COMMENTARY ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013

Prepared by

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Part 1: Introduction and Executive Summary

1. Introduction

1.1 This submission is made by Webber Wentzel ("**WW**") in response to the invitation of the acting chairperson of the National Assembly's Portfolio Committee on Mineral Resources ("**the Committee**") offering interested and affected parties an opportunity to make written submissions on the proposed amendments to the Mineral and Petroleum Resources Development Act, 2002 ("**the MPRDA**") (as amended by the Mineral and Petroleum Resources Development Amendment Act, 2008 ("**the Amendment Act**")) as set out in the Mineral and Petroleum Resources Development Amendment Bill, 2013 ("**the Bill**").[1]

1.2 WW is a leading law firm in Africa, consistently ranked as such by a number of international ratings agencies in 2013. The firm has a staff complement of approximately 800 people (including over 150 partners and more than 440 fee-earners in a variety of legal disciplines) in offices in Johannesburg and Cape Town. Our client base includes many of South Africa's Top 100 companies in the mining, energy & infrastructure, financial services, insurance, oil & gas, transport, information technology, and media & telecommunications sectors.

1.3 Our mining sector group is the largest dedicated mining group based on the African continent. It is uniquely positioned to provide mining clients, including governments, with the most comprehensive offerings, covering all aspects of mining and resources law. Comprising over forty lawyers, the team brings together regulatory, mergers and acquisitions, corporate, commercial, project development, environmental, health & safety, and cross-border dispute resolution lawyers, all with extensive international experience advising clients in mining and related industries.

2. Executive Summary

2.1 We commend the drafters of the Bill on its laudable objects which aim to, among other things:

2.1.1 improve the regulatory system;

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[1] The Minister published her intention to introduce the Bill into Parliament during June 2013 in Government Notice. 567 published in *Government Gazette* 36523 of 31 May 2013, attaching an explanatory memorandum summarising the Bill. The Bill was tabled in the National Assembly on 21 June 2013 and published on 24 June 2013. On 5 August 2013, Ms FC Bikani, MP, Acting Chairperson of the Portfolio Committee on Mineral Resources issued an invitation to all interested individuals and organisations to submit written comments on the Bill before 6 September 2013.

2.1.2 remove ambiguities; and

2.1.3 streamline administrative processes.

2.2 In our view, however, the proposed amendments contained in the Bill do not appear to achieve these objectives and, in fact, contradict and undermine them, as well as exacerbate the problems currently underlying the provisions of the MPRDA.

2.3 In our view, the Bill has been drafted inadequately and as a result a number of the provisions are vague, ambiguous and unclear. We note that this may potentially contravene the rule of law principle enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), which, among other things, requires legal certainty.

2.4 The vague wording of a number of important provisions introduced by the Bill, together with the broad administrative discretion afforded to the Minister of Mineral Resources ("**the Minister**") as well as the Department of Mineral Resources' ("**DMR**") regional managers ("**Regional Managers**") are likely to create further regulatory uncertainty in the mining industry.

2.5 The National Development Plan 2030[2] which was adopted by the Cabinet on 7 September 2012 states that in order to address the major constraints inhibiting accelerated growth and development of the mining sector and thus the growth of investment, outputs, exports and employment in the mining sector, the government must, among other things, *"[ensure] certainty in respect of property rights; [pass] amendments to the [MPRDA] to ensure a predictable, competitive and stable mining regulatory framework*".[3] Given the concerns expressed in this submission, it is clear that, the Bill, if enacted in its current form, would not achieve these objectives. If the Bill is amended to address these concerns appropriately, it would go a long way towards developing the "*predictable, competitive and stable mining regulatory framework*" which is crucial to the development and growth of the mining industry.

2.6 The following specific amendments introduced by the Bill are of particular concern:

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[2] *Our future – make it work: National Development Plan 2030*, National Planning Commission, published on 15 August 2012.

[3] *Ibid*, at 147. See *ibid* at 42, where the National Development Plan states that one of the reasons why the South African mining industry failed to take advantage of the global commodities export boom which occurred in the last decade, is the fact that South Africa's regulatory and policy framework hinders investment in the mining sector. Also see *ibid*, at 156, where the National Development Plan lists the urgent need for regulatory reform to provide policy certainty in the first phase of the "*movement towards an inclusive and dynamic economy*".

Historic tailings

2.6.1 the proposed amendment of the existing definition of "*residue stockpile*" would bring tailings dumps which came into existence before 1 May 2004 (that is the commencement date of the MPRDA) ("**historic tailings**") under the ambit of the MPRDA. Although the proposed section 42A of the MPRDA creates transitional provisions to bring residue stockpiles and residue deposits within the ambit of the MPRDA by introducing the concept of a reclamation permit, the Bill fails to regulate the transition adequately. Further, this may in fact give rise to the expropriation of historic tailings under section 25 of the Constitution.

Mineral beneficiation

2.6.2 the proposed amendments to section 26 of the MPRDA, which deal with mineral beneficiation, would vest broad discretion in the Minister, without providing any criteria as to how this discretion should be guided. The proposed amendments to section 26 allow the Minister, in her sole discretion, to prescribe the levels required for beneficiation, the percentage per commodity and the developmental pricing conditions that are required for beneficiation, as well as the percentage of raw mineral or mineral products to be offered to local beneficiators. The proposed amendments appear to be in conflict with South Africa's international trade law obligations, as well as with the property clause in section 25 of the Constitution;

Environmental regulation

2.6.3 the Bill proposes to overhaul the environmental management regime contained in the MPRDA. The Bill does not, however, provide for any transitional arrangements, nor does it resolve the apparent conflicts between the MPRDA and the National Environmental Management Act, 1998 ("**NEMA**"). Furthermore, with regard to the issue of a closure certificate the Bill envisages that a right holder would no longer be indemnified from liability for environmental damage after the issue of a closure certificate. This defeats the purpose of a closure certificate. For this reason, it is recommended that this amendment should be excluded from the Bill;

Transfer of rights / interests

2.6.4 as regards the Bill's proposed amendment relating the transferability and encumbrance of prospecting and mining rights under section 11 of the MPRDA, it is of concern that the term "*interest*" is undefined and that the

transfer of a "*controlling interest*" in listed mining companies now falls with the ambit of section 11;

Designated minerals

2.6.5 with regard to associated minerals, the Bill allows a third party to hold a right to associated minerals over the same area where another party has been granted the right to mine or prospect for a primary mineral. The Bill does not address the practical difficulties that have arisen regarding the mining of associated minerals, which will further be examined in this submission;

Penalties

2.6.6 the proposed sanctions in relation to penalties are excessive and disproportionate and should be revisited as they have no rational basis;

Sequence of applications

2.6.7 there are two proposed amendments on which clarity is required. The first is the proposed deletion of section 9 of the MPRDA regarding the order of processing applications, which appears to abolish the 'first-in-first-assessed' principle. Although it appears that this principle is seemingly now catered for by the amendments effected by the Amendment Act to sections 16(2)(c) and 22(2)(c) of the MPRDA, the intention of the legislature to delete the ‘first-in-first-assessed’ principle should be unambiguous. The second aspect that requires clarity relates to the rights and obligations of a mining right holder, in particular in relation to the review of social and labour plans. Although the Bill provides for a five yearly review, it does not state by whom this would be conducted and what criteria would be applied. In the absence of more detail, both these provisions would lead to further uncertainty in the mining industry;

Free carried interest in oil and gas operations

2.6.8 the Bill inserts a definition of "*free carried interest*", which is defined as *"a share in the net profits derived from the exercise of an exploration right or production right issued in terms of [the MPRDA] as acquired by the state in*

terms of section 80(7) or 84(6), as the case may be, despite the State not contributing to capital expenditure";[4] and

2.6.9 the provisions in relation to the free carried interest are vague. The definition of "*free carried interest*" merely refers to a "*share in the net profits*", without setting out how large this share should be. This is not clarified in sections 80(7) or 84(6). In addition, these sections do not make any provision for how the extent of the free carried interest will be determined, and whether it will be imposed on a case-by-case basis or as a standard industry practice.

Each of these concerns is addressed in more detail below.

3. General concerns with the Bill

3.1 Vagueness and uncertainty

3.1.1 The Bill is fraught with instances of vague and uncertain language. Not only does this give rise to regulatory uncertainty, it allows administrators who are empowered under the Bill an overly broad discretion, which compounds this issue (see 3.3 for further discussion on this aspect).

3.1.2 As the Constitutional Court has repeatedly recognised, the rule of law is a foundational value enshrined in section 1(c) of the Constitution.[5] Mokgoro J in *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* held that "*central to the rule of law is the principle of legality which requires that law must be certain, clear and stable*".[6]

3.1.3 Moreover, Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa* quoted with approval an extract from De Smith, Woolf and *Jowell Judicial Review of Administrative Action*:[7]

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[4] An "*exploration operation*" is defined in section 1 of the MPRDA as "*the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery*". A "*production operation*" is defined in section 1 of the MPRDA as "*any operation, activity or matter that relates to the exploration, appraisal, development and production of petroleum*".

[5] Section 1(c) of the Constitution reads: "*The Republic of South Africa is one, sovereign, democratic state founded on the following values: …(c) Supremacy of the constitution and the rule of law".*

[6] *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at para 26.

[7] De Smith, Woolf & Jowell Judicial Review of Administrative Action 5 ed (Sweet & Maxwell, London 1995) at 14-15.

"*the rule of law embraces some internal qualities of all public law: that it should be certain, that it is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation*".[8]

3.1.4 The vague and uncertain wording of the Bill contravenes the principle of the rule of law and is thus potentially unconstitutional.[9] A pertinent example of the Bill's use of vague and uncertain language include its proposed amendment to section 17 and the inclusion of definition of "*concentration of rights*":

3.1.4.1 the Bill proposes to insert the phrase "*concentration of rights*" into sections 17(2)(b), 23(3)(b) and 80(3)(b) of the MPRDA respectively, to provide that the Minister *must* refuse to provide a prospecting right,[10] mining right,[11] or exploration right,[12] if this would result in a concentration of rights under the control of the applicant, and in the case of a prospecting right or a mining right, the associated companies of the applicant, a term which the Bill does not define; and

3.1.4.2 while the Bill refers to "*concentration of rights*", the MPRDA refers to "*concentration of mineral resources*". It remains unclear what the intention of this change in terminology is It is uncertain whether the

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[8] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 39. This *ratio decidendi* has been reaffirmed by the Constitutional Court in *Van Vuren v Minister of Correctional Services and Others* 2010 (12) BCLR 1233 (CC).

[9] *Affordable Medicines Trust v Minister of Health of the Republic of South Africa* 2005 6 BCLR 529 (CC) ("***Affordable Medicines***"), at para 108, *Dawood and another v Minister of Home Affairs; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* 2000 (8) BCLR 837 (CC) ("***Dawood***"), at para 97; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) ("***Hugo***"), at para 102; and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others V Smit NO and Others* 2001 (1) SA 545 (CC) ("***Hyundai***"), at para 24.

[10] Clause 12(e) of the Bill proposes to amend section 17(2)(b) of the MPRDA. Section 17(2)(b), as amended by the Bill (underlined) and Amendment Act (in bold), reads: "*the granting of such right will* ***result in the concentration of*** *rights* ***under the control of the applicant and*** *its* ***associated companies***".

