occupier or person in control of the land.

27.2.3. It follows that the person who is required to give notice and to consult in terms of the amended section 50(4)(a) will not be able to establish to which community it should give notice and with which community it should consult.

28. In view of the aforegoing it is suggested that the proposed insertion of references to community in various sections of the MPRDA is a political rather than a legal intervention since the current wording of the MPRDA which would, in all cases, require interested and affected parties to be consulted would, in any event, include consultation with communities who are interested and affected parties. It is submitted that the new definition and the insertions of references to communities create ambiguities rather than creating a new obligation to ensure consultation with communities who are affected by the provisions of the MPRDA.

*Replacements of the "Minerals and Mining Develop Board" with the "Ministerial Advisory Council" ("**Council**") and the establishment of a "Regional Mining Development and Environmental Committee" ("**REMDEC**"):*

29. The Minerals and Mining Development Board that was established by section 57 of the MPRDA will be dissolved by the proposed deletion, by clause 45 of the Amendment Bill, of sections 57 to 68 of the MPRDA. The Council is established by the insertion, by clause 44 of the Amendment Bill, of sections 56A, 56B, 56C, 56D, 56E, 56F, and 56G into the MPRDA.

30. REMDEC will be established by the proposed insertion, by clause 7 of the Amendment Bill, of sections 10A, 10B, 10C, 10D, 10E, 10F and 10G into the MPRDA.

31. REMDEC was previously established by the Board in terms of the erstwhile section 64 of the MPRDA which required the Board to establish a REMDEC in respect of each region contemplated in section 7 of the MPRDA. That had to be done in the prescribed manner. Regulation 39 of the MPRDA Regulations prescribed the composition of REMDEC but neither section 64 nor regulation 39 contains provisions regarding, disqualification of members, vacation of the office by any of the members, the terms of office and filling of vacancies or the reports which REMDEC is required to submit.

32. In accordance with the proposed newly inserted section 10B of the MPRDA the powers of REMDEC are specifically stated to be limited to –

32.1. advising the Minister in respect of objections received in terms of section 10(2) of the MPRDA; and

32.2. the making of recommendations, contemplated in section 54(5) of the MPRDA, to the Minister regarding the desirability of further negotiation with regard to compensation to land owners or lawful occupiers of land as opposed to the possible expropriation of the land. It should be noted that the provisions of section 54(5) seem to be at variance with the provisions of the proposed new section 10B(b) which provides that recommendations must be made to the Minister while section 54(5) requires the Regional Manager to consider the recommendations from REMDEC and then to advise the Minister.

33. The proposed amendments with regard to the establishment of the Council and REMDEC must be welcomed insofar as it regularises the composition of REMDEC and its duties and powers.

The amendments to section 11 of the MPRDA:

34. If the amendment to section 11(1) of the MPRDA, proposed in clause 8(a) of the Amendment Bill, was to be implemented in the form in which it is currently worded, section 11(1) would read as follows:

> *"**11. Transferability and encumbrance of prospecting rights and mining rights-***
>
> *A prospecting right or a part of a prospecting right, mining right or a part of a mining right or an interest in any such right in an unlisted company or any controlling interest[17] in a listed company[18] (which companies hold a prospecting right or mining right or an interest in any such right), may not be ceded, transferred, encumbered, sub-let, assigned or[19] alienated without the prior written consent of the Minister, as prescribed."*

35. The proposed amendment suffers from two problems:

35.1. If the proposed amended text is read carefully it becomes obvious that the proposed wording is, on the one hand, not complete and, on the other hand, contains superfluous wording.

35.2. The proposed amendment is also erroneously based on a version of section 11(1) that is not currently effective legislation.

36. The problems referred to in paragraph 35.1 are the following:

36.1. The draftsperson of clause 8(a) of the Amendment Bill proposes the deletion of the phrase ", or any interest" from the phrase "... or any interest in any such right, or

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[17] The new definition of "controlling interest" is to be inserted into section 1 of the MPRDA by clause 1(f) of the Amendment Bill.

[18] A new definition of "listed company" is proposed to be inserted into section 1 of the MPRDA by clause 1(o) of the Amendment Bill.

[19] The draftsperson of clause 8(a) of the Amendment Bill erroneously assumed that the word "or" currently occurs in the text of section 11(1) of the MPRDA.

any interest in an unlisted company or any controlling interest in a listed company ...". This deletion creates an incomplete phrase in that the words ", or any interest" is required to qualify the words "in an unlisted company" for the phrase to make sense. The phrase should read as follows:

> *"..."... mining right or a part of a mining right or any interest in any such right, or any interest in an unlisted company or any controlling interest in a listed company ..."*

It is clear that the underlined words (and the comma) ", or any interest" should not be deleted from section 11(1) as is currently proposed in the Amendment Bill.

36.2. The proposed amended section 11(a) is qualified by the phrase "… without the prior written consent of the Minister as prescribed." It is not clear what should be prescribed. Applying the normal grammatical meaning of the words in the quoted phrase it would be written consent of the Mineral that should be prescribed. That makes no sense. The quoted phrase is superfluous and should be deleted.

36.3. An even bigger concern is that the draftsperson of clause 8(a) of the Amendment Bill erroneously assumed that the amendment to section 11(1) by the 2008 Act became effective. A proper examination of the process whereby the 2008 Act was put into operation will shows that:

36.3.1. The 2008 Act was put into operation by proclamation 14 of 2013, dated 31 May 2013, which merely provided that the President determined that the 2008 Act "... shall come into operation on the 7th June 2013".

36.3.2. However, proclamation 14 of 2013 was amended by proclamation 17 of 2013 dated 6 June 2013 which provided that the President decided to amend

proclamation 14 of 2013 by the insertion after the words "7th June 2013" of the following words: " …with the exception of section 11(1) as substituted by section 8(a) of Act 49 of 2008[20] ...". The amendments by the 2008 Act of several other sections of the MPRDA were also excluded from the provisions of proclamation 14 of 2013.[21]

36.3.3. As a result, the amendments to section 11(1) did not become effective on 7 June 2013 and the President has never put that amendment (or the other amendments which were excluded from proclamation 14 of 2013) into operation.

36.3.4. As a result of this error by the draftsperson of clause 8(a) of the Amendment Bill, the current text of that clause incorrectly reflects the current law. Therefore, for instance, the phrase in parenthesis in clause 8(a) of the Amendment Bill which reads "…(which [**corporations or**] companies hold a prospecting right or a mining right or interest in any such right)" does not exist in the current text of the MPRDA.

36.3.5. The current text of section 11(1) in the MPRDA reads as follows:

> *"11 Transferability and encumbrance of prospecting rights and mining rights-*
>
> *A prospecting right or mining right or interest in any such right or a controlling interest in a company or close corporation cannot be ceded, transferred, let, sub-let, assigned, alienated or disposed of with the written consent of the Minister, except in the case of change of interest in listed companies."*

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20 Which is a reference to the 2008 Act.

21 These other sections were the insertion of section 11(5), the insertion of section 38B, the amendment of section 47(1)(e), the amendment of section 102(2) and the amendment of section 106(2).

Clearly, therefore, the text of clause 8(a) of the Amendment Bill is incorrect and should it be passed by the National Assembly in its present form it would create legislative chaos since it would mean that the National Assembly would amend a law that does not exist.

37. It is proposed, therefore, that clause 8(a) be redrafted to remove the grammatical errors referred to above and to reflect the text of section 8(a) as it exist at the moment which would exclude the amendments to section 11(1) proposed by the 2008 Act that were never implemented.

38. Clause 8(b) of the Amendment Bill proposes a process whereby an application for ministerial consent for the cession or alienation of a right must be dealt with. However, the proposed insertion of section 2A creates contradictions in the MPRDA.

38.1. In the proposed new section 11(2A)(a) it is provided that an application for the transfer of a right must be accompanied by an application in terms of section 102 to vary the right. The reference to "the right" must, surely, be a reference to the right being transferred.

38.2. The proposed paragraphs (b), (c) and (d) of the new section 11(2A) further requires an application for a new right by what is variously referred to "the transferee"[22] and the "applicant"[23] which, notwithstanding the different nomenclature, seems to refer to the same person.

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22 In the proposed paragraph (b).
23 In the proposed paragraph (c) and (d).

38.3. The problem with this procedure is that the transferee, which one assumes is the person to whom the right will be transferred, cannot, as is required by the proposed new section 11(2A) make an application for a prospecting right or a mining right in terms of sections 16 or 22 since the Regional Manager will have to reject the applications in terms of section 16(2)(b) of 22(2)(b) since the area and the mineral in respect of which such an application will be made, will be held under the right of the transferor which is the right that is being transferred to the transferee.

38.4. Is now seems to be the intention of the draftsperson of the Amendment Bill is that there must be two rights in respect of the same land and mineral – the right which is being transferred to the transferee and a new right for which the transferee must apply (but which, according to the provisions of sections 16 and 22) cannot be accepted by the Regional Manager.

39. It follows from the aforegoing that the proposed amendment in clause 8(b) of the Amendment Bill creates contradictions and is unimplementable.

The introduction of the concept "gasification" into the definition of "mine":

40. Clause 1(j) of the Amendment Bill proposes the insertion into section 1 of the MPRDA of the concept "gasification". Although the word "gasification" occurred (as an undefined concept) in the definition of "processing" in section 1 of the MPRDA the new definition of the concept was probably informed by the insertion of a reference to "gasification" in the definition of "mine" when used as a verb. The word "gasification" would, after the proposed amendment, therefore, occur twice in the amended MPRDA.

40.1. Once in the existing definition of "processing"; and

40.2. Once in the amended definition of "mine" when used as a verb.

41. It is not clear that the meaning ascribed to the word “gasification” in the new proposed definition of that concept is appropriate with regard to the meaning of the word “gasification” where it occurs and had previously occurred in the defined concept “processing” in section 1 of the MPRDA.

41.1. The processes described in the definition of “processing” are operations that are performed in relation to a mineral after it has been mined and loosened from the earth.

41.2. The differences between the concepts of processing and mining were clearly defined in the judgement in the case *Albertonse Stadsraad v Driti BK*[24] which, although it related to the definition of “mine” under the erstwhile Minerals Act, is equally applicable to the provisions of the MPRDA.

42. The problem that has arisen as a result of the newly inserted definition of the term “gasification” is that, as is clear from the description of the process in the new definition as well as the insertion of the word “gasification” in the definition of the word “mine” when used as a verb, the newly defined concept relates to a process that is used to recover gas from *in situ* coal deposits.

42.1. To conduct such a process, in terms of section 5A of the MPRDA, requires a mining right since the person extracting the gas by way of gasification would be conducting mining operations.

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[24] 2003(5) SA 157 (SCA).

42.2. That definition clearly does not apply to “gasification” used in the defined concept “processing” which is something which occurs after a mineral has been mined and does not require a mining right.

43. It follows that the amendment proposed in clause 1(j) of the Amendment Bill of the definition of “gasification” creates ambiguity with regard to the meaning of the word “gasification” where that word is used in the definition of the word “processing” in the MPRDA. It is proposed that the problem referred to above be solved by amending the definition of the term “processing” in section 1 of the MPRDA by inserting, immediately after the word “smelting” the word “thereof or extracting of gas therefrom”.