[11] Clause 18(e) of the Bill proposes to amend section 23(3)(b) of the MPRDA. Section 23(3), as amended by the Bill (underlined) and Amendment Act (in bold), reads:

"***The Minister must, within*** *the prescribed period* ***of receipt of the application from the Regional Manager, refuse to grant a mining right if—***

(a) ***the application does not meet the requirements referred to in subsection (1)****; and*
(b) *the granting of such right will result in the concentration of rights in question under the control of the applicant and its associated companies.*"

[12] Clause 54(c) of the Bill proposes to amend section 80(3)(b) of the MPRDA. Section 80(3), as amended by the Bill (underlined) and Amendment Act (in bold), reads:

"*The Minister must,* ***within*** *the prescribed period* ***of the receipt of the application from the*** *Regional Manager, refuse to grant an exploration right if—*

(a) the application does not meet all the requirements referred to in subsection (1).; and
(b) the granting of such a right will result in the concentration of rights in question under the control of the applicant".

Minister will consider the specific minerals or whether the Minister will consider all rights held by the applicant.

3.1.5 The Bill also fails to remedy the vague and uncertain language currently employed by the MPRDA. A pertinent example is the Bill's failure to deal with the ambiguities in section 11 of the MPRDA, in particular the meaning of "*interest*" in section 11(1).

3.2 **Time periods**

3.2.1 The Bill contains numerous proposed amendments which delete and replace specific time periods currently contained in the MPRDA with a "*prescribed period*" which is yet to be determined.

3.2.2 It is anticipated that these "*prescribed periods*" will be regulated in further regulations yet to be promulgated by the Minister. This is another example of 'rule by regulation'.[13] This creates uncertainty for holders of rights. It also has the resultant effect that stakeholders in the mining industry, as well as other interested and affected parties, will not be afforded the opportunity to make submissions on the time periods set out in the proposed regulations, as would have been the case had the Bill made specific reference to these periods.

3.2.3 The stipulated time periods should be retained and, in addition, further time periods should be included.

3.2.4 It is evident that the Bill is vague in this regard and the lack of time periods creates further uncertainty and leaves these crucial time periods uncertain. It is recommend that the time periods currently contained in the MPRDA are not deleted and replaced by so-called "*prescribed periods*" which are yet to be adopted.

3.3 **Broad and unfettered administrative discretion**

3.3.1 Much of what the Bill itself should contain is left to the Minister's discretion. The Bill does not provide any guidance as to how this discretion should be exercised by the Minister. Examples include: (i) clause 21 of the Bill which gives the Minister broad discretion regarding beneficiation and the export of

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[13] This construction is used, for instance, in sections 11(4); 13(3); 14(3); 16(3) and (4); 17(1) and (2); 19(2)(a); 22(2), (3) and (5); 23(3) and (4); 25(2)(a); 27(4), (5)(b), (6) and (7)(e); 35(2)(c); 73(3); 74(2), (3) and (4) of the MPRDA, as proposed to be amended by the Bill.

minerals;[14] (ii) clause 8(a) of the Bill which subjects the disposal of a right to those conditions which the Minister may determine;[15] (iii) the power afforded to the Minister under clause 15(a) to impose conditions over the removal of a mineral from a prospecting area;[16] as well as (iv) the Minister's power to require the applicant for an exploration right to comply with the Amended Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry ("**the Revised Mining Charter**").

3.3.2 There is a strong argument that the discretion afforded to the Minister under the Bill in these instances is overbroad and contrary to the rule of law. As mentioned in 2.3, the rule of law requires law to be certain, and that the exercise of powers and discretions under the law not be undertaken in an unrestricted manner. Those who are affected by the exercise of broad discretionary powers by administrative officials must know, among other things, what is relevant to the exercise of those powers.[17] This means that the relevant provision must indicate with reasonable certainty to those officials who are bound by it what is required of them, so that they may regulate their conduct accordingly.[18] The Constitutional Court has also held that it would be inappropriate for a regulator to exercise an unfettered as well as unguided discretion in situations fraught with potentially irreversible and prejudicial consequences to business entities and others who may be affected.[19]

3.3.3 In addition, the Bill allows the Minister to publish her decisions in these instances in regulations to the MPRDA or even as directives in a *Government*

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[14] Clause 21 of the Bill amends section 26 of the MPRDA. See 14.3 for further discussion on this amendment.

[15] Clause 8(a) of the Bill amends section 11 of the MPRDA. See 9 for further discussion on this amendment.

[16] Clause 15(a) of the Bill amends section 20(2) of the MPRDA in the following way (the underlined text is inserted by clause 15(a)):

"*The holder of a prospecting right shall not without the prior written permission of the Minister remove any mineral from a prospecting area for any purpose except for having such mineral analysed, valued or tested subject to such conditions as the Minister may determine;…*".

[17] See, for instance, *Dawood*, *op cit*, note 6, at para 22, where the Constitutional Court stated that:

"*[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner…if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision*".

[18] Similarly, Justice Ngcobo in *Affordable Medicines, op* cit, note 10, at para 108, held that in order for a rule to comply with the requirement that it be "*stated in a clear and accessible manner*" its meaning must "*indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*". In the Constitutional Court judgment of *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) at para 65, Justice Skweyiya further added that rules:

"*should be communicated in clear language so those affected can know what it is they should do in order to comply with the law… [t]he public should not have to rely on lawyers to interpret the meaning and import of words in proclamations*".

[19] *Janse van Rensburg*, *NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC), at para 31.

Gazette notice. This means that industry stakeholders and other interested and affected parties would not have the opportunity to make submissions on the determination of these time periods.

3.3.4 In general, the instances where the Bill confers an overly broad administrative discretion on the Minister or other administrative officials can be made constitutionally compliant either by:

3.3.4.1 the inclusion in the relevant provisions of the detail which they currently do not contain and which the Bill, as currently drafted, leaves to be decided by the Minister (or the relevant administrative official) in the future; or

3.3.4.2 in those instances where a discretion is afforded to the Minister (or the relevant administrative official), the specification of objective criteria which the Minister *must* take into consideration when exercising her discretion to ensure that it is exercised in a clear and certain manner. The substance of such guidelines or factors would, of course, depend upon the nature of the decision to be made by the Minister.

Part 2: Commentary on the provisions of the Bill

4. **Proposed amendments to section 1 of the MPRDA**

4.1 **Definition of "*designated minerals*"**

4.1.1 In our view, the proposed insertion of the definition of "*designated minerals*" contains no guidance as to what minerals will constitute designated minerals or how the process of designating minerals will be governed and, as such, grants the Minister an unfettered and broad discretion to declare certain minerals to be designated minerals.

4.1.2 We recommend that the Bill should either incorporate such guidelines in the MPRDA or make provision for guidelines to be published in the Government Gazette, which guidelines must clearly identify the procedure to be followed and the criteria to be met for a mineral to be declared a designated mineral. Further, the distinction between designated minerals and strategic mineral is not clear.

4.2 **Definition of "*employee*"**

4.2.1 We note that the definition of "*employee*" has not been amended and remains a reflection of the definition of employee contained in the Labour Relations Act, 1995 ("**the LRA**").

4.2.2 In our view, there is a varying distinction between the definition of "*employee*" as contained in the MPRDA and the definition of "*employee*" as contained in the Mine Health and Safety Act, 1996 ("**MHSA**"). The MHSA provides that all persons performing work on a mine are deemed as "*employees*" of the owner of the mine. As such, we recommend that the definition contained in the MPRDA and the definition contained in the MHSA are aligned.

4.3 **Definition of "*free carried interest*"**

4.3.1 Free Carried Interest is defined in the Bill as:

> "*a share in the net profits derived from the exercise of an exploration right or production right issued in terms of [the MPRDA] as acquired by the State in terms of section 80(7) or 84(6), as the case may be, despite the State not contributing to capital expenditure*".

4.3.2 We refer you to the following proposed sections in this regard:

4.3.2.1 section 80(7) grants the State a free carried interest in all new exploration rights, with an option to acquire a further interest through a designated organ of State or State-owned entity, as determined by the Minister in the *Government Gazette*; and

4.3.2.2 similar provision is made for new production rights under section 84(6) and section 84(7) and further provides that the State, when exercising its option in terms of section 84(6), must be issued with special shares which carry the right to appoint up to two directors to the management board of the production operation, with alternates, and these shares would also carry the right to receive all dividends or other distributions in respect of the further shares issued to the State.

4.3.3 The provisions provided for in the Bill in relation to free carried interest are unworkably vague. The definition of "*free carried interest*" merely refers to a "*share in the net profits*", without setting out the size of share in this regard. This is not made any clearer in section 80(7) or 84(6) and these sections do not make any provision for who will determine the extent of the free carried

interest, and whether it will be imposed on a case-by-case basis or as a standard practice across the industry.

4.3.4 A further concern is the stipulation contained in the proposed section 84(7) that the State must be issued with special shares which carry the right to appoint up to two directors. This may be a practical impossibility, as many rights in the petroleum industry are held by unincorporated joint ventures, which have no directors.

4.3.5 It is of concern that the provisions relating to free carried interest may be a disincentive to investment in the petroleum industry in South Africa, particularly as it will not be compensated and the State will have an unconstrained discretion to determine how large this interest may be.

4.3.6 We recommend that these provisions will undoubtedly need to be fleshed out if they are to accord with the requirements of the rule of law and thus pass constitutional muster. If the government is intent on imposing a free carried interest, it may be better for this to be provided for in separate legislation, properly introduced by way of a money bill in parliament in terms of section 77 of the Constitution with sufficient detail on how the free carried interest will operate.

4.4 **Definition of "*gasification*"**

4.4.1 The Bill amends the definition of "*mine*", when used as a verb, to include the process of "*gasification*". We recommend that the Minister, DMR and the drafters of the Bill dispel any disputes as to whether the company carrying out the process of gasification requires a mining right or a production right to do so, and instead confirm that a company must obtain a mining right to carry out gasification as it is considered to be an act of mining.

4.4.2 We note that the Bill does not amend section 107 of the MPRDA. The invitation to comment on the Mineral and Petroleum Resources Development Amendment Bill, 2012 provided the petroleum industry with the opportunity to request the DMR to amend section 107 of the MPRDA to empower the Minister to make bespoke regulations regarding non-conventional gas. Such regulations are essential to promoting regulatory certainty to this particular sector of the industry and thus promote its development.

4.5 **Definition of "*historically disadvantaged South Africans*"**

4.5.1 The Bill, similarly to the Revised Mining Charter, incorporates a requirement for demographic representivity of "*historically disadvantaged South Africans*" ("**HDSAs**").

4.5.2 A statement that HDSAs should be representative of the demographics of the country is vague as well as ambiguous as to the group of persons who can be designated as HDSAs in this regard.

4.5.3 The term "*demographics*" has not been defined, leaving the definition ambiguous and open to interpretation. It is, however, clear that the inclusion of the term "*demographics*" is aimed at ensuring that the numerical characteristics of a particular demographic group will determine how that group is to be treated in relation to other groups from a 'previously disadvantaged' perspective. On this basis, African persons, as they constitute the majority of South Africa's population, must be given preference over Coloured persons, who in turn must be given preference over Indian persons.[20] This has an impact on the number of White women qualifying as HDSAs for the purpose of the Bill. This is notwithstanding the inclusion of "*women*", unqualified by race, in the definition of "*designated groups*" in section 1 of the Employment Equity Act, 1998.

4.5.4 There does not appear to be any warrant for the Bill's demographic differentiation in section 9(2) of the Constitution, section 1 of the Broad-Based Black Economic Empowerment Act, 2003 ("**B-BBEE Act**") or the Revised Broad-Based Black Economic Empowerment Codes of Good Practice[21] (the "**revised B-BBEE codes**").

4.5.5 On 23 May 2013, the National Assembly's Portfolio Committee on Trade and Industry unanimously adopted a provision in the Broad-Based Black Economic Empowerment Bill Amendment, 2012 ("**B-BBEE Bill**") which provides that "*[i]n the event of any conflict between this act and any other law in force immediately prior to the date of the commencement of the Broad-Based Black Economic Empowerment Amendment Act 2013, this act prevails if the conflict*

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[20] According to Statistics South Africa's mid-year population estimates for 2013 (available at http://www.statssa.gov.za/publications/P0302/P03022013.pdff), African people constitute 79.8 per cent of South Africa's population, Coloured people constitute 9 per cent, Indian/Asian people 2.5 per cent, and White people make up 8.7 per cent of South Africa's population.

[21] Published in Government Notice 800 in *Government Gazette* 35754 of 5 October 2012.

specifically relates to a matter dealt with in this act".[22] The provisions of the B-BBEE Act and its regulations, including the codes of good practice on black economic empowerment issued under the B-BBEE Act, will thus trump any provision in any other law relating to empowerment. To enable the industry to align itself with the provision of the B-BBEE Bill, the trumping provision in the B-BBEE Bill will only come into operation one year after the rest of the B-BBEE Bill takes effect.

4.5.6 The Bill and the Revised Mining Charter will thus be required to be aligned with the B-BBEE Act and the revised B-BBEE codes.

4.6 **Definition of "*labour sending areas*"**

4.6.1 In our view, the definition of "*labour sending areas*", being areas from where the majority of mineworkers, both historical and current, are or have been sourced, will extend to areas which may fall outside the boundaries of the Republic of South Africa ("**South Africa**") and may include primarily the Republic of Mozambique, the Kingdom of Lesotho and the Republic Zimbabwe under various labour sourcing agreements. This must undoubtedly be considered when a holder considers the proposed obligations contained in the Bill in respect of such labour sending areas.

4.7 **Definition of "*mining area*"**

4.7.1 The definition of "*mining area*" is deleted and replaced in its entirety in the Bill.

4.7.2 The proposed amendment refers to "*adjacent land*" which in our view, if adopted, would have practical implications as this could include another mining area and create a conflict/overlap of rights. In our view, this definition, as drafted in the Bill, is far too wide.

4.8 **Definition of "*prospecting area*"**

4.8.1 The definition incorrectly refers to the area to which a mining right or a mining permit is granted. This should make reference to an area for which a prospecting right has been granted.

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[22] L Ensor *Parliamentary committee adopts 'trumping' clause in BEE bill* Business Day 23 May 2013 (Accessed http://www.bdlive.co.za/national/2013/05/23/parliamentary-committee-adopts-trumping-clause-in-bee-bill 8 July 2013).

4.8.1 The definition of "*prospecting area*" is deleted and replaced in its entirety in the Bill. In relation to any environmental, health, social and labour matter and any residual, latent or other impact on such a matter, the definition of prospecting area includes land or surface adjacent or non-adjacent to the area for which a prospecting right or permit is granted. In view of the wide ambit of the definition of land, it is unclear what would constitute a "*surface*" other than land for the purposes of the definition of "*prospecting area*".

4.8.2 This definition if adopted would also have practical implications as this could include another prospecting or mining area and create a conflict/overlap of obligations. The Bill, however, does not put in place any precautionary measures to avoid the potential difficulties and conflicts which may arise from overlapping obligations. In our view, this definition, as drafted in the Bill, is far too wide.

4.9 **Definition of "*strategic minerals*"**

4.9.1 Similarly to the definition of "*designated minerals*", the proposed amendment to the definition of "*strategic minerals*" contains no guidance as to what constitutes such mineral, how the process will be governed, and grants an unfettered and broad discretion to the Minister to declare certain minerals to be strategic minerals. This definition creates further ambiguity and uncertainty and the defined term is not used in the Bill.

4.9.2 We recommend that the Bill should make provision for guidelines to be published which identify the procedure to be followed and the criteria to be met for a mineral to be declared a strategic mineral.

4.10 **Definition of "*this Act*"**

4.10.1 Clause 1(zA) of the Bill amends the definition of "*this Act*" under section 1 of the MPRDA, so that it reads as follows:

> "*'this Act' includes -*
>
> *(a) The regulations and any term or condition to which any permit, permission, right, consent, exemption, approval, notice, closure certificate or directive issued, given granted or approved in terms of this act; and*
>
> *(b) <u>The Codes of Good Practice for the South African Mineral Industry [("**the Codes of Good Practice**")] [,] Housing and Living Conditions</u>*

*Standards for the Minerals Industry [("**the Standard**")] and the Amended Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry];…".*

4.10.2 In our view, the definition as amended is too broad as it seeks to include, not only the Codes of Good Practice and the Revised Mining Charter but also directives and closure certificates as part of the contents of the Act and gives these instruments the same legal status as the MPRDA. This is problematic in that these instruments contain differing standards for the same subject matter, making it impossible for a mining company to comply with all of these legal instruments and thus with "*this Act*". This is apparent, for instance, with regard to the housing and living conditions,[23] beneficiation[24] and black economic empowerment.[25]

4.10.3 It is thus foreseeable that a mining company may be in compliance with one instrument, but fall short of the standards imposed by another. The Codes of Good Practice and the Standard have not been enforced by the DMR for this very reason. Furthermore, the Revised Mining Charter is currently *ultra vires* as the MPRDA did not empower the Minister to amend the Revised Mining Charter's predecessor, the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry.

4.10.4 The effect of the proposed inclusion of these instruments in the definition of "*this Act*", however, would apparently require that the Revised Mining Charter, the Standard and the Codes of Good Practice come into force upon the enactment of the Bill. Mining companies which do not comply with their

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[23] With regard to housing and living conditions, the Standard stipulates very broad requirements, such as "*a decent standard of housing for mineworkers*" and "*[being] responsive to housing demand*". The Standard does not provide any measurable 'hard' targets. The Revised Mining Charter, however, requires mining companies to comply with a number of 'hard targets' including: the conversion or upgrade of hostels into family units by 2014; attainment of an occupancy rate of one person per room by 2014; and the facilitation of home ownership options for all employees by 2014. The Revised Mining Charter provides a scorecard which allocates points for compliance with each of these targets for each year from 2010 to 2014.

[24] As regards beneficiation, the Revised Mining Charter requires compliance with section 26 of the MPRDA. In addition, the Revised Mining Charter provides for a beneficiation offset against a portion of its historically disadvantaged South African ("**HDSA**") ownership not exceeding eleven per cent. The MPRDA, however, does not provide for a beneficiation offset. In addition, the criteria stipulated in the Revised Mining Charter's scorecard for the assessment of beneficiation are unclear, and differ from what is stated in the MPRDA and the Revised Mining Charter.

[25] With regard to black economic empowerment, there are a number of significant differences between the requirements stipulated by the Revised Mining Charter and those stipulated in the Codes of Good Practice. The Revised Mining Charter requires that mining companies achieve twenty-six per cent HDSA ownership by 2014. It makes use of concepts such as "*meaningful economic participation*" and "*effective ownership*" to impose additional requirements as regards black economic empowerment. The Codes of Good Practice, on the other hand, stipulate three elements (voting rights, economic interest and net value) in terms of which black economic empowerment of a company must be gauged.

provisions on that date of the Bill's enactment would be subject to the sanctions and penalties under the section 99 of the MPRDA, as well as to the Minister's power under section 47 of the MPRDA to cancel a right if its holder contravenes the Act as specified thereunder.[26]

4.10.5 We suggest that paragraph (b) of the definition of "*this* Act" as inserted by clause 1(zA), particularly the inclusion of the Codes of Good Practice and the Standard thereunder, should be deleted.

5. **Proposed amendment - section 5A as contained in clause 3 of the Bill**

5.1 The introduction of section 5A(c) of the Amendment Act provides *"no person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, retain, explore for and produce any mineral or petroleum or commence with any work incidental thereto without…giving the landowner or the lawful occupier of the land in question at least 21 days' written notice*". Consultation with the landowner or lawful occupiers of land is no longer required as section 5(4)(c) has been deleted. The meaning of "*retain*" is unclear in this regard.

5.2 Sections 16 and 22 require the applicant for a right to consult with the landowner or lawful occupier of the property during the application phase. Once a right has been granted and the holder wishes to gain access to the land in order to conduct prospecting or mining operations, a second phase of consultation is undertaken under section 5 of the MPRDA. During second phase of consultation, set out in section 5, compensation and access are discussed and agreed between the landowner and the right holder. In our view, that consultation is practically necessary in this regard and gives effect to section 54.

5.3 In our view, the mere serving of notice conflicts with section 54, which section implies that agreement regarding compensation must be reached before a right holder may enter a landowner's land.

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[26] Clause 3 of the Revised Mining Charter states, in a somewhat convoluted manner, that non-compliance with its provisions (and the MPRDA) shall render the mining company in breach of the MPRDA, and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the MPRDA. In addition despite the disputed status of the Revised Mining Charter, the DMR has implemented it. Thus the inclusion of the Revised Mining Charter under the definition of "*this Act*" is of little practical significance. The Codes of Good Practice, however, do not contain a 'non-compliance' clause as the Revised Mining Charter does, and the Standard states that non-compliance with its provisions shall render the relevant mining company subject to section 47 of the MPRDA. As mentioned, the DMR has not implemented the Codes of Good Practice or the Standard. The inclusion of the Codes of Good Practice and the Standard under the definition of "*this Act*" has a significant effect on status and enforcement.

5.4 We suggest that the word "*or*" to be replaced with "*and*" in order to ensure that landowners and lawful occupiers, who will be affected by the prospecting activities, will be consulted prior to such activities being conducted on their property.

6. **Proposed amendment - section 9 as contained in clause 5 of the Bill**

6.1 Clause 5 of the Bill substitutes section 9 of the MPRDA, so that it reads:

> "(1) *The Minister may by notice in the Gazette invite applications for* reconnaissance permission, *prospecting rights, exploration rights, mining rights, production rights and mining permits in respect of any area of land, block or blocks, and may subject to the provisions of the Act*, *prescribe in such notice the period within which any application may be lodged with the Regional Manager and the terms and conditions subject to which such rights and permits may be granted*.
>
> (2) *Any acreage relinquished or abandoned, or any right or permit that has been cancelled, relinquished, abandoned or has lapsed, will not be available for application until the Minister invites applications as contemplated in subsection (1*)".

6.2 Section 9 of the MPRDA, currently deals with instances where more than one application is received for a right, and provides that (i) applications received on different dates must be dealt with in order of receipt; and (ii) applications received on the same date must be regarded as having been received at the same time, with preference given to applications from historically disadvantaged persons.

6.3 The explanatory memorandum attached to the notice indicating the Ministers intention to introduce the Bill into parliament,[27] records that section 9 "*is amended by substituting the application process of first come first served with a process in terms of which the Minister reserves a right to periodically invite applications by notice in the Gazette*", however, the Bill itself is unclear.