44. Furthermore, the manner of inserting a reference to “gasification” in the definition of “mine” when used as a verb is also inappropriate and confusing. According to clause 1(p) of the Amendment Bill, the word “gasification” is to be inserted into the definition of the word "mine" when used as a verb, in the following phrase: “... whether by underground gasification, open working or otherwise ...”. Without a comma between the words “underground” and “gasification” the normal grammatical meaning that will be given to the phrase under consideration is that the word “gasification” qualifies the word “underground” and that the amended text, therefore, refers to "underground gasification". That was clearly not the intention of the legislature.

45. Furthermore, the place where the word “gasification” was inserted into the phrase quoted in the paragraph above proves to be inappropriate. The word “underground” should be qualified by the word “working” and the word “gasification” should follow after that. The deletion of the word "or" from the current text is also inappropriate. The

phrase should, therefore read as follows: “whether by underground or open working, gasification or otherwise ...”.

Amendments to include stockpiles created before 2004 into the regulatory regime of the MPRDA:

46. Several court decisions confirmed that mine dumps that were created before the MPRDA became effective in 2004 ("**Pre-2004 Dumps**") were not included in the defined concepts “residue stockpiles” and “residue deposits” in the MPRDA[25]. In order to bring those dumps within the regulatory regime of the MPRDA, the Amendment Bill proposes the following amendments to the MPRDA:

46.1. The insertion, by clause 1(l) of the Amendment Bill, of a new definition of “historic residue stockpiles” into section 1 of the MPRDA.

46.2. The amendment, by clause 1(z) of the Amendment Bill, of the definition of “residue stockpile” in the MPRDA by the addition thereto of the phrase “including historic mines and dumps created before the implementation of the Act”.

46.3. The insertion, by clause 30 of the Amendment Bill, of a new section 42A which provides for the “management of historic residue stockpiles and residue deposits”.

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[25] In *De Beers Consolidated Mines Limited v Ataqua Mining Pty Limited and Others* OPD 1215/2006, 13 December 2007 (an unreported judgement) paragraphs 67, 68 and 76, the Court held that the MPRDA does not apply to tailings dumps produced under title prior to the title granted in terms of the MPRDA. The *Ataqua*-case was followed in *African Exploration and Mining and Finance Corporation and Another v Minister of Mineral Resources and Others* NGP 13717/2011, an unreported judgement delivered on 6 November 2013 (in paragraph 13) and in *Bosaletse O and Others v Minister of Mineral Resources and Others* FSHC 1891/2013, an unreported judgement delivered on 26 September 2013 (in paragraphs 19 to 23).

47. It will be shown below that these proposed amendments are, in several respects, not properly formulated but, more importantly, drafted without a proper understanding of the of ownership of Pre-2004 Dumps. I will deal with the second issue first.

48. In terms of the common law which prevailed before the MPRDA became effective, ownership in the material in dumps (rock, sand, slimes and, often residue of minerals that were not recovered in the original mining operations) were vested in the person who held the right, in terms of the common law or a statutory right to mine, for a particular mineral. It is therefore not correct to assume, as the draftsperson of the Amendment Bill seems to have done, that a Pre-2004 Dump, and the material therein, is owned by the person who mined that dump. The minerals in a dump belong to the holder of the right to that mineral at the time when it was loosened from the soil.[26]

49. Secondly the ownership of a dump and the material therein will depend on whether that dump has acceded to the land or not. If the dump had acceded to the land, it is owned by the landowner and forms part of the earth regardless as to who mined the material in the dump. Because the minerals in an immovable dump do form part of the earth, the normal provisions of the MPRDA with regard to prospecting and mining would apply to those minerals and the provisions in the MPRDA with regard to residue stockpiles, residue deposits and the newly created concept of “historic residue stockpiles” do not apply to those minerals. The distinction between movable and immovable Pre-2004 Dumps is not recognised in the proposed definition of "historic residue stockpiles"

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[26] See, in this regard, *Trojan Exploration Company Pty Limited v Rustenburg Platinum Mines Limited* 1996(4) SA499(A) at 518D to G.

which would, having regard to its present proposed wording, include immovable Pre-2004 Dumps.

50. Arguably the proposed section 42A(1) provides for a distinction between movable and immovable Pre-2004 Dumps since it only refers to "residue stockpiles and residue deposits" which are "currently not regulated under this Act". Legally, immovable Pre-2004 Dumps are currently regulated under the MPRDA. It follows that the preservation of ownership provided for in the proposed new section 42A(1), which is limited for a two-year period from the date when the Amendment Bill is promulgated, does not apply to Pre-2004 Dumps which are immovable. This is correct since the ownership of immovable dumps vests in the landowner and should not be subject to the two year period provided for in the proposed section 42A(1).

51. Both the proposed sections 42A(1) and (2) refer to "... all historic residue stockpiles and residue deposits ...". This phrase creates confusion. There is no definition of an historic residue deposit in the MPRDA. A current definition of "residue deposits" defines that concept to mean a residue stockpile that remains at the termination of a prospecting right, mining right, mining permit, exploration right, production right or an old order right. All those terms refer to rights than only came into existence on 1 May 2004 when the MPRDA became effective.[27] It follows that it is inappropriate to refer to residue deposits in the proposed sections 42A(1) and (2) since those proposed sections are intended to deal with Pre-2004 Dumps. The reference to residue deposits should therefore be deleted from the provisions of the proposed sections 42A(1) and (2). The

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[27] With regard to the reference to "old order right" it was held in *Holcim South Africa Pty Limited v Prudent Investors Pty Limited and Others* 2010 SACLR 392A in paragraphs 15 to 26 that the concept "old order right" only came into existence on 1 May 2004 and, although the concept includes the previous common law mineral rights it is inappropriate to refer to those common law rights as "old order rights".

same observation applies to all the other references to "residue deposits" in the proposed section 42A.

52. The provisions of the proposed section 42A(3) can only apply once an amendment of the mining work programme of a holder of a mining right contemplated in the proposed section 42A(2) has been granted. As it reads at the moment the proposed sections 42A(1), (2) and (3) are vague with regard to a time period within which an owner of an historic residue stockpile has to apply for and obtain the amendment of its mining work programme in terms of section 102 of the MPRDA.

53. There is also nothing in the proposed sub-sections 42A(1), (2) and (3) which explains how the owner of the historic residue deposit would obtain ownership of the minerals which it may mine from the historic residue stockpile after the two year period contemplated in the proposed section 42A(1). In fact, there is nothing in the proposed three sub-sections which explains who the owner of the material in the historic residue stockpile will be after the two year period referred to in the proposed section 42A(1). It is specifically noted that the proposed section 42A(9) only applies to historic residue stockpiles located outside the mining area where the owner fails to apply for a mining right or mining permit within the two year period referred to in the proposed section 42A(4). Section 42A(9) provides that that the custodianship of minerals in historic residue stockpiles "... shall revert back to the State and that the State shall be entitled to invite applications thereon in terms of section 9". That provision do not, however, apply to the historic residue deposits contemplated in the proposed sections 42A(1), (2) and (3). The question as to what happens to and who becomes the owner of an historic residue deposit contemplated in the proposed section 42A(1) if the owner thereof failed to apply for an amendment of its mining work programme is, therefore, not answered

by the proposed amendments in the Amendment Bill which seek to include Pre-2004 Dumps into the regulatory regime of the MPRDA.

54. The proposed sub-sections 42A(3) to 42A(9) relate to historic residue deposits "located outside the mining area". This description does not accurately describe the nature of the historic residue deposits contemplated in the proposed section 42A(4). To refer to a historic residue deposit situated outside "the mining area" does little to determine exactly which historic residue deposits the draftsperson of the Amendment Bill is referring to. There are residue stockpiles that are situated on a mining area but which are not owned by the holder of the mining right to that mining area. As explained earlier, Pre-2004 Dumps belong, at common law, to the person who held the common law mineral right to the mineral which are contained in the dump and not necessarily to the person who mined the material which is in the dump. The proposed section 42A does not provide for that type of Pre-2004 Dump.

55. It is also noted that the provisions in the proposed section 42A(4) to (9) only contemplate that the owner of an historic dump may obtain a mining right or a mining permit. It does not provide for an application of a prospecting right in respect of such a historic residue stockpile.

55.1. Where the owner of a historic residue stockpile is, therefore, not sure about the quantity of minerals which may be contained in an historic residue stockpile he will not be able to prospect for those minerals prior to applying for a mining right or a mining permit and will, therefore, not be able to satisfy the requirements of sections 23 or 27 of the MPRDA which require that an application for such a right

or permit can only be granted if it is shown that the mineral can be optimally mined in accordance with the mining work programme.

55.2. Without having determined the mineral content of such an historic residue stockpile an applicant for a right or permit will not be able to draft a proper mining work programme or demonstrate that a mineral occurring in the historic residue stockpile can be optimally mined.

55.3. It is possible that the owner of an historic residue stockpile can, during the two-year period within which it has the exclusive right to apply for a mining right or mining permit, exercise its rights of ownership and can conduct prospecting operations on the historic residue stockpiles without a prospecting right since the provisions of the MPRDA do not, during that two year period, apply to the historic residue stockpile. However, a problem that can be foreseen is that where an historic residue stockpile is situated on the land that is owned by someone else or is situated on a mining area held under a mining right vesting in someone else, the owner of the historic residue stockpile may not, as of right, be able to gain access to the dump without the consent of the landowner or the holder of the mining right in respect of the mining area on which the historic residue stockpile is situated. It is proposed, therefore, that the proposed section 42A(4) be amended to grant the owner of an historic residue stockpile an exclusive right also to apply for a prospecting right in terms of section 16 of the MPRDA.

56. With regard to the proposed definition, in clause 1(l) of the Amendment Bill, of the concept “historic residue stockpiles”, the following comments are apposite:

56.1. The phrase "... other than a prospecting right, mining right, mining permit, exploration right or production right ..." is qualified by the words "... issued in terms of this Act". These words are superfluous. All the various types of rights which are qualified by the words "issued in terms of this Act" are defined in the MPRDA and can only be issued in terms of the MPRDA.

56.2. Although it is proposed that the definition of "residue stockpile" be amended in accordance with clause 1(z) of the Amendment Bill by the deletion of the word "beneficiation" from the clause "beneficiation mineral plant waste" and replacing that with the phrase "mineral processing plant waste", the phrase "beneficiation plant waste" still remains in the new proposed definition of "historic residue stockpile". Although, therefore, the proposed new definition follows the wording of the definition of "residue stockpile" in describing the material that a historic residue stockpile will consist of, there will be a difference between the two definitions if the current wording of the definition of "historic residue stockpiles" is accepted.

56.3. The same applies to the proposed insertion into the definition of "residue stockpile" of the words "within the mining area" into the phrase "stored or accumulated within the mining area for potential reuse ...", the proposed wording of the new definition of "historic residue stockpiles" does not contain a qualification that the stockpile stored or accumulated material must be stockpiled, stored or accumulated within the mining area. It is, in any event, not clear why it is necessary to amend the definition of "residue stockpile" by including the words "within the mining area". One would have thought that any material that is stockpiled, stored or accumulated

would qualify as a residue stockpile regardless as to where the material is so stockpiled, stored or accumulated.