6.4 The purpose for the amendment of section 9 is unclear and it is presumed that the deletion would not affect existing rights and/or applications for rights, however, the Bill should clearly stipulate this.

6.5 We note that the Amendment Act inserted subsections 16(2)(c), 22(2)(c), 79(2)(c) and 83(2)(c) into the MPRDA, relating to applications for an exploration right and a

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[27] See footnote 1.

production right respectively. These sections provide that an application must be accepted provided that "*no prior application … has been accepted for the same mineral on the same land and which remains to be granted or refused*" (our emphasis).

6.6 In our view, these provisions effectively impose the 'first-in-first-assessed' principle on the application process, and do so to an even greater degree than section 9 of the MPRDA, as applications received on the same day are no longer considered to have been received at the same time, but rather in the order in which they were submitted. The first application to be received on that day will be considered first. Any other applications received on that day will only be considered if the first application is rejected by the DMR. It appears as if the proposed deletion of section 9 of the MPRDA by the Bill merely removes any repetition of the contents of subsections 16(2)(c), 22(2)(c), 79(2)(c) and 83(2)(c) inserted by the Amendment Act.

6.7 This, however, is not clear from the Bill, and the wording of section 9 of the MPRDA is not identical to what was inserted by the Amendment Act in subsections 16(2)(c) and 22(2)(c). We suggest that clause 5 of the Bill should be amended to indicate clearly whether the 'first-in-first-assessed' principle is still applicable. Clarity on this issue is important as the abolition of the 'first-in-first-assessed' principle would fundamentally alter the regulatory regime for the processing of applications.

7. Proposed amendment - section 10 as contained in clause 6 of the Bill

7.1 The proposed amendment to section 10(2)(a) provides that any objection to the granting of a prospecting right, mining right or mining permit must be referred to the Regional Mining Development Committee ("**REMDEC**"). No provision is made for "*either party*" to directly make submissions to REMDEC.

7.2 The proposed amendment to section 10(2)(b) provides that the Regional Manager may refer the objection to the applicant to consult with the person objecting and submit the result of the consultation within 30 days from the date of such referral. The period of 30 days is very short and it is unlikely that such a brief period will result in any meaningful outcome from the consultation between the applicant and the objector.

7.3 We recommend that:

7.3.1 in respect of section 10(2)(a), the applicant should be informed of the reasons for the objections, and both parties should have the opportunity to make

submissions to REMDEC. We suggest that the process provide a guideline on whether the applicant and the objecting party should consult with one another in an attempt to resolve the objection;

7.3.2 the time period in respect of section 10(2)(b) should be increased to a minimum of 60 or a maximum of 90 days and

7.3.3 section 10(3) should be amended to provide that confirmation of the agreement reached between the parties should be sent to the Regional Manager and REMDEC for noting.

8. **Proposed amendment - section 10 A - G as contained in clause 7 of the Bill**

8.1 We note that:

8.1.1 section 10C(2) only makes provision for State representatives to be appointed to the REMDEC by the Minister. No provision has been made for stakeholder representation in the composition of REMDEC;

8.1.2 section 10C(3) seeks to allow the Minister the option to appoint a representative from "*any relevant public entity*" to REMDEC. The reason for this inclusion is not clear from a reading of the Bill and it is necessary for this to be expanded upon;

8.1.3 section 10E(2) provides that the Minister may remove a committee member on account of misconduct. The remedy provided for in the amendment does not, in our view, consider or remedy the harm or damage that may have already occurred;

8.1.4 the insertion of the word "*initial"* before the word "*term*" in section 10F(2) would clarify that a member may only serve for two terms;

8.1.5 provision should be made in section 10C(2) for stakeholder representation in the composition of REMDEC;

8.1.6 in respect of section 10E(2) the Minister should be empowered to revoke or refuse to grant any rights or licences to a member who engaged in an activity that undermines the integrity of the committee; and

8.1.7 in regard to section 10F(2), the time-frames need to be clearly set-out, as the periods for which the appointments are made, are not clear.

9. **Proposed amendment - section 11 as contained in clause 8 of the Bill**

9.1 Clause 8(a) and (b) of the Bill respectively amend section 11(1) of the MPRDA, which was amended by section 8 of the Amendment Act (although such amendment has yet to take effect) and insert subsection 11(2A) into the MPRDA, so that subsequent to the amendments introduced by the Amendment Act and those proposed by the Bill (insertions underlined and deletions in square brackets and bold), sections 11(1) and 11(2A) of the MPRDA read as follows:

> "(1) 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, or any interest in an **unlisted company or any controlling interest in a listed company (which companies hold a prospecting right or mining right or an interest in any such right),** may not be ceded, transferred, encumbered, let, sublet, assigned, or alienated or otherwise disposed of without the prior written consent of the Minister, and subject to such conditions as the Minister may determine."
>
> and
>
> "*(2A) Any transfer of a part of a prospecting right or mining right contemplated in subsection (1) must be granted if -*
>
> *(a) the application for such transfer is accompanied by an application in terms of section 102 to vary the right;*
>
> *(b) the transferee has simultaneously lodged an application in terms of section 16 or 22, as the case may be;*
>
> *(c) the applicant has complied with the requirements contemplated in section 17 or 23, as the case may be; and*
>
> (d) *the applicant has been granted a prospecting right or mining right to which the transfer relates*".

9.2 The proposed amendment to section 11 does not deal with any of the current ambiguities and will result in further ambiguity if not clearly worded from the outset.

9.3 It is a trite principle in our law that the legislature must pass laws that are reasonably clear and precise, enabling citizens to understand what is expected of them.[28] In our view, section 11 in its current form does not comply with the rule of law and the proposed amendment does not create any interpretational clarity, but adds more uncertainty. In our view, the provisions of section 11 cannot remain in their current form and are in dire need of amendment.

9.4 The ambiguities to the wording of the current section 11 contained in the MPRDA that have been problematic in practice are, among other things:

9.4.1 what constitutes *"an interest in any such right"* (a mining right or prospecting right) in terms of section 11(1). Section 11(1) suggests that an *"interest"* is something which (i) can be obtained in relation to a right (mining or prospecting) and (ii) can be transferred. The practical difficulties with the phrase *"an interest in any such right"* are, among other things:

9.4.1.1 whether a share in a company constitutes an *"interest"* in that company's business and/or assets, and/or in the business and/or assets of such company's subsidiaries?

9.4.1.2 whether an encumbrance upon and/or an option to purchase or any other contractual right to, upon election or otherwise contingent upon some further factor, take interest in a prospecting or mining right, constitutes an interest in such right?

9.4.1.3 whether section 11 also envisaged the indirect change of a controlling interest or merely direct change of a controlling interest?

9.4.1.4 what constitutes the transfer of a controlling interest (ie does the restraint in section 11 with regard to the transfer of a controlling interest in a listed company apply when the interest so transferred, in itself, is less than a controlling interest? For example, a twenty per cent shareholder sells two per cent of their shareholding to a forty nine per cent shareholder thereby giving the forty nine per cent shareholder a fifty one per cent shareholding in the company)?

9.4.2 It is thus unclear whether the scope of the term "*interest*" would be broad enough to include an indirect interest in a prospecting or mining right. If so,

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[28] See *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at para 26.

section 11 would apply to the trading of shares in parent companies of the entities which directly hold or have an interest in a particular right, as well as the shares in subsidiary companies between the right holder and the parent company. This would translate into a cumbersome and, in our view, impossible application process for the transfer of an interest in a prospecting or mining right and the over burdening of the DMR in this respect. Section 11 thus has serious implications for important capital markets involved in the trading of South African mining securities, such as the JSE Limited, the New York Stock Exchange, the London Stock Exchange, the Toronto Stock Exchange and the Australian Stock Exchange.

9.5 Section 11(3) remains unclear as to whether the cession of shares in security (eg a pledge of shares) in favour of a bank for purposes of security of a loan to fund a mining project requires section 11 consent. Further, the section 11(3) exemption appears to only be applicable to South African Banks which makes it very limiting as non-South African financial institutions regularly provide funding to South African mining operations. Notably, Ministerial consent under section 42A of the MPRDA may be granted to encumber or mortgage a reclamation permit in favour of a non-South African financial institution for the purpose of funding or financing of a mining project. We propose that section 11(3) also makes provision for non-South African financial institutions.

9.6 It is suggested that the requirement to obtain Ministerial consent to grant security rights (ie pledge of shares, or encumbrance by mortgage) secures no practical purpose. The objective can be achieved by subjecting the realisation of the security subject to the consent of the Minister.

9.7 The Amendment Act does not clarify any of the uncertainty created by the MPRDA, but rather adds to the uncertainty and impracticality, as the amendment:

9.7.1 removed the word "*controlling*" from the text of section 11(1) in respect of unlisted companies to merely require a change of interest in an unlisted company to trigger the Ministerial consent; and

9.7.2 removed the exemption for listed companies and requires Ministerial consent in terms of section 11 for the change of a controlling interest in a listed company.

9.8 Despite the ambiguity and problems with the current wording of section 11(1) in the MPRDA and the Amendment Act, the proposed amendment does not intend to rectify the ambiguity.

9.9 The requirement proposed by the Bill that the change of an interest in an unlisted company will require Ministerial consent in terms of section 11, is impractical. We suggest that only a change to the HDSA shareholding or a change of control (which, as suggested above, must be defined) should require Ministerial consent.

9.10 Should the proposed amendment be adopted in its current form, it will result in insurmountable delays with the processing and granting of Ministerial consents which will severely impact on investment in the South African mining industry. In our view, the DMR does not have the capacity to process consent applications efficiently and effectively and this added burdensome requirement will undoubtedly result in applicants waiting unreasonably long periods to obtain approval for, among other things, transfer of mining rights or prospecting rights. We further note that section 11 does not prescribe time periods within which the Minister must grant or refuse a section 11 application. In order to circumvent delays we propose that a time period be stipulated for the grant or refusal of a section 11 application.

9.11 The Minister's unfettered discretion to determine conditions for the grant of the section 11 consent, as it is not linked to any objective standard, is untenable. Although any aggrieved party would have recourse to the courts should a condition imposed by the Minister not be rationally connected to the decision to grant the section 11 consent, it would, from an administrative law perspective, be better to regulate the scope within which the Minister may impose conditions to a section 11 consent. In our view, an application for Ministerial consent in terms of section 11 is not the appropriate place to impose conditions, but that the Minister should impose such conditions when the right is granted. The Ministerial discretion will have a serious impact on investment in the mining sector and will most likely deter investment as the effect of this discretion is that the terms of the right at the date of transfer may be amended and more onerous conditions may be imposed by the Minister.

9.12 The partitioning of rights is welcomed, but the process contemplated by the proposed section 11(2A) for the partitioning does not seem to be aligned with the relevant sections dealing with an application for a prospecting right and/or mining right. Section 11(2A) provides that the transfer or a part of a right must be granted if:

9.12.1 the application for such transfer is accompanied by an application in terms of section 102 to vary the right;

9.12.2 the transferee has simultaneously (with the section 11 application) lodged an application in terms of section 16 or 22 as the case may be;

9.12.3 the applicant has complied with the requirements contemplated in section 17 or 23 as the case may be; and

9.12.4 the applicant has been granted a prospecting right or a mining right to which the transfer relates;

9.13 It is commendable that the Bill confirms that a person may hold a share in a right, which was previously left unclear. The Bill does not, however, provide a solution for the many complications that may arise from overlapping rights and in particular, the fact that more than one party would be responsible for environmental, health and safety issues.

9.1 Section 11(2A)(a) requires that the transferee, together with the section 11 application, simultaneously lodges an application for a prospecting or mining right in terms of section 16 or 22. We submit that this requirement does not make sense, as the right to be partitioned already exists and the partitioning will not create a new right. We suggest that it would make more sense to require that the transferee lodges documents which have a bearing on its own financial and technical competence and its BEE compliance in support of the section 11 application as if it were an applicant.

9.2 Section 11(2A)(d) requires that the applicant must have been granted a prospecting or mining right. We again submit that this requirement does not make sense. It is the very fact that a prospecting or mining right already exists (which the holder thereof seeks to partition) that gives rise to the section 11 application.

9.3 The Regional Manager is not, in terms of the current wording of section 16 or 22 (as the case may be), able to accept the applications required by subsection (b) in respect of an existing right, and if he/she does so they will be acting *ultra vires* as the statutory provision does not bestow such powers on the Regional Manager. The Regional Manager will have to reject such an application as the application will be in respect of the same mineral and land as that to which the right to be partitioned relates.

9.4 Section 11 must be amended to be reasonably clear and precise to enable the holders of mining rights or prospecting rights to know with certainty when the provisions of section 11 will be triggered instead of adopting amendments which will only add to the ambiguity.

10. **Proposed amendment - section 17, section 18 and section 24 as contained in clause 12, 13 and 19 of the Bill as well as the definition of "*concentration of rights*" as set out in section 1**

10.1 Clause 1(e) of the Bill inserts the definition of "*concentration of rights*" into section 1 of the MPRDA, which definition reads as follows:

> "*'concentration of rights' refers to an instance where an applicant is already the holder of a prospecting right or rights, a mining right or rights or a mining permit or permits and the granting of an additional prospecting right or rights, mining right or rights or mining permit or permits will defeat the objects of section 2(d);".*[29]

10.2 The Bill proposes to insert the phrase "*concentration of rights*" into sections 17(2)(b), 23(3)(b) and 80(3)(b) of the MPRDA respectively, to provide that the Minister *must* refuse to grant a prospecting right,[30] mining right,[31] or exploration right,[32] if this would result in a concentration of rights under the control of the applicant, and in the case of a prospecting right and a mining right, also under the control of the *associated companies* of the applicant, a term which is not defined in the Bill.

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[29] Section 2(d), as amended by the Bill (underlined) and Amendment Act (in bold), reads: "*substantially and meaningfully expand opportunities for historically disadvantaged South Africans, including women, 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*".

[30] Clause 12(e) of the Bill proposes to amend section 17(2)(b) of the MPRDA. Section 17(2)(b), as amended by the Bill (underlined) and Amendment Act (in bold), reads: "*the granting of such right will* ***result in the concentration of*** *rights* ***under the control of the applicant and*** *its* ***associated companies****.*"

[31] Clause 18(e) of the Bill proposes to amend section 23(3)(b) of the MPRDA. Section 23(3), as amended by the Bill (underlined) and Amendment Act (in bold), reads:

"***The Minister must, within*** *the prescribed period* ***of receipt of the application from the Regional Manager, refuse to grant a mining right if—***

(a) ***the application does not meet the requirements referred to in subsection (1)****; and*
(b) *the granting of such right will result in the concentration of rights in question under the control of the applicant and its associated companies.*"

[32] Clause 54(c) of the Bill proposes to amend section 80(3)(b) of the MPRDA. Section 80(3), as amended by the Bill (underlined) and Amendment Act (in bold), reads:

"*The Minister must,* ***within*** *the prescribed period* ***of the receipt of the application from the*** *Regional Manager, refuse to grant an exploration right if—*

(a) the application does not meet all the requirements referred to in subsection (1).; and
(b) the granting of such a right will result in the concentration of rights in question under the control of the applicant".

10.3 In our view the inclusion of these matters into the MPRDA creates further uncertainty for the following reasons:

10.3.1 the Bill refers to "*concentration of rights*", while the MPRDA refers to "*concentration of mineral resources*". It remains unclear what the intention of this change in terminology is, however, we are of the opinion that it may be an indication of a decision to move away from imposing a restriction on a particular commodity, towards a restriction of the number of rights which can be held by a particular holder of rights granted in terms of the MPRDA, regardless of the minerals or categories of petroleum or the total area or quality of mineral resources to which such holder's rights pertain;

10.3.2 section 69 of the MPRDA, as amended by the Amendment Act and the Bill, does not make any reference to section 1 of the MPRDA and, as such, does not expand the definition of "*concentration or rights*" to include production rights. We presume that this is an omission on the part of the legislature, as this concept provides a basis on which the Minister may justify her decision to refuse the grant of production rights;

10.3.3 the power of refusal granted to the Minister in the proposed definition is broader than that currently provided for in the MPRDA, in terms of which the Minister only has this power of refusal in relation to prospecting right and retention permit applications;

10.3.4 clause 18(e) of the Bill effectively requires a right holder to pass this "*concentration of rights*" test twice. Under clause 12(e) of the Bill, the Minister would be required to apply this test in the first instance to determine whether to refuse the application for a prospecting right. She would then have to apply it again, under clause 18(e), to determine whether to refuse the application for a mining right. This undermines a prospecting right holder's exclusive right under section 19(1)(b) of the MPRDA to apply for and be granted a mining right over the same land and for the same mineral for which it holds a prospecting right;[33]

10.3.5 The Minister is only obliged to refuse to grant an additional right or permit if the granting of such right or permit will "*defeat the objects of section 2(d)*". As such, the provisions in the Bill relating to concentration of rights will not apply

[33] Subsection 19(1)(b) of the MPRDA reads: "*[i]n addition to the rights referred to in section 5, the holder of a prospecting right has — subject to subsection (2), the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question.*"

to HDSAs in the South African mining industry as such entities/persons further the objects of section 2(d). The Revised Mining Charter should be the primary instrument to promote and substantially and meaningfully expand opportunities for HDSAs in the South African mining industry; and

10.3.6 the definition of "*concentration of rights*" grants the Minister a broad unfettered discretion to refuse a prospecting right, mining right, or exploration right, without reference to any guiding principles.

10.4 We note that section 17(2)(b) seeks to limit the grant of rights to the applicant and its associated companies, a term which is not defined in the Bill. As discussed above, the uncertainty that arises in this regard is whether this refers to specific minerals or whether the DMR will consider all rights held by the applicant.

10.5 In our view, this section is far too vague to be in line with the rule of law principle and, if it is retained, needs to be expanded upon for clarification.

10.6 It is thus recommended that:

10.6.1 all references to "*concentration of rights*" are removed from the Bill; and

10.6.2 clause 18(e) should be deleted.

10.7 We note that clause 13(e) seeks to amend section 18(5) in providing that the holder of a prospecting right may, during the time that the renewal application in respect thereof is being processed, continue to conduct prospecting operations in terms of the existing prospecting work programme. We submit that this laudable provision falls short as it is not clear whether the holder may then drill more prospecting holes than originally indicated. In this regard it should be noted that the DMR has in the past, suspended prospecting rights in the event of the holder thereof exceeding the number of prospecting holes indicated in the prospecting work programme. It is submitted that the Bill be amplified to clearly state what the holder would be entitled to do during the time that the renewal application is being processed.

10.8 We note that clause 19(e) seeks to amend section 24(5) in providing that the holder of a mining right may, during the time that the renewal application in respect thereof is being processed, continue to conduct prospecting operations in terms of the existing mining work programme. We submit that this laudable provision too falls short as it is not clear what the holder may do. It is submitted that the Bill be amplified to clearly state what the holder would be entitled to do during the time that the renewal application is being processed.

11. **Proposed amendment - section 22 as contained in clause 17 of the Bill**

11.1 We note that the proposed section 22(4)(c) refers to consultation with the "*relevant structures*". It is, however, unclear to whom or what this refers and what input from or agreement with such structures is required. [34]

12. **Proposed amendment - section 23 as contained in clause 18 of the Bill**

12.1 The new section 23(1)(e) provides that the social and labour plan shall be reviewed every five years, however, no certainty is given as to who should review the social and labour plan and for what the purpose, nor are there any consequences stipulated for the failure to so "*review*".

12.2 In our view, the proposed section is unclear and creates further social obligations on the holders of mining rights, in addition to those obligations which the holder has committed to in its social and labour plan and creates an uncertain financial exposure to holders without having any objective and ascertainable framework. The social and labour plan deals with various socio-economic challenges and needs of the communities and the holder is expected to make financial provision to comply with its commitments, failing which it will be in contravention of the MPRDA.

12.3 We recommend that the proposed section 23(2)(b) be deleted. Due to the Minister's wide unfettered discretion to issue directives to the holder to address further socio-economic challenges or needs, it is not reasonably clear and precise to enable mining right holders to understand the expectations required of them.

13. **Proposed amendment - section 25 as contained in clause 20(d) of the Bill**

13.1 Clause 20(d) of the Bill amends section 25(2)(f) of the MPRDA, so that it reads as follows (the underlined text is inserted by clause 20(d)):

> "*[t]he holder of a mining right must -*
>
> *(f) <u>implement the approved</u> social and labour plan <u>which shall be reviewed every five years for the duration of the mining right</u>;…".*

13.2 As stated above, the Bill provides for social and labour plans to be reviewed every five years but does not provide any detail regarding the review (such as by whom it

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[34] The Mineral and Petroleum Resources Development Regulations published in Government Notice 527 in *Government Gazette* 26275 of 23 April 2004 do not provide any further guidance on what constitutes "*relevant structures*".

would be conducted, and what criteria would be applied). The vagueness of this provision may to lead to uncertainty. We suggest that clause 20(d) of the Bill be redrafted to provide these details.

14. **Proposed amendment - section 26 as contained in clause 21 of the Bill and the definition of "*beneficiation*" as set out in section 1**

14.1 **Mineral beneficiation**

14.1.1 Clause 21 of the Bill amends section 26 of the MPRDA. Section 22 of the Amendment Act also amended section 26 of the MPRDA, so that, subsequent to the amendments by both the Bill (underlined) and the Amendment Act (in bold), section 26 of the MPRDA reads as follows:

"*(1) The Minister must initiate or* ***promote*** *the beneficiation of minerals and petroleum resources in the Republic.*

(2) If the Minister, after a Minister of the relevant State department finds that a particular mineral, mineral product *or form of petroleum can be beneficiated in the Republic, the Minister may promote such beneficiation subject to such terms and conditions as the Minister may determine.*

(2A) In promoting beneficiation, the Minister may prescribe the levels required for beneficiation.

(2B) The Minister shall from time to time by notice in the Gazette determine such percentage per mineral commodity or form of petroleum and the developmental pricing conditions in respect of such percentage of raw minerals, form of petroleum or mineral products as may be required for local beneficiation, after taking into consideration the national interest.

(2C) Every producer shall offer to local beneficiations a certain percentage of its raw mineral or mineral products *as prescribed by the Minister.*

(3) Any person who intends to export any designated minerals mined or form of petroleum extracted in the Republic may only do so with the Minister's written consent subject to such conditions as the Minister may determine".