57. Probably also to provide for the inclusion of historic residue stockpile into the regulatory regime of the MPRDA clause 1(z) of the Amendment Bill proposes to amend the definition of "residue stockpile" by inserting at the end thereof the words "including historic mines and dumps created before the implementation of this Act". It is not clear why these words are inserted into the current definition of residue stockpile.

57.1. The words which are so added to the definition of "residue stockpile" introduces concepts which are not defined in the MPRDA especially since the proposed new definition of "historic residue stockpiles" and the new proposed new section 42A adequately deals with Pre-2004 Dumps.

57.2. It is not clear how the words "historic mines" fit into a definition which describes material stored, accumulated or disposed of. To include what is essentially, "historic residue stockpiles" is also inappropriate because the concept "residue stockpiles" as currently defined refers to current or "live" dumps on which holders of rights dump material which is discarded while mining operations continue under current dumps. These "live" dumps are to be distinguished from a "residue deposit" which are dumps that remain "…at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or an old order right…" Many "… historic mines and dumps created before the implementation of the Act" (which is nothing else but "historical residue deposits") would be dumps that were created many years ago and would no longer be "live". To include the phrase "… historic mines and dumps created before the

implementation of the Act" into the concept "residue stockpile" would destroy the distinction between a "residue stockpile" and a "residue deposit". One of the results of destroying this distinction is that one would not require a mining right to mine in "…historic mines and dumps created before the implementation of the Act". This is so because the definition of the word "mine", when used as a noun, does not include an excavation into a residue stockpile and, when used as a verb, does not include the mining of a residue stockpile, while both those concepts include mining in a residue deposit. It would, therefore, not be illegal to make an excavation and win minerals from "…historic mines and dumps created before the implementation of the Act". It would mean that the process envisaged in the new section 42A would be contradicted by the amendment to the definition of residue deposit which, in effect, includes "historic residue stockpiles" into the concept "residue deposit".

57.3. To include “dumps created before the implementation of this Act” into the concept of a “residue stockpile” is, in any event, also inappropriate since it is proposed that the concept "historic residue stockpile" will now be defined and would include the dumps described in the quoted passage.

Amendment to the definition of “this Act” and the inclusion of provisions which allow the Minister to amend the Codes and Mining Charter:

58. Several amendments are proposed in the Amendment Bill which are clearly intended to give legislative content to the Codes and Mining Charter developed by the Minister in terms of section 100 of the MPRDA. These amendments are the following:

58.1. By way of clause 74 of the Amendment Bill, section 100 of the MPRDA will be amended by the insertion therein of new sub-sections 100(3) and 100(4). The newly inserted section 100(3) places a peremptory obligation on the Minister to

impose the provisions of the Codes and the Mining Charter when granting applications for prospecting rights and mining rights while the newly inserted section 100(4) empowers the Minister "as and when the need arises" to amend or repeal the Codes and the Mining Charter.

58.2. By way of clause 1(zD) of the Amendment Bill, to amend the definition of "this Act" to provide that it includes the Codes and the Mining Charter.

58.3. The insertion of requirements in several provisions of the MPRDA that the Minister is obliged to determine whether the granting of a right will comply with the Mining Charter. In this regard reference can be had to:

58.3.1. Clause 12 of the Amendment Bill which proposes an amendment to section 17 of the MPRDA to provide, in section 17(1)(f) thereof, that the Minister must grant a prospecting right if the granting thereof will comply with the Mining Charter;

58.3.2. Clause 18 of the Amendment Bill which amends section 23(1)(h) thereof by providing that the Minister must grant a mining right if the granting thereof will comply with the Mining Charter;

58.3.3. Clause 20(d) of the Amendment Bill which proposes the insertion into section 25(1) of the MPRDA of a new sub-section (fA) which requires the holder of a mining right to comply with the requirements of the Mining Charter;

58.3.4. Clause 23 of the Amendment Bill which proposes the amendment of section 28 of the MPRDA by the insertion therein of a new sub-section (3) which

requires the holder of a mining right to submit to the Regional Manager an annual report detailing the holder's compliance with, amongst others, the Mining Charter.

59. A pointed out in paragraph 5 above, one of the reasons why the President referred the Amendment Bill back to Parliament was that the President was of the view that the proposed amendments to the definition of "this Act" would be unconstitutional. Parliament rejected that view of the President and has persisted in its proposed amendments to the definition of "this Act". It is submitted that the Parliament's view is incorrect and that the President's view that the proposed amendments to the definition of "this Act" are unconstitutional, is correct. An analysis of the proposed amendments to the definition of "this Act" and the law applicable to the making of legislation shows the following:

59.1. In terms of section 43 and 44 of the Constitution the legislative authority of the national sphere of government is vested in the National Assembly which has the exclusive power to pass legislation with regard to any matter within the functional area of the national government.

59.2. It is significant to note that section 44(1)(a)(iii) of the Constitution confers upon the National Assembly the power to assign any of its legislative powers except the power to amend the Constitution to any legislative body in another sphere of government. Since a specific power is created in the Constitution with regard to the assignment by Parliament of its legislative authority it must follow that Parliament cannot assign any of its legislative power to a body other than a legislative body. The Minister is not a legislative body. It follows that Parliament

does not have the constitutional power to assign its legislative authority to the Minister.

59.3. The proposed amendment to the definition of “this Act” in section 1 of the MPRDA would elevate the Codes and the Mining Charter, which were developed by the Minister, to the level of national legislation since it would now form part of the provisions of the MPRDA which is national legislation. Parliament does not have the power to do this and the attempt by the draftsperson of the Amendment Bill to include the Codes and the Mining Charter into the provisions of the MPRDA would, if accepted by Parliament, mean that Parliament would be acting unconstitutionally.

59.4. The same argument actually applies to the existing definition of "this Act" in section 1 of the MPRDA which also seeks to elevate the terms of a mining and prospecting right to be part of national legislation. That part of the current definition of “this Act” is, therefore, also unconstitutional.

59.5. The further amendments of the MPRDA by the proposed insertions of references to the Codes and Mining Charter in other sections of the MPRDA and thereby elevating the provisions of the Codes and Mining Charter to national legislation are, for the same reasons, unconstitutional.

59.6. In terms of the new proposed section 100(4) the Minister is now granted the power to amend, as and when he or she pleases, the Codes and the Mining Charter, which will be, as a result of the amendment of the definition of "this Act" referred to above, part of the MPRDA, and, therefore, will constitute national legislation. Our courts have already decided in *Executive Council Western Cape Legislature &*

Others v President of the Republic of South African & Others[28] that a provision which purported to empower the President to amend an Act of Parliament by proclamation is unconstitutional and invalid. That demonstrates that the elevation of the Codes and the Mining Charters to national legislation as well as the purported power to be granted to the Minister in accordance with the proposed section 100(4) will be struck down as unconstitutional.

60. Apart from the probable unconstitutionality of the proposed amendments aimed at giving legislative content to the Codes and the Mining Charter it is undesirable to do so. The Codes and the Mining Charters are not written in legal language. It is replete with contradictions, ambiguities, vague and open-ended drafting and absurdities. It is not fit to be implemented and, should it be given legislative effect, it would fall foul of the principle of the rule of law in section 1(c) of the Constitution.

61. Having regard to the nature of the Codes and the Mining Charter and the content of those documents it is clear that they were developed as guidelines and/or policy documents and not as legislation. The Supreme Court of Appeal has already criticized attempts to give policy legislative force.[29]

62. It is submitted, therefore, that the proposed amendments in the Amendment Bill to give legislative force to the provisions of the Codes and the Mining Charter should not be adopted by Parliament.

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28 1995(4) SA 877 (CC).

29 See *Akani Garden Route Pty Limited v Peninsula Point Casino Pty Limited* 2001(4) SA 501 (SCA) in paragraph [7].

The amendments to section 9 of the MPRDA replacing the first come first serve principle with a system of ministerial invitation for rights:

63. The whole of section 9 of the MPRDA is substituted, in accordance with clause 5 of the Amendment Bill, by a new section 9 which replaces the previous provisions with regard to the order of processing of applications for rights with a completely new process based on invitations made by the Minister for applications for rights to be granted in terms of the MPRDA. In addition, several of the sections of the MPRDA are amended to provide that applications for rights must be lodged "subject to section 9". These amendments are:

63.1. The amendment, by clause 9 of the Amendment Bill, of section 13 of the MPRDA relating to applications for reconnaissance permission.

63.2. The amendment, by clause 11 of the Amendment Bill, of section 16 of the MPRDA relating to applications for prospecting rights.

63.3. The amendment, by clause 17 of the Amendment Bill, of section 22 of the MPRDA relating to applications for mining rights.

63.4. The amendment, by clause 22 of the Amendment Bill, of section 27 of the MPRDA relating to applications for mining permits.

63.5. The proposed insertion, by clause 30 of the Amendment Bill, of section 42A(9) which provides that where historic residue stockpiles " revert back to the State…", the Minister may invite applications, in respect of those historic residue stockpiles, in terms of section 9.

63.6. The amendment, by clause 77(c) of the Amendment Bill, to Section 107(1) which authorises the Minister to make regulations by the insertion therein of a sub-section (jB) which authorises the Minister to make regulations regarding the procedures applicable in respect of invitation for applications in terms of section 9.

64. In a summary of the Amendment Bill the draftsperson of the Bill motivates the amendment to section 9 by stating that –

> *"This invitation process will ensure co-ordinated quality approvals by the Department that meaningfully contribute towards the fulfilment of the objects of the Act. It will bring about certainty and transparency and further enhance optimal development of the nation's mineral and petroleum resources."*

What is not stated is that the new process removes the initiative for applying for rights in respect of any specific piece of land and mineral from the mining industry and makes the exploitation of that land subject to the Minister's discretion to invite applications for rights in respect of that land, or not.

65. Save for the Minister's discretion to invite applications or not, the proposed section 9(2) provides that any person may request the Minister to invite applications in respect of an area of land. However, despite such a request the Minister is under no obligation to invite applications which means that the Minister retains a discretion to invite applications or not.

66. The proposed section 9(5) provides some security for a person who, in terms of the proposed section 9(2) requested the Minister to invite applications in that the Minister is obliged to "give preference" to an application lodged by a person who requested the Minister to invite applications. However, that person does not have an exclusive right to apply for a right in respect of the land or mineral which he or she has identified.

67. In any event, it would seem that, in terms of the proposed section 9(3), the first come first served procedure is maintained. An analysis of the provisions of clause 5 of the Amendment Bill shows the following:

67.1. The new proposed section 9(3) of the MPRDA provides that applications received in response to the ministerial invitation contemplated in the proposed section 9(1) "... must be processed in accordance with the provisions of Act, including the terms and conditions upon which applications may be accepted, rejected, granted or refused".

67.2. Both sections 16(2)(c) and 22(2)(c) of the MPRDA provide that prospecting or mining right applications cannot be accepted by the Regional Manager if a prior application for such a right in respect of the same mineral and land has been accepted and which remains to be granted or refused.

67.3. Depending on how the provisions of the proposed section 9(1) are going to be implemented there is a potential contradiction between the proposed section 9(1) and 9(3).