4.2.2 Clause 1(b) of the Bill proposes to substitute the definition of "*beneficiation*" inserted by clause 1(a) of the Amendment Act with the following (underlined text is that inserted by clause 1(b) of the Bill):

> "*'beneficiation' means the transformation, value addition or downstream beneficiation of a mineral and petroleum resource (or a combination of minerals) to a higher value product, over baselines to be determined by the Minister, which can either be consumed or locally exported*".

14.1.2 Clause 1(i) of the Bill proposes to insert the following definition of "*developmental pricing conditions*":

> *'"'developmental pricing conditions' refers to a pricing methodology of mineral/s, petroleum or mineral products, reserved for domestic beneficiation, as determined by the Minister*".

14.2 **Mineral products**

14.2.1 Clause 21 of the Bill inserts subsection (2B), which allows the Minister, in her sole discretion, to prescribe the levels required for beneficiation, the percentage per commodity and the developmental pricing conditions that are required for beneficiation, as well as the percentage of raw mineral or mineral products to be offered to local beneficiators. Clause 21 of the Bill inserts subsection (2C) which only obliges a producer to offer a certain percentage of its raw mineral or mineral products to local beneficiators. It appears that producers of petroleum products are thus exempted from the obligation of a producer to offer to local beneficiators a certain percentage of their petroleum products.

14.3 **Overly-broad discretion**

14.3.1 The proposed definition of beneficiation introduces a wider and unfettered ministerial discretion to determine the standards and levels of such beneficiation and there is no indication of how the baselines referred to in the definition, which will ultimately result in a limit of the higher value product, will be determined by the Minister.

14.3.2 We respectfully recommend that definition of "*beneficiation*" be expanded upon to clarify the aforementioned uncertainties which will, in turn, allow for constructive commentary in terms thereof.

14.3.3 The Bill makes it mandatory for the Minister to "*initiate or promote the beneficiation of minerals and petroleum resources in the Republic*".

14.3.4 However, in our view, the Bill affords the Minister unduly broad discretion over beneficiation, without providing any criteria under which such discretion should be exercised. In particular, the definition of "*beneficiation*" provides for the "*baselines to be determined by the Minister*", and subsections 26(2A), (2B) and (2C) respectively allow the Minister, in her sole discretion, to prescribe the levels required for beneficiation, the percentage per commodity and the developmental pricing conditions that are required for beneficiation, as well as the percentage of raw mineral or mineral products to be offered to local beneficiators. It is inappropriate for the Minister to attempt to control these economic factors which are usually dictated by market forces. The beneficiation provisions of the Bill notably extend beyond producers of raw minerals, to include producers of mineral and petroleum products who are not rights holders under the MPRDA. It thus appears that the Bill attempts to extend the application of the MPRDA to individuals and entities in mineral and petroleum derivative industries formerly not subject to the MPRDA, and to regulate the downstream mineral and petroleum industries. In our view, such provisions fall outside the scope and object of the MPRDA, and will have a negative impact on both holders of rights under the MPRDA as well as beneficiators.

14.3.5 The Bill also fails to give any guidelines on how the pricing methodology of the developmental pricing conditions will be developed.

14.3.6 The Bill's provisions regarding beneficiation are perhaps the greatest indicator of an unfortunate principle enshrined in various clauses in the Bill, being 'rule by regulation'. In other words, much of what the Bill itself should contain is left to the Minister’s future discretion in the form of regulations to the MPRDA. As provided for above, this is clearly disadvantageous to stakeholders, as not only will they not have advance notice of the relevant regulatory regime, but also, the normal legislative public participation process will be bypassed entirely, with key decisions left to be determined by regulation.

14.3.7 The Bill also deletes the word "*economically*" from subsection 26(2) of the MPRDA. It appears that the Minister is no longer required to consider whether beneficiation can take place economically when she decides whether to promote the beneficiation of a particular mineral or category of petroleum.

14.3.8 We note that section 26(3) requires written ministerial consent for export of a designated mineral however; obtaining ministerial consent (in terms of other provisions of the MPRDA) currently takes 6-18 months. It would thus not be practical to obtain consent to export unless reasonable time frames for processing applications are clearly stipulated. The procedure and requirements for applying for such consent should also be set out in the Bill itself.

14.3.9 In addition, we note that section 26(3) further allows the Minister to impose conditions on such exports as she may determine. The uncertainty in this regard is likely to hinder any export business from operating efficiently. It should be noted that this amendment potentially contravenes international trade agreements entered into by South Africa in that section 26(3) may constitute an 'export licensing system'.

14.4 **Contravention of South Africa's international trade law obligations**

14.4.1 South Africa is a member of the World Trade Organisation ("**WTO**") and is a party to the General Agreement on Tariffs and Trade, 1947 ("**the GATT**").[35] South Africa is also a party to the 1999 Trade, Development and Cooperation Agreement ("**the TDCA**") with the European Union, which entered into force on 1 May 2004.[36]

14.4.2 Article XI read with article XX of the GATT,[37] and article 19, read with article 27 of the TDCA,[38] prohibit the parties to these agreements from imposing

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[35] The GATT is a multilateral international agreement, which regulates trade and is administered by the WTO. South Africa was one of the founding parties to the GATT. The GATT was amended by the General Agreement on Tariffs and Trade, 1994 ("**the GATT 1994**"). The GATT 1994 provided for the creation of the WTO. South Africa ratified the GATT 1994 on 2 December 1994. GATT is thus binding on South Africa under section 231(5) of the Constitution, which provides that South Africa is bound by international agreements which were in force when the Constitution took effect on 4 February 1997.

[36] The TDCA was signed in October 1999, and provisionally applied - but only partially - from 1 January 2000. The TDCA fully entered into force on 1 May 2004. It forms the legal basis for overall relations between South Africa and the European Union, and covers five areas of cooperation: political dialogue; development cooperation; cooperation in trade and trade-related areas; economic cooperation; and cooperation in other areas.

[37] Article XI.1 of the GATT reads as follows:

> "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.*"

[38] Article 19 of the TDCA reads as follows:

> "*1. Quantitative restrictions on imports or exports and measures having equivalent effect on trade between South Africa and the Community shall be abolished on the entry into force of this Agreement.*
>
> *2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa.*

quantitative restrictions[39] on exports. A quantitative restriction is a measure which places a limitation on the amount of goods that may be exported between countries.[40]

14.4.3 The requirement in the proposed section 26(3) that a person may only "*export designated minerals mined and petroleum extracted in the Republic… with the Minister's written consent subject to such conditions as the Minister may determine*" will have the effect of restricting the export of minerals from South Africa, and may well constitute a prohibited quantitative restriction as envisaged by the GATT and the TDCA. If South Africa is found to be in breach of the GATT, the Dispute Settlement Body of the WTO, following a complaint by an affected member state, may make recommendations to South Africa which, if not met, may result in the suspension of concessions or other obligations owed to South Africa by the affected member state under the GATT or another WTO treaty. If South Africa is found to be in breach of the TDCA, the Co-operation Council established by this treaty, or an international arbitration panel constituted under it, may issue a binding decision requiring South Africa to implement certain corrective measures.

14.4.4 The Bill's proposed amendments to section 26 may also contravene the bilateral investment treaty ("**BIT**") between South Africa and the United Kingdom, which came into force on 27 May 1998 and provides:

14.4.4.1 any company incorporated in accordance with the laws of England and Wales is entitled to bring a claim under SA-UK BIT in the event that the Bill is enacted, as it is: (i) a United Kingdom "*company*" as defined in article 1(d)(ii) of the SA-UK BIT; (ii) constituted under the laws in force in the United Kingdom; (iii) the shares held by such a company in any South African subsidiary constitute an "*investment*" as defined in article 1(a)(ii) of the SA-UK BIT, which specifically includes "*shares in a company*"; and (iv) such an investment has been made in South Africa's "*territory*" (ie a shareholding is held in a South African incorporated company);

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3. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement."

[39] A quantitative restriction is a measure which places a limitation on the *amount* of goods that may be exported between countries (P van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* 2nd ed., Cambridge University Press, 2009, at 444).

[40] See P van den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* 2nd ed., Cambridge University Press, 2009 at 444.

14.4.4.2 the SA-UK BIT requires South Africa and the United Kingdom to afford investors and their investments "*fair and equitable treatment*" and "*full protection and security*" within their territory. The principle of fair and equitable treatment thus imposes obligations on South Africa, as a host state to United Kingdom investments amongst others, to act transparently, reasonably and without ambiguity. Requirements imposed by a government on investors which hinder the economic performance of their investments, such as the Bill's requirements under the proposed subsections 26(2B), (2C) and (3), are contrary to the principle of fair and equitable treatment; and

14.4.4.3 article 14 of the SA-UK BIT contains a twenty year sunset provision. Accordingly, any investment by a United Kingdom company in South Africa will be protected under the SA-UK BIT for an additional twenty years after the BIT's termination.

14.4.5 The proposed amendments may further offend against the right to freedom of trade, occupation or profession in section 22 of the Constitution which provides that "*the practice of a trade, occupation or profession may be regulated by law*" subject to certain requirements.

14.4.6 The phrase "*regulated by law*" has been interpreted to mean that the practice of a trade, occupation or profession may be rationally ordered or organised but *only* by the operation of law. Thus any measure that regulates a trade, occupation or profession must qualify as "*law"* in that it must fulfil all the requirements of valid legislation. As explained below, the rule of law requires that legislation is certain and accessible, and must provide guidelines or criteria according to which administrative discretion is exercised. The high court has held that laws which vest unfettered discretion in administrative officials do not fall within the ambit of "*law*" as envisaged in section 22 of the Constitution.[41] On this basis, owing to the unfettered discretion afforded to the Minister under the proposed subsections 26(2B), (2C) and (3), any regulation of a trade, occupation or profession regarding mineral beneficiation by the

[41] Currie & De Waal, *The Bill of Rights Handbook*, 5th ed., Juta & Company Ltd, 2005, at 493; *Janse van Rensburg NO en 'n ander v Minister van handel en Nywerheid en 'n ander* 1999 (2) BCLR 204 (T) at 221D. The court in this case held that the Harmful Business Practices Act, 1988, afforded the Minister of Trade and Industry an unfettered discretion to restrict the business activities of individuals. As a result, the court held that any measure taken by the Minister of Trade and Industry in accordance with that unfettered discretion did not fall within the ambit of the term "law" as envisaged under s22 of the Constitution.

Minister may fall outside of the ambit of the term "*law*" used in section 22 of the Constitution, rendering it unlawful.

14.4.7 Section 26 of the MPRDA, as amended by the Bill, does not refer to the beneficiation offset allowed against the HDSAs ownership requirement of the Revised Mining Charter. In clause 2.3, the Revised Mining Charter provides that *"[m]ining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent".* The Bill gives no indication of how its beneficiation requirements would count towards this offset.

14.5 **Failure to consider how this provision affects diamonds and precious metals**

14.5.1 The Bill does not explain how the amended section 26 is intended to interact with the Diamonds Act, 1986 ("**the Diamonds Act**") and the Precious Metals Act, 2005 ("**the Precious Metals Act**"). These Acts already regulate the export of diamonds and precious metals, including gold.[42] To ensure that mining companies comply with the correct export regime as regards the export of the minerals it produces, it is important that clause 21 of the Bill is redrafted to clarify the interaction between the MPRDA, the Diamonds Act the Precious Metals Act.

14.6 **Potential for an arbitrary deprivation**

14.6.1 It is apparent that the proposed amendments to section 26 of the MPRDA, which would empower the Minister to set the levels and developmental pricing conditions for beneficiation of minerals and to consent to and set conditions for the export of "*designated minerals*", would constitute a deprivation of property as envisaged in section 25 of the Constitution. These proposed amendments would interfere with a right holder's right to use, enjoyment and exploitation of the minerals which it has extracted. As mentioned above, all that is required to establish a deprivation is "*any interference*" with any of the incidents of ownership.[43] The fact that the amendment does not deprive the rights holders

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[42] Gold is included in the definition of "*precious metal*" contained in section 1 of the Precious Metals Act.

[43] As stated by the Constitutional Court in *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) at para 57, "*[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned*".

of *all* the incidents of ownership is irrelevant to whether or not there has been a deprivation of property.[44]

14.6.2 A deprivation is unconstitutional under section 25(1) of the Constitution if it is procedurally unfair and arbitrary in substance. Procedural fairness requires that an administrative official, such as the Minister, should exercise his/her powers in terms of clear rules and principles set out in advance. Where the power is conferred by legislation, that power would be arbitrary if there are inadequate criteria to guide its exercise.[45] The proposed amendments to section 26, if enacted, would permit the arbitrary deprivation of right holders' right to use, enjoyment and exploitation of the minerals they have extracted, as there is no legal constraint on the Minister's discretion.

14.7 **Conclusion on mineral beneficiation**

14.7.1 In view of all of the issues arising from the Bill's provisions regarding beneficiation and export restrictions, it is recommended that the drafters of the Bill should:

14.7.1.1 correct the definition of "*designated minerals*" by listing such minerals. Alternatively, the Bill should include a subsection under section 26 of the MPRDA requiring the Minister to publish a list of "*designated minerals*" within a particular time frame, together with an explanation as to why such minerals have been listed as designated. The Bill should also include certain criteria which the Minister must adhere to in determining "*designated minerals*". It is recommended that the following criteria should be included:

14.7.1.1.1 the declaration of a mineral as "*designated*" must relate to an objectively determined public purpose, (ie the restrictions placed on the sale of a "*designated mineral*" must serve a general need of the public at large);

14.7.1.1.2 there must be significant local demand for a "*designated mineral*" for the purposes of beneficiation (ie if there is no market for the

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[44] T Roux "Property" in Woolman et al *Constitutional Law of South Africa* (2nd Edition), Juta and Company Limited, March 2012, at 46-19. This determination only becomes relevant at the next stage of the enquiry, in establishing whether there is sufficient reason for the deprivation.

[45] Currie & De Waal, *op cit*, note 42, at 543 - 544.

beneficiation of a mineral in South Africa, then it should not be declared "*designated*"); and

14.7.1.1.3 any mineral which is declared "*designated*" must be incapable of being sourced from outside South Africa at a competitive price.

14.7.1.2 delete section 26(2B) and append a schedule to the MPRDA stipulating the baselines or levels of beneficiation for each "*designated mineral*", the percentage per "*designated mineral*" and the developmental pricing conditions at which such percentage of each mineral commodity must be beneficiated. Alternatively, section 26(2B) should be amended to:

14.7.1.2.1 provide criteria to which the Minister must adhere when she exercises her discretion in regard to designated minerals. Such criteria for the determination of the developmental pricing conditions of a "*designated mineral*" should include that the price must be market-related and competitive. The Bill should require that the setting of beneficiation baseline levels for each mineral should be done in consultation with the relevant industry stakeholders. Further, the Bill should specify a period within which the Minister must publish these determinations, and require that the Minister publish an explanation of her decision simultaneously. If the drafters of the Bill do not provide adequate criteria to guide the exercise of the Minister's discretion regarding these issues, then, as discussed in 14.6.2, once enacted, subsection 26(2B) would contravene subsection 25(1) of the Constitution;

14.7.1.2.2 delete subsection 26(3) to avoid any conflict with subsection 25(1) of the Constitution and to avoid contravening South Africa's obligations under the TDCA and the GATT. Alternatively, the proposed subsection 26(3) should be amended to provide criteria to which the Minister must adhere when she exercises her discretion in consenting to the export of "*designated minerals*". Such criteria should include a provision that any restriction placed on the export of a mineral must not breach South Africa's obligations under the GATT or the TDCA. If the drafters of the Bill do not consider these suggestions, then, as discussed in 14.6.2, once enacted, subsection 26(3) would contravene subsection 25(1) of the Constitution; and

14.7.1.2.3 at the very minimum, to avoid an overlap with the Diamonds Act and the Precious Metals Act, the Bill must be amended to state that diamonds and precious metals are excluded from the requirements set out under subsection 26(3).

15. **Proposed amendment - section 28 as contained in clause 23 of the Bill**

15.1 Clause 23 of the Bill amends section 28 of the MPRDA, which was likewise amended by section 24 of the Amendment Act, so that subsequent to the amendments by both the Bill (underlined) and the Amendment Act (in bold), section 28 of the MPRDA reads as follows:

"*(1) The holder of a mining right, mining permit must, at **the** registered office or place of business **of such holder**, keep proper records of mining activities and proper financial records in connection with the mining activities.*

*(2) The holder of a mining right, mining permit, the manager of any **mineral** or mineral product processing plant and 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—*

(a) prescribed returns with accurate and correct information and data;

(b) an audited annual financial report or financial statements reflecting the balance sheet and profit and loss account;

(c) the prescribed annual report detailing the holder's compliance with the provisions of section 2(d) and (f), the Amended Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry provided for in section 100 and the approved social and labour plan; and

(d) the prescribed annual report detailing accurate information and data in respect of mineral reserves and resources within the mining area".

15.2 In our view, section 28 is vague and may be difficult to implement as the obligation to keep proper records of mining activities would not be applicable to agents, sellers (that are not producers) and purchasers of minerals. In this regard, subsections 2(c) and 2(d) will also not be applicable to agents, purchasers and sellers (that are not producers), yet the current wording requires such parties to submit these records. Furthermore, it may be extremely difficult to enforce the provisions of this section

where agents or purchasers of any minerals are foreign nationals with no local presence in South Africa.

15.3 From a MHSA perspective, the proposed amendment requires that in the case of a mineral processing plant the manager be required to keep proper records as required in terms of this section. We note though that the term *"manager"* is not defined and it is unclear whether this is a manager as contemplated in the MHSA, which manager is a legal appointee with legislated duties and responsibilities.

15.4 Further, to the extent that a mineral processing plant operates separately from a mine, it is likely that this will be dealt with as a *"works"* under the MHSA. The proposed amendments to the MPRDA have included a definition of an owner of a works, with reference to the MHSA. However, the obligation to retain information appears not be have been placed upon this owner (in the case of a processing plant which is not part of a mine), which is an interesting distinction in respect of the duties of the employer (holder) of a mine. It is likely that, practically, the holder (employer) will require the manager or the employer representative to prepare and submit these reports on behalf of the holder. However, in the case of the processing plant, it appears that there is no obligation upon the owner to ensure that this occurs, based on the current wording.

15.5 The impact of this is that a failure to do so would not amount to a breach by the owner but rather be a personal breach of his obligations by the manager, and the owner (holder) would not be held liable as the section does not require that the holder or owner ensure that the manager submits the reports and retains the information.

16. **Proposed amendment - section 37 as contained in clause 28 of the Bill as well as section 94(2) of the Amendment Act contained in clause 67 of the Bill**

16.1 Clause 28 of the Bill amends section 37 of the MPRDA. Section 32 of the Amendment Act inserted sections 38A and 38B, so that subsequent to the amendments by both the Bill (underlined) and the Amendment Act (in bold), section 37 of the MPRDA reads as follows:

> "*(1) All environmental requirements provided for by this Act will be implemented in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) [("**NEMA**")].*
>
> *(2) Any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable*

development by integrating social, economic and environmental factors into the planning and the implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.

38A Environmental Authorisations

(1) The Minister is the responsible authority for implementing environmental provisions in terms of [NEMA] as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area.

(2) An environmental authorisation issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act.

38B Approved environmental management programmes and environmental management plans

(1) An environmental management plan or environmental management programme approved in terms of the Act before and at the time of [NEMA] shall be deemed to have been approved and an environmental authorisation been issued in terms of [NEMA].

(2) Notwithstanding subsection (1), the Minister may direct the holder of a right, permit or any old order right, if he or she is of the opinion that the prospecting, mining, exploration and production operations is likely to result in unacceptable pollution, ecological degradation, or damage to the environment, to take any action to upgrade the environmental management plan or environmental management programme to address the deficiencies in the plan or programme.

(3) The Minister must issue an environmental authorisation if he or she is satisfied that the deficiencies in the environmental management plan or environmental management programme in subsection (2) have been addressed and that the requirements in Chapter 5 of [NEMA], have been met."

16.1.1 Moreover, clause 67 of the Bill deletes section 94(2) of the Amendment Act.

16.2 **Conflict between NEMA and the MPRDA**

16.2.1 The Bill states that all environmental requirements provided for by the MPRDA will be implemented in terms of the National Environmental Management Act, 1998 ("**NEMA**"). Consequently there are a number of conflicts between the provisions of the MPRDA and NEMA if the Bill is enacted in its current form. It will be necessary to amend the Bill and/or NEMA to streamline their environmental provisions if the two are to be read together.

16.2.2 We recommend that the implications of the Bill's amendments to section 37 of the MPRDA must be considered in conjunction with the extensive amendments made to the MPRDA by the Amendment Act: the deletion of sections 38 ("*Integrated environmental management and responsibility to remedy*"), 39 ("*Environmental management programme and environmental management plan*"), 40 ("*Consultation with State departments*"), 41 ("*Financial provision for remediation of environmental damage*") and 42 ("*Management of residue stockpiles and residue deposits*"); the insertion of sections 38A ("*Environmental authorisations*"); and 38B ("*Approved environmental management programmes and environmental management plans*").

16.2.3 The environmental regulation of mining, prospecting and related activities is, at present, regulated under the MPRDA (sections 37 to 46) by the Minister. The Amendment Act and the National Environmental Management Amendment Act, 2008 ("**the NEMA Amendment Act**"), however, contemplate a fundamental change in this regime to the effect that environmental regulation would be governed under NEMA, with the Minister of Water and Environmental Affairs as the responsible regulator.

16.2.4 The Amendment Act read with NEMA implement a three-phase scheme for the shift of environmental regulation from MPRDA to NEMA:

16.2.4.1 phase one would act as an eighteen month period within which the *status quo* of the current environmental regulatory regime on mines would be maintained;

16.2.4.2 phase two would last from months nineteen to thirty six within which environmental regulation on mines would be regulated by NEMA with the Minister being afforded competency within this period to administer

NEMA (the Minister of Water and Environmental Affairs would be the appeal authority); and

16.2.4.3 phase three would start at the beginning of month thirty seven when the interim competency of the Minister to administer NEMA would end the Minister of Water and Environmental Affairs would be given exclusive competency to administer the Act (both on mines and elsewhere).