67.3.1. Section 9(1) provides that the Minister may prescribe in his invitation the period within which the application for a right may be lodged with the Regional Manager "... and the procedures which must apply in respect of such lodgement". Hence the qualification inserted into, amongst others, sections 16 and 23 which provide that applications for prospecting or mining rights must be lodged "subject to section 9".

67.3.2. However, at the same time, the proposed section 9(3) preserves the provisions of the MPRDA with regard to all applications for rights "... including the terms and conditions upon which applications may be accepted, granted or refused". The normal grammatical meaning that would be given to the quoted phrase in section 9(3) indicates that the words "terms and conditions" in the quoted phrase refer to the provisions of the MPRDA which provide for the acceptance, rejections, granting or refusal of applications. On the other hand, it may be argued that the words "terms and conditions" in the quoted phrase refer to the "procedures which may apply in respect of such lodgement" which the Minister may prescribe in the invitation in accordance with the proposed section 9(1).

67.3.3. Should the intention be that the Minister can, by way of the procedures that he or she may prescribe, deviate from and/or ignore the provisions of the MPRDA then, for the reasons already stated in paragraph 59.6 above, that power of the Minister could arguably also be unconstitutional.

67.4. It is proposed, therefore, that:

67.4.1. the potential contradiction between the proposed sections 9(1) and (3) be removed by deleting the power granted to the Minister to prescribe "... procedures which must apply in respect of such lodgement" since the MPRDA already sufficiently provides for such procedures;

67.4.2. the proposed amendments make it clear that applications received will still be processed in the order in which they were received in accordance with the provisions of, amongst others, sections 16(2)(c) and 22(2)(c);

67.4.3. the insertions into the various sections of the MPRDA that the applications for rights must be lodged “subject to section 9” referred to in paragraphs 63.1 to 63.4 above be removed; and

67.4.4. if it is the intention of the legislature to only allow applications once the Minister has issued an invitation for applications, rather to replace the phrase "subject to section 9" in each of the sections of the MPRDA referred to in paragraphs 63.1 to 63.4 above with a clear statement that applications for rights may only be made after a ministerial invitation contemplated in section 9(1). For instance, in the case of section 16(1), the section should read:

> *"Any person who wishes to apply to the Minister for a mining right must, in response to an invitation issues by the Minister in terms of section 9(1), lodge the application —"*

68. The proposed amendments with regard to the invitation for applications for prospecting and the qualification in section 2(1) of the MPRDA that lodgement for applications for mining rights can only be made “subject to section 9”, create a serious threat to security of tenure of holders of prospecting rights.

68.1. A holder of a prospecting right is, in section 19(1)(b) of the MPRDA, granted the exclusive right to apply for a mining right.

68.2. Although the proposed section 9(4) prohibits ministerial invitations in respect of land and minerals if an exiting a right is held in respect of that land and minerals, the holder of the prospecting right, at the same time, cannot, notwithstanding his exclusive right to apply for a mining right, lodge an application for a mining right whilst section 22(1) is qualified by the phrase “subject to section 9”. The anomaly that is created is that, The Minister cannot issue an invitation for application for

rights in terms of the land and mineral in respect of which a prospecting right has been granted and, at the same time, the holder of the prospecting right cannot lodge and application for a mining right in respect of that land and minerals because he can only do so, "subject to section 9" that is, in response to any invitation by the Minister.

68.3. This ambiguity and anomaly should, clearly, be removed from the Amendment Bill.

69. It is a principle of legislative interpretation that where different words are used in the same Act a different meaning is intended.[30] In the proposed section 9(1) it is provided that the Minister may invite applications "including in respect of land relinquished or abandonment ...". In the proposed new section 9(4) reference is made to "... land in respect of which another person holds a right ...". In other places in the proposed amendments to section 9 of the MPRDA reference are made to an "area of land" rather than to just "land". These inconsistencies should be removed from the proposed amendments to section 9 of the MPRDA.

70. In the proposed new section 9(2) there is a typing error in that reference is made to "... in or on such area or land ..." where, clearly, what was intended was a reference to "... area of land" as is done later in the same proposed sub-section where reference is made to "... invite applications in such area of land, block…".

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30 See, for instance, *Durban City Council v Shell & BP South Africa Petroleum Refineries Pty Limited* 1971(4) SA 446A at p. 457; *More v Minister of Co-operation & Development* 1986(1) SA 102 (A) at 115D to E; *Tshwete v Minister of Home Affairs (RSA)* 1988(4) SA586(A) at 618E to F and *S v Dlamini; S v Dladla; S v Joubert; S v Shitekat* 1999(4) SA 623(CC) at para. [47].

Amendments of the appeal procedure provided for in section 96 of the MPRDA:

71. The Amendment Bill proposes several amendments to the internal appeal procedure provided for in section 96 of the MPRDA. These are:

71.1. The removal, by way of the amendment proposed in clause 71(a) of the Amendment Bill, of the current double appeal process which requires, in most cases, an appeal to the Director-General and, if any party is dissatisfied with the decision of the Director-General on appeal, a further appeal to the Minister. This double appeal process is replaced by a single appeal to the Minister of Mineral Resources in respect of any decision made in terms of the MPRDA and to the Minister of Environmental Affairs in respect of any decision that relates to environmental matters.

71.2. The insertion, by clause 71(c) of the Amendment Bill, of a qualification of the general provision that an appeal does not suspend the administrative decision appealed against by the insertion of two new proposed sub-sections, namely sections 96(2A) and 96(2B) which provide for –

71.2.1. In the proposed section 96(2A), the suspension of any further decisions which, in the opinion of the Minister, may affect the outcome of an appeal; and

71.2.2. In the proposed section 96(2B), a provision that a right granted in terms of the Act shall not be executed until the period provided for the lodgement of an appeal has expired or, where an appeal has been lodged, until the appeal has been finalised.

71.3. The insertions into each of sections 17(5)(b)[31], 23(5)(b)[32] and 27(9)(b)[33] of a provision which provides that prospecting rights, mining rights or mining permits that have been granted may not be executed, where the grant of those rights have been appealed against, until such an appeal has been finalised.

72. The deletion of the double appeal process is to be welcomed and should provide a speedier resolution of disputes by way of the single appeal process that will now be provided for in the amended section 96. The question is whether the Minister will have the capacity to deal with a vastly increased number of appeals which were previously dealt with by the Director-General. It should be noted that section 103(1) of the MPRDA prohibits the delegation by the Minister of his or her power to hear internal appeals under section 96 of the MPRDA. It follows that the Minister will have to consider all the internal appeals personally. Save for this reservation the proposed amendments to section 96 are to be welcomed.

73. In view of the proposed insertion of section 96(2B) that any right granted in terms of the Act shall not be executed until the prescribed period for lodgement of an appeal expired, and if such appeal is lodged, until such an appeal has been finalised, makes it unnecessary to make the further amendments to sections 17(5)(b), 23(5)(b) and 27(9)(b) since those amendments merely duplicate that which will be provided for in the proposed section 96(2B).

74. Some uncertainty remains with regard to the proposed insertion of section 96(2A). It provides that any pending administrative decision made in terms of the Act "... which,

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31 By way of clause 12(g) of the Amendment Bill.
32 By way of clause 18(g) of the Amendment Bill.
33 By way of section 22(l) of the Amendment Bill.

in the opinion of the Minister may affect the outcome of an appeal ... must be suspended pending the finalisation of the appeal". Clearly the suspension does not follow as a matter of law. It is not clear who has the power to suspend the "pending administrative decision". Furthermore, since the Minister clearly does not have knowledge of all pending administrative decisions that have to be taken in the Department by many different officers, he or she does not necessarily know when a pending administrative decision may affect the outcome of an appeal pending before him in terms of section 96(1)[34]. On the other hand, it is also so that officials throughout the Department who is empowered to take administrative decisions are not aware of all the appeals that have been lodged with the Minister in terms of section 96(1) of the MPRDA. It is clear, therefore, that the proposed amendments which were designed to prevent contradictory administrative decisions to be taken in matters which are subject to appeals may not achieve the desired objective unless an administrative system is instituted with regard to all appeals lodged with the Minister in terms of section 96(1) which would be available to and could alert all other decision makers of the pending appeal.

75. Furthermore, clarity should be provided as to who has the power to suspend pending applications as contemplated in section 96(2)(b) and pending administrative decisions contemplated in the proposed section 96(2A). The drafting of the amendments can also be improved by deleting the provisions of section 96(2)(b) since subsequent applications would also require pending administrative decisions and the provisions of section 96(2)(b) and the proposed section 96(2A) are, therefore, duplicated.

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[34] It will be noted that the same problem exists with regard to the provisions of section 96(2)(b) which were inserted into the MPRDA by the 2008 Act.

The amendment to the definition of "Historically Disadvantaged Persons":

76. The definition of "Historically Disadvantaged Persons" is, in terms of clause 1(k) of the Amendment Bill, completely replaced, now with a new definition of "Historically Disadvantaged South Africans". All the references to associations and juristic persons which were included in the previous definition have, of necessity, been deleted since associations and juristic persons can, hardly, be South African citizens.

77. The new definition still refers to "a category of persons or a community" which were disadvantaged by unfair discrimination neither of which can, obviously, be a South African citizen. It follows that, insofar as the draftsperson of the proposed amendment attempted to limit the meaning of the words "Historically Disadvantaged South Africans" to South African citizens, he or she did not achieve that purpose. If a category of persons or a community was, therefore, discriminated against prior to 1994, they would qualify as "disadvantaged persons" regardless to whether they consist of South African citizens or not.

78. The draftsperson of the new definition also saw fit to qualify the whole definition with the phrase "... which should be representative of the demographics of the country". This qualification reduces the definition to something which does not and can never exist. It includes into the definition a contradiction which strips the definition of any meaning.

78.1. If, on the one hand, it is accepted that, for instance, white males were not discriminated against prior to 1994 then, clearly, the definition should not include white males. It follows that, a group of people who was discriminated against prior to 1994 cannot represent the demographics of the country since the demographics of the country would include white males.

78.2. On the other hand, white males form part of the demographics of the country. If the phrase "... which should be representative of the demographics of the country…" is included into the definition as is proposed by the Amendment Bill white males will have to be included in the concept "historically disadvantaged South African". The result is that the whole of the definition is absurd and makes no sense.

78.3. The absurdity is also demonstrated by the fact that the definition of "historically disadvantaged South Africans" also refers to individual persons since the definition includes only "South African citizens" which must, of necessity, be natural persons. A natural person can clearly not be "… representative of the demographics of the country."

79. Furthermore, since the phrase "historically disadvantaged persons" is no longer defined, several references to "historically disadvantaged person" in the MPRDA are now undefined, for instance:

79.1. The two references to "historically disadvantaged persons" in the definition of "Broad–based Economic Empowerment" in section 1 of the MPRDA;

79.2. Item 12 of schedule II to the MPRDA which empowered the Minister to assist "historically disadvantaged persons".

80. One of the rights entrenched in the Bill of Rights is the right to economic activity in section 26 of the Constitution. In terms of that section every person shall have the right of freely engaging in economic activity and a livelihood anywhere in the national territory. The amended definition of "Historically Disadvantaged Persons" would

clearly limit the right of foreigners, lawfully resident in South Africa, to freely engage in economic activity insofar as the MPRDA afford advantages to persons who were discriminated against prior to 1994. There is no doubt that black foreigners were discriminated against prior to 1994. There is, it is submitted, no justifiable reason why their right as "historically disadvantaged persons" should be limited. This limitation is, therefore, arguably unconstitutional. In any event, it is unconscionable for a government which professes not to be xenophobic to brazenly deny foreigners participation in the mining industry in South Africa.

81. It is a well-known fact that many of the mine workers in South Africa are not South African citizens. Is it the intention of this amendment of the definition of "historically disadvantaged persons" to exclude those workers from the advantages bestowed upon historically disadvantaged persons by the MPRDA? Insofar as those workers form part of a workforce and may be included in what is commonly referred to as an ESOP, does that ESSOP no longer qualify to be considered as qualifying for inclusion in the participation of HDSA's in the economic empowerment contemplated under the charter?

82. It is submitted, therefore, that the limitation of the concept "Historically Disadvantaged Person" to South African citizens only is undesirable and should not be adopted by Parliament.

83. It was pointed out above that the amendment of the definition of "historically disadvantaged person" by the exclusion therefrom of legal persons such as associations and juristic persons means that save for the reference to groups of persons and communities, only a natural person qualifies as a "historically disadvantaged South

African". It is well known that, almost without exception, prospecting rights, mining rights and mining permits are granted to juristic persons and not to natural persons. The proposed amendments which exclude juristic persons from the definition of "historically disadvantaged South Africans" means that the so-called "flow through principle" will have to be applied to determine whether advantages generated by the grant of the right will flow to natural persons who are historically disadvantaged South Africans. Principles which previously applied to determine whether juristic persons qualified as historically disadvantaged persons such as the race or gender of the persons who control a juristic person will no longer find application. It could also mean that on the day when the Amendment Bill becomes effective, juristic persons who previously qualified as an historically disadvantaged person will, no longer, so qualify. It follows that empowerment deals which were previously concluded at great expense could be undone. It is noted that there are no transitional provisions included in the Amendment Bill.

Amendments made to the MPRDA with regard to the issuance of a closure certificate in terms of section 43 thereof:

84. The proposed insertion of section 43(1A) into the MPRDA by clause 31(b) of the Amendment Bill is a duplication of similar provisions in section 24R(1) of the National Environmental Management Act, 1998 (Act 107 of 1998) ("**NEMA**").

84.1. That section in NEMA provides, in different wording, that the holder of rights issued in terms of the MPRDA, holder of old order rights and owner of works remain responsible for any environmental liability, pollution or ecological degradation notwithstanding the issue of a closure certificate by the Minister of Mineral Resources in terms of the MPRDA.

84.2. The duplication of what is already in section 24R(1) of NEMA creates contradictions and should be avoided. The amendment proposed by clause 31(b) of the Amendment Bill is, therefore, superfluous and should be deleted from the Amendment Bill.

85. In any event, if the provisions of clause 31(b) are retained in the Amendment Bill, there exists a grammatical error in that the comma between the words "ecological degradation" and the words "the dumping and treatment of extraneous water" should be replaced by the word "and".

86. Clause 31(f) of the Amendment Bill proposes to amend section 43(6) of the MPRDA. However, as is the case with regard to the new insertion of section 43(1)(a) dealt with in paragraph 84 above, the amended section 43(6) of the MPRDA constitutes a duplication and contradiction of section 24R(2) of NEMA.

86.1. The proposed amended section 43(6) of the MPRDA contradicts the provisions of section 24R(2) of NEMA. Only one of these provisions should be applied to determine the effect of the issue of a closure certificate on the financial provision provided by the holder of a right granted in terms of the MPRDA.

86.2. Since the issue of a closure certificate is something dealt with in the MPRDA it is proposed that the provisions of section 24R(2) should be deleted and that the proposed amendment of section 43(6) by clause 31(f) of the Amendment Bill should prevail.

87. Clause 31(g) of the Amendment Bill proposes in the insertion of a new section 43(14) into the MPRDA. The wording of the proposed section 43(14) refers to a holder who "formally or legally abandons a right".

87.1. It is not clear what is meant by the underlined words in the quoted passage, "formally or legally". It suggests that there is more than one way of abandoning a right issued in terms of the MPRDA. That is not correct. The MPRDA refers to the abandonment of rights in many provisions and section 56(f) provides that any right granted or issued in terms of the MPRDA shall lapse whenever it is abandoned.

87.2. The words "formally or legally" are superfluous and should be deleted from the proposed section 43(14) of the MPRDA.

88. It is also not clear why the exemption from the provisions of section 43(6) should be restricted to rights which are terminated through abandonment. Surely the holder of a mining permit which was issued for a period of one year and who, for whatever reason, allowed the mining right to lapse without conducting any mining operation should, similarly, be exempted from the provisions of section 43(6), since such an holder would not have conducted any invasive operations in terms of its mining permit.

89. In any event, the proposed insertion of section 43(14) seems superfluous.

89.1. Whether or not there has been any invasive operation conducted by a holder of a right is a factual issue which should be relevant to determine whether there are latent and residual environmental impacts which may become known after a closure certificate has been issued. Surely, if there were no invasive operations it

is unlikely that there would be latent and residual environmental impacts which may become known after a closure certificate has been issued. That must be a factor that must be determined in the prescribed manner for which regulations will have to be drafted as contemplated in the amended section 43(6) of the MPRDA. Those regulations should provide that where there has been no invasive operation conducted under a right, the portion of the financial provision which the Minister may retain is nil.

89.2. It follows that if the regulations contemplated in the amended section 43(6) are properly drafted, the insertion of section 43(14) is not necessary and superfluous.

References to the "Amendment Broad-based Socio-economic Charter for the South African Mining and Mineral Industry in the Amendment Bill:

90. The amendments proposed in the Amendment Bill inserts several references into the MPRDA to the "Amended Broad-based Socio-Economic Charter for the South African Mining and Mineral Industry", sometimes further qualified by the phrase "… provided for in section 100". This occurs in the following amendments:

90.1. By way of clause (zD) of the Amendment Bill, the insertion of paragraph (b) of the definition of "this Act" in section 1 of the MPRDA;

90.2. By way of clause 12 of the Amendment Bill, the amendment of section 17(1)(f) of the MPRDA;

90.3. By way of clause 18(a) of the Amendment Bill, the amendment of section 23(1)(h) of the MPRDA;

90.4. By way of clause 20(e) of the Amendment Bill, the insertion of section 25(2)(fA) into the MPRDA; and

90.5. By way of clause 20(f) of the Amendment Bill, the amendment of section 25(2)(h) of the MPRDA.

91. In most of these amendments references are inserted into the Amended MPRDA to the "Amended Broad-based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry provided for in section 100". Section 100 of the MPRDA does not provide for the "Amended Broad-based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry". It refers to the "broad-based socio-economic empowerment Charter". The description of the Mining Charter in the insertions and references referred to above are, therefore, incorrect.

The amendments to regulate the date on which a person becomes the holder of a right granted in terms of the MPRDA and the date on which such a right becomes effective:

92. Several amendments are proposed to various sections of the MPRDA with a view to clarify the provisions of the MPRDA with regard to:

92.1. The date on which a person becomes the holder of a right granted in terms of the MPRDA; and

92.2. The date on which such a right becomes effective; and

92.3. The date from which the period for which a right is granted is computed.

93. The uncertainty with regard to these dates was created by a recent judgement of the Appellate Division in the matter *Minister of Mineral Resources and Others v Mawetse (SA) Mining Corporation Pty Limited*[35]. In this judgement, the court stated[36] that:

> *"There are three distinct legal processes which must be distinguished from each other, namely the granting of, execution of and coming into effect of the right. A prospecting right is granted in terms of section 17(1) on the date that the DDG approves the recommendation.... For practical purposes communication of that decision then enabled challenges by the grantee to conditions which it may consider objectionable and furthermore will alert not only the grantee but also competitors who might have an interest. The period for which the right endures has to be computed from the time that the applicant is informed of the grant ... From the date of the grant Dilokong became the holder of a valid prospecting right as defined in the MRPDA. But in terms of section 19(2)(a) of the MPRDA that right has to be registered in the Mineral and Petroleum Title Office but while s.5(1) of the MPRDA provides that a prospecting right is a limited real right in respect of the mineral to which it relates, section 2(4) of the MTR Act*[37] *provides that '(t)he registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties'. These provisions appear at face value to be contradictory with regard to the nature of the right and its legal consequences.... The purpose and effect of registration are not only that the right becomes binding on third parties but also serves as notice to the general public akin to registration of an immovable property in a deeds office. The granting of the prospecting right becomes effective on the date of which the environmental-management plan lodged by the applicant in terms of section 16(4)(a) is approved in terms of section 39.*[38] *That is the date from which a successful applicant can effectively start prospecting."*

94. Clearly the Court identified three relevant dates:

94.1. The date on which the decision to grant the right is taken;

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35 2016(1) SA 306(SCA).
36 In paragraph [19] of the reported judgement.
37 This is a reference to the Mining Titles Registration Act, 16 of 1967.
38 This judgement was based on the provisions of the MPRDA before amendment thereof by the 2008 Act.

94.2. The date on which right is registered; and

94.3. The date on which the environmental-management plan is approved in terms of section 39 and when the right becomes effective.

Significantly, no mention is made of the date on which the right is executed.

95. Clearly, the draftsperson of the Amendment Bill intended to amend the provisions of the MPRDA to with a view to negate the effect of the *Mawetse*-judgement. This it attempted to do as follows:

95.1. The amendment, by clause 12(g) of the Amendment Bill, to substitute section 17(5) of the MPRDA relating to the effective date of a newly granted prospecting right;

95.2. The amendment, by clause 13(g) of the Amendment Bill, to section 18(5) of the MPRDA relating to the renewal of a prospecting right;

95.3. The amendment by clause 18(g) of the Amendment Bill of section 23(5) of the MPRDA with regard to the effective date of a newly granted mining right;

95.4. The amendment, by clause 19(g) of the Amendment Bill, of section 24(5) of the MPRDA with regard to the grant of a renewal of a mining right; and

95.5. The amendment, by clause 22(l) of the Amendment Bill, by the insertion of section 27(9) into the MPRDA which relates to the effective date a mining permit and the date upon which the renewal of a mining permit takes effect.

96. The amendments proposed to the MPRDA with regard to the date upon which newly granted prospecting rights, mining rights and mining permits become effective[39] will not change the effect of the *Mawetse*-judgement insofar as the judgement relates to the date upon which a person to whom a prospecting right, mining right or mining permit is granted becomes the holder of that right or permit.

96.1. All three these amendments refer back to the definition of "effective date" in section 1 of the MPRDA which defines the effective date as the date on which the relevant permit is issued or the relevant right is executed. The definition of "effective date" was inserted into the provisions of the MPRDA by the 2008 Act. This amendment moved away from the previous provisions of the MPRDA which previously provided that rights and permits granted in terms of the MPRDA became effect on the date when the environmental management programme or plan in respect of those rights or permits were approved.

96.2. As pointed out above, the court decided that a prospecting right is granted in terms of section 17(1) on the date that the DDG (in the case of a prospecting right) or the DG (in the case of a mining right) approves the recommendation (usually made by the Regional Manager) that a prospecting right, mining right or mining permit, as the case may be, be granted to an applicant. That statement must be qualified to some extent in that the court found that for practical purposes the date of grant is the date upon which the decision to grant the right or permit is communicated to the applicant. The proposed amendments of the MPRDA which provide that the rights or permits granted in terms of section 17, 23 and 27 become effective on the

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[39] Amendments referred to above by clauses 12(g), 18(g) and 22(l) (as far as the latter amendment inserts a new section 23(9)(a) into the MPRDA).

effective date (being the date upon which the right or permit is executed) does not affect this part of the judgement in the *Mawetse*-case. It only amends that part of the judgement which stated that a right or permit becomes effective on the date on which the environmental management programme or plan is approved. That amendment was, in any event, brought about by the 2008 Act and not by the Amendment Bill.

97. Clearly, however, the draftsperson of the Amendment Bill also intended to amend the effect of the *Mawetse*-judgement with regard to the date on which the period for which a prospecting right, mining right or mining permit is granted commences and hence, the date on which such a right or permit would expire. From the passage of the *Mawetse*-judgement quoted above, it is clear that the court held that the period for which the right endures has to be computed from the date that the applicant is informed of the grant since, from that date, the applicant becomes the holder of the right albeit it only becomes effective from the date on which, in that case, the environmental management programme or plan is approved.

98. Peculiarly though, the draftsperson of the Amendment Bill did not make any amendments to the MPRDA to change the effect of the *Mawetse*-judgement with regard to the date from which the period for which a prospecting right, mining right or mining permit was granted must be computed and, therefore, to determine the date upon which those rights or permits would expire. Notwithstanding the amendments in the Amendment Bill, therefore, the period for which prospecting rights, mining rights or mining permits are granted remains, as found in the *Mawetse*-judgment, the date on which the applicant for those rights are informed of the decision to grant the right or

permit and the expiry date of those rights or permits must be calculated with reference to that grant date.

99. However, the draftsperson of the Amendment Bill was not satisfied that the consequences of the *Mawetse*-judgement with regard to the commencement of the time period of a renewal of prospecting right, mining right or mining permit should remain. To that end the Amendment Bill provides in the new amended sections 18(5), 24(5) and 27(10) that:

99.1. Rights or permits in respect of which an application for renewal has been lodged remain in force notwithstanding its expiry date until the application for renewal has either been "granted and a notarial deed of renewal has been executed, or such application has been refused."

99.2. During the time period which the right or permit remain in force, the holder of the right or permit could continue to conduct prospecting operations or mining operations, as the case may be.

99.3. When an application for the renewal of a prospecting right, mining right or mining permit is granted, the renewal will take effect and the renewal period for which the application as made shall commence on the date of execution of the resultant notarial deed of renewal.

100. These proposed amendments do negate the effect of the *Mawetse*-judgement in respect date of the commencement of the period for which a renewal application for a prospecting right, mining right or mining permit has been granted. This period now, regardless of the date on which the renewal application is granted, commences running

from the date upon with the notarial deed of renewal is executed. Read with the amendment which postpones the date of expiry of the original prospecting right, mining right or mining permit beyond its normal expiry date pending the date of execution of a renewed grant of those rights or permits, the total period during which an holder of a prospecting right, mining right or mining permit is entitled to continue prospecting and mining can be extended far beyond the date and period which were originally contemplated in the MPRDA. This often happens in practice where years elapse between the date of the grant of an application for the renewal of, for instance, a prospecting right, and the date on which that renewed prospecting right is executed.

101. The respondent in the *Mawetse*-judgement argued that the date upon which a renewed prospecting right granted to it commenced running was the date on which the renewed prospecting right became effective and/or when it is executed. In reaction to this argument the court stated the following[40]:

> *"This is an untenable proposition. If correct, it would mean that the right is sterilized in definitely in favour of the Dilokong…. No applications for that right, i.e. for chrome (base metals) in respect of the farm Driekop, could then be considered while the right remained sterilized. An immediate reservation of the right in this fashion is contrary to the letter and spirit of the MPRDA. Section 17(6) expressly provides that a prospecting right remains valid for a maximum period of 5 years. Such an interpretation offends against one of the MPRDA's key objectives, namely that the mineral right must be exploited within stipulated time frames for the benefit of the public. In Agri SA it was held that one of the objects of the MPRDA is to abolish the entitlement to sterilize mineral rights. The structure of the MPRDA in any event militates against Dilakong's contentions. Section 19(2)(d) provides that the holder of a prospecting right 'must commence with the prospecting activities within 120 days from the date on which the prospecting right becomes effective in terms of section 17(5) or such an extended period as the Minister may authorise.' As stated in s17(5) stipulates the effective date is the date on which the environmental plan is approved in terms of s39. That plan must*

40 At clause [20] of the reported judgement.

> *be submitted to the Regional Manager within a period of 60 days after notification to do so. The Minister must within 120 days from the lodgement approve same, provided certain requirements have been met. It is plain from these provisions that a successful applicant for a prospecting right cannot sit back, with arms folded, and remains supine on the basis that the DDG has unlawfully imposed the BEE compliance condition and that the Regional Manager's refusal to execute the right by reason of that non-compliance was unlawful. Those decisions remain valid until set aside by a court. The appropriate course of action was for Dilokong to obtain a mandamus compelling the DMR to execute the right, that is, assuming the right was lawfully granted."*

102. From this passage of the *Mawetse*-judgement it is clear that the proposed amendments to sections 18, 24 and 27 which have the potential of significantly extending the period during which mineral rights, held under a prospecting right, mining right or mining permit, can be sterilized is contrary to the principles of the MPRDA. Furthermore, there is no logical reason why the date on which the renewal period of a right or permit commences should differ from the date on which the original grant of such a right or permit commences.

103. Rather than an amendment relating to the date of commencement of the renewal period in respect of prospecting rights, mining rights and mining permits, the Amendment Bill should amend the provisions of the MPRDA relating to the commencement of both the original grant period and the renewal period in a uniform manner. If it is decided that the effect of the *Mawetse*-judgement should be negated and that those periods should commence running from the date of execution of those rights or permits, that it should be provided that the execution of right or permits must take place within a stipulated period from the date upon which the right or permit is granted. If a reasonable period is provided for, say 90 days, this should allow sufficient time to organise for the execution of the right or permit and, where there are disputes with regard to the

conditions of the grants, those disputes can be resolved or a court application can be brought to do so.

PART B: COMMENTS ON THE DRAFTING OF THE CLAUSES OF THE AMENDMENT BILL

104. The comments under this Part of the memorandum are limited to drafting comments which were not dealt with under the various headings in Part A of this memorandum.

Clause 1(f)of the Amendment Bill:

105. Clause 1(f) of the Amendment Bill inserts into the MPRDA a definition of "controlling interest" in relation to either a company or, in paragraph (b) of the clause "any other business other than a company referred to in paragraph (a)".

106. The only reference to "a controlling interest" occurs in section 11 of the MPRDA where that concept appears in the phrase "an unlisted company or any controlling interest in a listed company". Since the use of the words "controlling interest" in the MPRDA is limited to controlling interests in listed companies, the provisions of clause 1(f) insofar as it relates to "any other business other than a company" is superfluous. Paragraph (b) of the proposed definition of controlling interest should, therefore, be deleted from the Amendment Bill.

Clause 1(m)of the Amendment Bill:

107. Clause 1(m) of the Amendment Bill inserts into the MPRDA a reference to "labour sending areas". The only place in the MPRDA where this concept is used is in an amendment of section 2(i) of the MPRDA which, after amendment by clause 2 of the Amendment Bill, now provides that one of the objects of the MPRDA is to ensure that holders of mining rights contribute towards the social-economic development of the area in which they are operating "... including labour sending areas".

108. The problem with the newly inserted definition of "labour sending areas" and the proposed amendment of section 2(i) is that it is impossible to determine which labour sending areas the proposed amendments are referring to.

108.1. The definition merely states that "labour sending areas" refer to "... areas from where a majority of miners, both historical and current, are or have been sourced".

108.2. It does not state by whom the miners were to have been sourced. By a specific mining company or by the whole of the mining industry? The normal grammatical meaning of the phrase quoted, suggests that labour sending areas are all areas where mineworkers are or have been sourced from by all mining companies.

108.3. A further question is how does one determine where "a majority of mineworkers" were sourced from in the past. Are there sufficient records to be able to determine where a majority of mineworkers were sourced in the past?

109. It is suggested that what the draftsperson of the Amendment Bill probably intended was that an holder of a mining right is required to contribute towards the socio-economic development of an area from which the majority of its own labour force has been sourced. It is suggested that the amendments proposed in the Amendment Bill do not make this intention clear. It is ambiguous and should be refined to reflect what is probably the intention of the draftsperson.

Clause 1(s) of the Amendment Bill:

110. Clause 1(s) of the Amendment Bill proposes an amendment to the definition of "mining operation" by the addition thereto of the words "including residue stockpiles".

111. The addition of the words quoted in the previous paragraph is inappropriate. The meaning of a mining operation relates to an act. A residue stockpile is not an act, it is a thing. To include residue stockpiles into a definition which relates to the performance of an act detracts from the meaning of the concept and creates confusion. This proposed amendment should not be adopted.

Clause 1(w) of the Amendment Bill:

112. Clause 1(w) of the Amendment Bill proposes a completely new definition of the concept "prospecting area". Previously a prospecting area was confined to the area of land in respect of which a prospecting right had been issued. The proposed amended definition now refers to two areas:

112.1. In the proposed new paragraph (a), insofar as the words "prospecting area" relates to a mining right or a mining permit, it is the area for which that mining right or mining permit has been granted; or

112.2. In relation to environmental, health and safety, social and labour matters and any residual latent or other impacts a prospecting area includes land which is adjacent or non-adjacent to the area contemplated in paragraph (a) (which is the area in respect of which a mining right or a mining permit has been granted).

113. Although this sound bizarre, the new definition does not include the area in respect of which a prospecting right has been issued. It is also not clear why paragraph (a) of the new proposed definition refers to the area in respect of which a mining right or a mining permit has been granted. One can only explain this bizarre amendment to a typing error of the draftsperson of the Amendment Bill.

114. Clearly clause 1(w) of the Amendment Bill should be amended by deleting the proposed wording of paragraph (a) of the definition of "prospecting area" and replacing it with the phrase "(a) in relation to a prospecting right, means the area for which the prospecting right is granted; or"

Clause 11(c) of the Amendment Bill:

115. Clause 11(c) of the Amendment Bill proposes an amendment to section 16(4)(b) of the MPRDA. After the amendment, the amended sub-section would read as follows:

> *"To consult in the prescribed manner with the landowner, lawful occupier, an affected party and community ...."*

116. Upon a proper grammatical interpretation of the proposed wording of section 16(4)(b) the quoted passage would be referring to four persons who must be consulted with, namely:

116.1. The landowner;

116.2. The lawful occupier;

116.3. An affected party and

116.4. A community.

This amendment would make it impossible to determine which community should be consulted with.

117. It is proposed that the word "affected" should qualify both the words "party" and "community". It is proposed, therefore, that the proposed amendment to section

16(4)(b) should read "... the landowner, lawful occupier and any affected party and community ...".

Clause 13(a) of the Amendment Bill:

118. Clause 13(a) of the Amendment Bill proposes amendments to section 18(2)(c) of the MPRDA. Amongst those is the proposed insertion of the phrase "… reflecting the holders compliance…". Due to a typing error the word "holder's" was inadvertently inserted as "holders".

Clause 14(c) of the Amendment Bill

119. Clause 14(c) of the Amendment Bill amends section 19(2)(h) of the MPRDA by placing an obligation on holders of prospecting rights to annually submit progress reports and data of prospecting operations to both the Regional Manager and the council for Geo Science. This is a duplication of the amended section 21(1)(b) and 21(1A) of the MPRDA.

Clause 15(a) of the Amendment Bill:

120. Clause 15(a) of the Amendment Bill proposes the amendment of section 20(2) of the MPRDA with regard to the requirement to obtain ministerial permission to remove bulk samples of minerals during prospecting operations. The new proposed wording of section 20(2) requires the holder of a prospecting right to obtain ministerial permission to remove bulk samples from a prospecting area "... for any purpose as prescribed...".

121. Applying the normal grammatical meaning of the quoted phrase it would seem as if the draftsperson intended that the purpose for which bulk samples may be removed must be prescribed. That is clearly not the intention. It is also unlikely that the written

permission of the Minister needs to be prescribed. It is suggested that the words "as prescribed" are superfluous and inappropriate and should be deleted from the Amendment Bill.

Clause 20(f) of the Amendment Bill:

122. Clause 20(f) of the Amendment Bill proposes the amendment of section 25(2)(h) of the MPRDA. Save for the inappropriate reference therein to the "Amended Broad-based Socio-economic Empowerment Charter for the South African Mining and Mineral Industry" already referred to in paragraph 90 above, the proposed amendment also contains a grammatical error. An analysis of the proposed amendment shows that:

122.1. The draftsperson of the Amendment Bill sought to place an obligation on the holder of a mining right to submit the prescribed annual report in respect of three issues, namely:

122.1.1. The holder's compliance with the provisions of section 2(d) and (f) of the MPRDA;

122.1.2. The holder's compliance with the "Amended Broad-based Socio-economic Empowerment Charter for the South African Mining and Mineral Industry" provided for in section 100; and

122.1.3. The holder's compliance with the approved social and labour plan.

122.2. The draftsperson proposes the deletion of the word "and" occurring between the words "in section 100" and "the approved social and labour plan", and to replace the word "and" with a comma.

122.3. That, however, is grammatical inappropriate if the draftsperson wishes to distinguish between the three issues referred to in paragraphs 122.1.1 to 122.1.3 above. It is appropriate to retain the word "and" where it presently occurs in section 25(2)(h) and not to insert a comma as is proposed in clause 20(f) of the Amendment Bill.

Clause 21(b) of the Amendment Bill:

123. Clause 21(b) of the Amendment Bill proposes the amendment of section 26(2) of the MPRDA to place a peremptory obligation on the Minister to "... publish such conditions required to ensure security of supply for local beneficiation in the prescribed manner". The underlined words in the quoted passage are grammatically inappropriate.

123.1. The words "such conditions" would normally be a reference to a previous reference to the word "conditions" somewhere in the proposed new section 26(2). The word "conditions" does, however, not appear anywhere else in the proposed section 26(2). It would, therefore, be more appropriate to delete the word "such" from the quoted passage.

123.2. The words "in the prescribed manner" must obviously refer to something that needs to be prescribed. Applying the normal grammatical meaning to the quoted phrase it would seem that the words "in the prescribed manner" refer and qualify either the word "publish" or the words "conditions required". That would mean that the Minister must either publish something in the prescribed manner or that the conditions required in the prescribed manner must be published. Neither of these meanings seems appropriate. It is proposed that the words "in the prescribed manner" be deleted from the phrase quoted above.

124. It is, therefore, proposed that the obligation placed on the Minister in the new section 26(2) should be to “publish conditions required to ensure security of supply for local beneficiation”.

125. One could also ask the question: the conditions of what? The conditions applicable to the grant of rights, the conditions applicable to the grant of by the Minister of his or her approval contemplated in the proposed section 26(3) or, the conditions which are applicable to the offer contemplated in the proposed section 26(2B)? The use of the word "conditions" in the proposed amended section 26(2) is vague and leaves the obligation of the Minister open ended. The Minister's powers under section 26(2) should be properly described.

126. It is also not clear where the Minister should publish the conditions contemplated in the proposed amended section 26(2). One would expect these conditions to be published in the Government Gazette. If that is the intention then it would be more appropriate to provide that the Minister should "prescribe" the conditions contemplated in the amended section 26(2).

Clause 23 of the Amendment Bill:

127. Clause 23 of the Amendment Bill proposes several changes to the provisions of section 28 of the MPRDA. Some of these changes introduces vagueness, namely:

127.1. The introduction of the words “or mineral product” in section 28(2) of the MPRDA; and

127.2. The insertion of the words “... and any agent, purchaser or seller of any mineral or mineral product ....”.

128. Although the words “mineral product” are used in several places in the MPRDA, it is not clear exactly to what it refers.

128.1. Clearly a mineral product is something derived from the processing of a mineral. However, when does a product of a mineral cease to be a “mineral product” and become, for instance, a manufactured product?

128.2. To demonstrate the vagueness of the term “mineral product” one needs to consider, for instance, minted gold. Minted gold is the product that results from the refinement process after the extraction of gold ore from the earth. There are several steps in this refinement process. Are the products of all these various refinement processes all “mineral products”? Is the refined gold itself a “mineral product”? The answer to these questions are not obvious from the proposed section 28(2) nor, for that matter, from any other place in the MPRDA where the words “mineral product” are used.

128.3. It is proposed that the use of the words "mineral product" be avoided or that the meaning of the words be properly defined.

129. Previously section 28(2) required the “... manager of any mineral processing plant” to submit prescribed returns and other information to the Director-General. Since the word “processing” is defined in section 1 of the MPRDA it was possible to determine who the manager of a “processing plant” was since the definition of the word “processing” refers to actions performed “... in relation to any mineral” and, significantly, not in relation to any “mineral product”. It is, therefore, not possible to determine with any precision who the manager of a mineral product processing plant is.

130. To exacerbate the vagueness that resulted from the introduction of the words "mineral product" the proposed amended text of section 28(2) now also requires "... any agent, purchaser or seller of any mineral or mineral product ..." to submit prescribed returns to the Director-General.

130.1. It should be obvious that these persons are not holders of any rights or may not even be in any way connected or part of the mining industry.

130.2. It will also be noted that these persons are not, in terms of section 28(1), required to keep proper records of mining activities and proper financial records in connection with the mining activities.

130.3. It is, at this stage, not clear what the prescribed returns and financial reports will be since that must be determined by the regulations. However, it is unlikely that the persons referred to in the quoted phrase will even be aware of the requirement that they should submit information (which they apparently are not legally required to keep) to the Director-General.

130.4. It is submitted, therefore, that the introduction of the phrase "any agent, purchaser or seller of any mineral or mineral product" be omitted from the proposed amendment to section 28(2) of the MPRDA.

Clauses 24, 25 and 27 of the Amendment Bill:

131. Clauses 24, 25 and 27 of the Amendment Bill make the provisions of sections 31, 32 and 35 of the MPRDA (all of which deals with the application for, and the rights of a holder of, a retention permit) also applicable to holders of exploration rights and (in the case of clause 27) the right to be granted a production right.

132. It is, however, submitted that all of these amendments are superfluous because of an amendment to section 69(2)(a), introduced by clause 47 of the Amendment Bill, provides that, amongst others, sections 31, 32 and 35 applies, with the necessary changes, to chapter 6 of the MPRDA (which deals with petroleum exploration and production). Furthermore, section 69(2)(b)(vii) specifically provides that any reference in, for instance, sections 31, 32 and 35 to a prospecting right be construed as a reference to exploration right.

133. In view of the provisions of section 69 the proposed amendments to sections 31, 32 and 35 of the MPRDA by clauses 27, 28 and 30 of the Amendment Bill respectively, is a duplication of the provisions of section 69 of the MPRDA and, therefore, superfluous.

Clause 32 of the Amendment Bill:

134. Clause 32 of the Amendment Bill purports to amend section 44 of the MPRDA. However, the proposed amended wording accords exactly with the present wording of section 44 and would seem, therefore, that clause 32 actually does not amend section 44 at all.

Clause 37 of the Amendment Bill:

135. Clause 37 of the Amendment Bill proposes several amendments to section 49 of the MPRDA. Section 49 deals with the power of the Minister to prohibit or restrict prospecting or mining in respect of land identified by the Minister or a mineral identified by the Minister. The main purpose of the amendments proposed by clause 37 of the Amendment Bill is to make the provisions of section 49, which currently are restricted to the prospecting and mining of minerals, applicable also to the reconnaissance, exploration and production of petroleum.

136. For the same reasons as set out above with regard to clauses 24, 25 and 27 it is unnecessary to amend section 49 of the MPRDA to make it applicable to the exploitation of petroleum. This is because section 49 is one of the sections listed in section 69(2)(a) of the MPRDA which makes section 49 applicable to chapter 6 of the MPRDA which, specifically, applies to the exploitation of petroleum.

137. The proposed amendments to section 49 by clause 37 of the Amendment Bill is, therefore, superfluous and constitutes a duplication with the provisions of section 69(2)(b) of the MPRDA.

138. In any event, the proposed wording of section 49(1) includes a reference to "... the strategic mineral or petroleum in question ...". While the concept "strategic mineral" is defined in section 1 of the MPRDA, there is no definition of the concept "strategic ... petroleum" in the MPRDA.

139. The proposed amendment in clause 37(a) of the Amendment Bill is drafted on the assumption that section 49(1) should be amended by the inclusion of the words "this strategic" immediately after the words "having regard to the national interest, ...". That assumption is incorrect. The words "... the strategic nature of the mineral in question ..." were already inserted into the original text of section 49(1) of the MPRDA by section 40(a) of the 2008 Act.

140. Should Parliament persist in amending section 49 by making it specifically applicable to the exploitation of petroleum, the provisions of section 49(2) should also be amended since the amended section will only be applicable to reconnaissance permissions, prospecting rights, mining rights, retention permits and mining permits. Should the proposed amendments to make section 49(1) applicable to petroleum be retained, then

section 49(2) should be amended to also include references to technical-operation permits, reconnaissance permits, exploration rights and production rights.

141. Section 49(4) was inserted into the original text of the MPRDA by section 38(b) of the 2008 Act. It provides that the Minister may by notice in the Gazette invite application for prospecting rights, mining rights or mining permits and may specify in such notice the period within any such applications may be lodged and the terms and conditions subject to which the right or permit may be granted. Clause 37(b) of the Amendment Bill proposes the amendment of section 49(4) by the insertion into it of a reference to a reconnaissance permission, reconnaissance permit, technical-cooperation permit, exploration right and production right which amendment would be appropriate if section 49 is expressly made applicable to the exploitation of petroleum.

142. In any event, the whole of section 49(4) is superfluous should the proposed amendment to section 9 be adopted. The same applies to the proposed insertion of section 49(5) by way of clause 37(c) of the Amendment Bill. At most, the current section 49(4) should be amended to provide that" …the provisions of section 9 apply to the land identified by the Minister in terms of sub-section 2(a) and the mineral identified by the Minister in terms of sub-section (2)(b)".

Clause 43 of the Amendment Bill:

143. Clause 43 of the Amendment Bill proposes amendments to section 56 of the MPRDA which deals with the lapsing of rights, permits and permissions.

144. Clause 43 of the Amendment Bill proposes the deletion of section 56(a) of the MPRDA which provides that any right, permit and permission granted in terms of the MPRDA shall lapse whenever "... it expires". It is not clear why this sub-section is deleted.

There were several amendments made by the Amendment Bill which provide for exceptions to this general rule, that right lapses when it expires, in cases where applications for renewals of rights and permits are lodged before the right or permit expires due to the effluxion of time. However, the general proposition that rights or permits lapse when they expire through the effluxion of time is necessary and should be retained.

145. Clause 43 of the Amendment Bill also proposes the amendment of section 56 by the insertion therein of paragraph (g). However, the manner in which the proposal is drafted is grammatical inept. If the present wording is accepted the new section 56(g) would read as follows:

> *"Any right, permit and permission granted or issued in terms of this Act shall lapse, whenever – (g) in the event that the holder is liquidated and finally deregistered or sequestrated, the right, permit or permission or licence must fall within the insolvent estate and if sold, transferred to the purchaser subject to the prior written consent of the Minister in terms of section 11. "*

It is proposed that the new section 56(g) should rather provide that

> *"Any right, permit and permission granted or issued in terms of this Act shall lapse, whenever – (g) the holder of a right or permit is liquidated and finally deregistered or sequestrated: provided that if the right, permit or permission falls within the insolvent estate it may be sold and transferred to a purchaser subject to the prior written consent of the Minister in terms of section 11."*

Clause 46(b) of the Amendment Bill:

146. Clause 46(b) provides for the substitution of section 69(2)(b) of the MPRDA by including into the present sub-section the additional words "or any provision of this Act" so that it reads "any reference in the provisions referred to in paragraph (a) or any provision in the Act to:".

147. This addition is inappropriate and would, in fact, make the current provisions of section 49(2)(a) obsolete.

147.1. If the underlined words are inserted into section 69(2)(b) it would mean that any reference in any section of the MPRDA to the words contemplated in sub-paragraphs (i) to (viii) of section 69(2) must be construed, in chapter 6 of the MPRDA, to be a reference to the relevant words and phrases used in chapter 6 in relation to the exploitation of petroleum.

147.2. That can clearly not be the intention of the draftsperson of the Amendment Bill.

147.3. It is only where those words occur in the sections referred to in section 69(2)(a) that those words should be so construed. The problem is best demonstrated by an example:

147.3.1. Section 2(d) of the MPRDA provides that the objects of the MPRDA are to "... substantially and meaningfully expand opportunities for historically disadvantaged South Africans, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources".

147.3.2. If the words "or any provision of this Act" is inserted into section 69(b) as is proposed by clause 46 of the Amendment Bill, the word "mineral" in section 2(d) of the MPRDA must be construed to be a reference to petroleum.

147.3.3. That would mean that the underlined phrases in section 2(d) would become superfluous since the word “mineral” would, already, be construed as a reference to petroleum. That, clearly, is inappropriate.

147.3.4. There are many similar examples of the use of the word “mineral” in the MPRDA where it is inappropriate to construe that word as a reference to petroleum.

148. It is suggested, therefore, that the amendment proposed to section 69(2)(b) of the MPRDA by clause 46(b) of the Amendment Bill is inappropriate and should be deleted from the Amendment Bill.

Clause 72 of the Amendment Bill:

149. Clause 72 of the Amendment Bill proposes several amendments to section 98 of the MPRDA which creates offences for the contravention of various sections of the MPRDA. However, the proposed amendments are in several respects inappropriate in that it refers to sections of the MPRDA which include provisions which could never be contravened. In this regard the following observations are apposite:

149.1. The reference to Section 2, in the proposed amended section 98(a)(i), referred to in the proposed amendment section 98(a)(i)) cannot be contravened since section 2 sets out the objectives of the MPRDA and does not place an obligation on any person.

149.2. The reference to section 11, in the proposed amended section 98(a)(i), since several of the sub-sections of section 11, such as, for example, section 11(2) cannot be contravened by any person since it merely places an obligation upon the Minister.

149.3. The reference to section 15, in the proposed amended section 98(a)(i), is inappropriate since section 15(1) cannot be contravened because it defines the rights of a holder of a reconnaissance permission. Only section 15(2) could possibly be contravened.

149.4. The reference to section 19, in the proposed amended section 98(a)(i), is similarly, inappropriate since section 19(1) cannot be contravened.

149.5. The reference to section 25, in the proposed amended section 98(a)(i), is similarly inappropriate since section 25(1) cannot be contravened.

149.6. The reference to section 6, in the proposed amended section 98(a)(i), is similarly not appropriate since sections 26(1), (2) and (2A) cannot be contravened. Only sections 26(2B) and (3) are capable of contravention.

149.7. The reference to section 27, in the proposed amended section 98(a)(i), is similarly inappropriate since most of the sub-sections of section 27 cannot be contravened. It is only possible for the provisions of section 27(7) to be contravened.

149.8. The reference to section 35, in the proposed amended section 98(a)(i), is similarly inappropriate since section 35(1) cannot be contravened.

149.9. The reference to section 43, in the proposed amended section 98(a)(i), is similarly inappropriate since those provisions are mainly procedural and, notionally, only the provisions of section 43(3) and (7) could be contravened.

149.10. The reference to section 102, in the proposed amended section 98(a)(i), is similarly inappropriate since section 102 cannot be contravened.

149.11. The reference to section 21, in the proposed amended section 98(a)(iii), is inappropriate since section 21(1)(B) cannot be contravened save by the council for Geo-science, which clearly, could not have been the intention of the draftsperson of the Amendment Bill.

149.12. The reference to section 11(4), in the proposed amended section 98(iv), is incorrect:

149.12.1. if the reference to section 11 in the proposed amended section 98(a)(i) is retained, the reference to section 11(4) would be a duplication and be superfluous.

149.12.2. section 11(4) provides that the transfer, cession, letting, sub-letting, alienation, encumbrances by mortgage or variation of a prospecting right or mining right contemplated in section 11 must be lodged for registration at the Mineral and Petroleum Titles Registration Office within the prescribed period from the date of execution.

149.12.3. Legally, the transfer of a right only becomes effective upon the registration of that transfer in the Mineral and Petroleum Titles Registration Office. If the parties to a transaction contemplated in section 11 choose, notwithstanding the

execution of a deed of transfer of the right, not to implement that transaction, they should be free to do so. The transaction relating to the transfer of a right is a private law transaction which, although it may require the consent of the Minister in terms of section 11 of the MPRDA, does not require the intervention of the regulator. If the parties wish to proceed with the transaction it can lodge the executed deed of transfer for registration but it is inappropriate to oblige them, at pains of committing a criminal offence, to do so.

149.13. The reference to section 28(1), in the proposed amended section 98(a)(iv), is inappropriate since the proposed amended section 98(a)(iii) already creates an offence for the contravention of section 28. A further reference to section 28(1) is a duplication and superfluous.

149.14. The reference to section 28(2)(d), in the proposed amended section 98(a)(iv), is superfluous since there is no section 28(2)(d) in the MPRDA.

150. It is clear from the aforegoing that the draftsperson of clause 72 of the Amendment Bill drafted the proposed amendments without proper attention to detail and that the proposed amendments should by substantially amended so as to properly reflect the sections of the MPRDA that can be contravened.

Clause 77(a) of the Amendment Bill:

151. Clause 77(a) of the Amendment Bill seeks to insert a new section 107(aA) into the MPRDA which authorises the Minister to make regulations regarding the rehabilitation of disturbances of the surface of the land where such disturbances are connected to prospecting or mining operations.

152. This amendment is inappropriate since the so-called Agreement between the Minister of Environmental Affairs and the Minister of Mineral Resources referred to in section 50A of NEMA provides that

> *"... all environment related aspects ...* [of prospecting and mining] *… would be regulated through one environmental system which is the principal Act*[41] *and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002";*[42]

and that –

> *"... the Minister*[43] *set the regulatory framework and norms and standards, and that the Minister responsible for mineral resources will implement the provisions of the principal Act*[44] *and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations ...".*

153. Clearly, therefore, for the Minister of Mineral Resources to make regulations with regard to rehabilitation of disturbances of the surface of land where such disturbances are connected to the prospecting or mining operations would be a contravention of the agreement with the Minister of Environmental Affairs with regard to the so-called "One Environmental System".

CONCLUSION

154. It is clear from the content of this memorandum that the Amendment Bill is substantially flawed and should be extensively redrafted in order to eradicate all the contradictions, vagueness and frankly, absurdities that will be created should the Amendment Bill be adopted in its present form.

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41 Which is a reference to NEMA.
42 See section 50A(2)(a).
43 This is a reference to the Minister of Environmental Affairs.
44 Which is a reference to NEMA.

155. It should be noted that these comments, save insofar as they refer to the unconstitutionality of some of the amendments, are not focused on the nature of the changes which the legislature may want to make to the present provision of the MPRDA, but rather on the the manner in which those changes are being made in the Amendment Bill. The vast majority of the comments in this memorandum relate to bad drafting and not the substance of the proposed changes.

156. The comments in this memorandum should be attended to in order to create certainty and a properly regulated mining industry.

157. I should warn that amending the Amendment Bill to remove all the flaws pointed out in this memorandum may not be legally possible.

157.1. Section 79(1) of the Constitution provides that the president may refer a Bill back to Parliament if he has reservations about its constitutionality.

157.2. Section 79(2) of the Constitution provides that the Rules of parliament must determine how a Bill, referred back under section 79(1) of the Constitution should be dealt with.

157.3. Rules 202 to 212 of the Rules of Parliament deals with this matter:

157.3.1. Rule 203(2) provides that the Speaker must refer the president's reservations to a parliamentary committee and that that committee must:

157.3.1.1. (a) Consider and confine itself to the president's reservations;

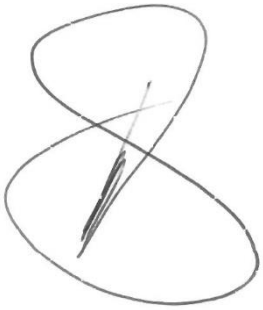
157.3.1.2. (c) must report to the Assembly on the President's reservations.

157.4. It would seem, therefore, that parliament does not have the power to reconsider aspects of the Bill that does not deal with the president's reservations.

157.5. If parliament does make changes to the Amendment Bill other than those referred back to parliament by the president, we may see new constitutional challenges which will delay the final adoption of the Bill even more.

158. In view of the aforegoing it is proposed that serious consideration should be given to repeal the Amendment Bill and to re-adopt a new Amendment Bill in which all the flaws referred to in this memorandum have been addressed.

SIGNED IN SANDTON ON THIS THE 20TH DAY OF MARCH 2017



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