16.2.5 Although there are issues with this 2008 scheme, these issues could have been rectified in the Bill. This has not, however, occurred. Two significant issues have emerged in the Bill:

16.2.5.1 firstly, the deletion of section 94(2) of the Amendment Act results in the scrapping of the initial eighteen month period as contemplated in that Act. The effect of this is that if the Bill is enacted in its current form phase one of the 2008 scheme will be skipped under the MPRDA regime and phase two will immediately be implemented (ie the Minister will immediately administer NEMA on mines). The following issues arise:

16.2.5.1.1 similar amendments have not been proposed to NEMA and the 2008 NEMA Amendment Act. Under these laws, the Minister will only be afforded the competency to administer NEMA from months nineteen to thirty six;

16.2.5.1.2 NEMA is the principle piece of legislation governing environmental regulation in South Africa. It is thus our view that any act taken by the Minister (purportedly under the MPRDA) within the first eighteen months would be *ultra vires* because these powers would yet to have been conferred in terms of NEMA; and

16.2.5.1.3 further, it is our view that the MPRDA will in that eighteen month period be susceptible to challenge for being unconstitutional in that it will be in complete misalignment with NEMA and therefore section 24 of the Constitution which NEMA gives effect to. We recommend that clause 67 of the Bill should be removed.

16.2.5.2 secondly, the Amendment Act introduces section 38A into the MPRDA. In its current form this proposed section read as follows: "*The Minister [of Mineral Resources] is the responsible authority for implementing environmental provisions in terms of the [NEMA] as it relates to*

prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area". Under the 2008 Scheme this section would only come into force in phase two. The mirror of this provision is provided for in the 2008 NEMA Amendment Act essentially to afford the Minister these powers in phase two. The 2008 NEMA Amendment Act, however, proposes a further amendment at phase three deleting these sections and returning the full power to administer NEMA to the Minister of Water and Environmental Affairs. Essentially then, in terms of NEMA, under the proposed 2008 scheme, the Minister will lose all powers to implement this Act from thirty seven months onwards. This will again result in a clash between the two Acts in which the NEMA will have to take precedence as the principle Act regulating the environment.

16.2.6 It is imperative that the NEMA Amendment Act is amended in accordance with the amendments proposed by the Bill, otherwise the uncertainty which would, no doubt, result from this conflict would render the Bill contrary to the rule of law and thus, as discussed in 2.3, potentially unconstitutional.

16.2.7 In addition, the fact that the Bill's proposed amendments conflict with NEMA may, in itself, render it unconstitutional as NEMA is the overarching environmental legislation which gives effect to section 24 of the Constitution.[46]

16.2.8 The application of NEMA is also likely to result in a right holder being subject to additional obligations, such as the conduct of environmental impact assessments required under NEMA. It will be necessary to amend the Bill and/or NEMA to streamline their environmental provisions if the two are to be read together.

16.2.9 It is recommended that:

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[46] Section 24 of the Constitution reads as follows:

"*Everyone has the right—*

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, <u>through reasonable legislative and other measures</u> that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*" (our emphasis).

Acts of Parliament which are enacted to give specific effect to rights as required by the Constitution are given a higher status than other legislation. These are known as 'constitutional' Acts. See C Botha, *Statutory Interpretation: An Introduction for Students*, 4th ed., Juta and Company Limited, 2007, at 14 - 15.

16.2.9.1 section 94(2) of the Amendment Act should not be deleted. This would mean that the eighteen month transitional period remains intact and the environmental regulation of prospecting, mining and related activities would not be governed under NEMA immediately after the enactment of the Bill; and

16.2.9.2 the Bill should amend section 38A of the Amendment Act to mirror the transition provided for in the 2008 NEMA Amendment Act to ensure that the two Acts do not clash from thirty seven months onwards.

16.3 **National Water Act, 1998 and the MPRDA**

16.3.1 In order to be granted a prospecting right, mining right, mining permit, reclamation permit, exploration permit and production right, the Minister must be satisfied that the applicant has the ability to comply with the relevant provisions of the National Water Act, 1998 ("**the National Water Act**"). It is recommended the Minister of Water Affairs and Forestry, as the responsible minister for the National Water Act, should adjudicate an applicant's ability to comply with the National Water Act, and that an applicant's ability to comply with the National Water Act should rather be dealt with in NEMA as part of an applicant's environmental authorisation.

17. **Proposed amendment - section 42A as contained in clause 29 of the Bill and the definitions of land, mine and residue stockpile**

17.1.1 Clause 29 of the Bill inserts section 42A of the MPRDA, to regulate the application for reclamation permits, and the management of residue stockpiles and residue deposits.

17.1.2 Prior to the Amendment Act, only debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation (collectively referred to as "**tailings**") created or stockpiled by the holder of a mining right, mining permit or production granted under the MPRDA (and not in terms of previous laws governing mineral resources, such as the Minerals Act, 1991 ("**the Minerals Act**"), fell within the definition of residue stockpiles and residue deposits as contemplated by the MPRDA. The MPRDA (prior to the Amendment Act) was thus not applicable to historic tailings. As such, the MPRDA avoided the expropriation of movables comprising historic tailings, which would have entitled the erstwhile owners of these movables to claim

compensation in terms of item 12 of Schedule II to the MPRDA. This interpretation of the MPRDA was confirmed in *De Beers*.[47] The high court held, among other things, that the historic tailings which had been created by De Beers were movable assets which did not accede to the land, were privately owned by De Beers, and were not subject to regulation in terms of the MPRDA. These historic tailings could thus not be the subject of any prospecting or mining right granted under the MPRDA to a third party.

17.1.3 The Amendment Act has partly amended this position by including the wording "*or an old order right*" at the end of the definition of "*residue stockpile*" and "*residue deposit*" with, in our view, the intention of incorporating all historic tailings. However, the concept of an "*old order right*" did not exist prior to the MPRDA and it is arguable that mineral rights that were abandoned, expired or lapsed prior to the MPRDA taking effect do not constitute "*old order rights*" for the purposes of the MPRDA. Therefore, tailing created pursuant to such rights would not, in our view, be subject to the amended definition. Furthermore, the amended definition does not incorporate tailings sold to third parties as movables. In such circumstances, the purchaser of the tailings did not have to hold mineral rights to process the tailings.

17.1.4 The Bill purports to rectify this issue by amending the definition of the term "*residue stockpile*" to include "*historic mines and dumps created before the implementation of this Act*". In other words, under the Bill, the State has custodianship of historic tailings, and the Minister may grant prospecting and mining rights over these tailings. Alternatively, such tailings automatically fall under the ambit of existing prospecting and mining rights held by third parties over the land physically underlying the historic tailings. It is unclear which of these interpretations is intended by the Bill.

17.2 **Definition of "*land*"**

17.2.1 The definition of "*land*" has been amended to include both "*residue deposits*" and "*residue stockpiles*".

17.2.2 In our view, the effect of the proposed amendment is that:

17.2.2.1 residue stockpiles will be considered part of the land, which may allow a

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[47] *De Beers Consolidated Mines Limited v Ataqua Mining (Proprietary) Limited and Others* [2007] ZAFSHC 74 (13 December 2007).

third party to apply for a right to process minerals contained in such residual stockpiles;

17.2.2.2 no clear distinction is provided in the Bill between "*residue deposit*" and "*residue stockpile*" as contained in the MPRDA and Bill which creates ambiguity in this regard;

17.2.2.3 the proposed amendment to the definition of "*prospecting*" includes prospecting for a mineral in a residue stockpile; and

17.2.2.4 the definition of "*residue stockpiles*" as amended by the Bill, will bring tailing dumps which came into existence prior to 1 May 2004 under the ambit of the MPRDA.

17.3 **Definition of "*mine*"**

17.3.1 The definition of "*mine*" when defined as a verb only makes reference to residue stockpile and when used as a noun only makes reference to residue stockpiles. As such, we note that, under the current wording, if minerals are removed from a "*residue stockpile*" it will not constitute mining and a person cannot mine a residue stockpile under the MPRDA.[48]

17.3.2 We note that the definition of "*prospecting*" includes a reference to both "*residue deposits*" and "*residue stockpiles*" and this creates a conflict between the definition of "*prospecting*" and "*mine*" in that the definition of "*mine*" (when used as a verb) does not include a "*residue stockpile*". This is inconsistent and creates the potential for the Minister to grant a prospecting right to a third party in respect of a residue stockpile owned and created by the holder of a mining right. This is an error and we strongly recommend that it be corrected. As such, residue stockpiles should be deleted from the definition of "*prospecting*".

17.3.3 We further note that there is an overlap in the definition, as reference is made to the term "*mineral*" which has already been defined and reference is also made to "*mineral resource*" which has not been defined. We recommend that the definition be aligned with the contents of the Bill and MPRDA in order to remove such ambiguities.

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[48] Please refer to paragraph 17 for a discussion on the proposed amendment of section 42A of the MPRDA by clause 29 of the Bill.

17.4 **Definition of "*residue stockpile*"**

17.4.1 We respectfully recommend that:

17.4.1.1 the Bill should provide for a transitional period in which the owner of such dumps can apply for a right in respect thereof; and

17.4.1.2 the rights of owners of dumps, as are currently applicable, will remain in force for the duration of the transitional period or for the duration of the period until the right applied for by the owner in respect of such dump is granted or refused.

17.4.1 Clause 1(x) of the Bill proposes to amend the definition of "*residue stockpile*" in section 1 of the MPRDA. It is noted that the definition of "*residue stockpile*" was also amended by section 1(u) of the Amendment Act so that, subsequent to the amendments by both the Bill (underlined below) and the Amendment Act (in bold below), the definition of "*residue stockpile*" reads as follows:

> "*'residue stockpile' means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stock-piled, stored or accumulated within the mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right,* ***or an old order right*** *including historic mines and dumps created before the implementation of this Act*;…".

17.4.2 As mentioned above, the Bill amends the definition of the term "*residue stockpile*" to include "*historic mines and dumps created before the implementation of this Act*". As a result, historic tailings are, for the first time, brought under the ambit of the MPRDA. This may in fact give rise to expropriation of historic tailings.

17.5 **Expropriation**

17.5.1 An expropriation would contravene section 25 of the Constitution,[49] which requires that expropriation is made "*for a public purpose or in the public*

[49] Section 25 of the Constitution reads (in relevant part) as follows:

"*(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

(2) Property may be expropriated only in terms of law of general application–

interest". The expropriation of historic tailings has no apparent public purpose or public interest motivation. In addition, the erstwhile owners of historic tailings would likely have a claim to compensation under item 12 of Schedule 11 to the MPRDA, section 25 of the Constitution, as well as, where appropriate (depending on the nationality of the expropriated owner or its shareholders), any bilateral investment treaties under which the South African government may only expropriate protected foreign investments in the public interest, on a non-discriminatory basis and against full market value compensation.

17.5.2 In order for an expropriation to be lawful, like any other deprivation and in accordance with section 25(1) of the Constitution, it must take place under a law of general application and not be arbitrary. In addition, under section 25(2) of the Constitution, it must be for a public purpose or in the public interest and compensated. It is apparent that the erstwhile owners of the expropriated historic tailings may be entitled to compensation under certain circumstances.

17.5.3 An expropriation has been described as a forced or compulsory transfer of a right in property,[50] and is considered to be a form of deprivation of property.[51] The term "*deprivation*" has been given a relatively broad meaning by the Constitutional Court,[52] requiring merely "*any interference*". There are a number of requirements which need to be met for a deprivation to qualify as an expropriation:

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court".

[50] T Roux "Property" in Woolman et al *Constitutional Law of South Africa* (2nd Edition), Juta and Company Limited, March 2012, at 46-19.

[51] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) ("***FNB***"), at para 57; Roux, *ibid*.

[52] In *FNB, ibid*, at para 57, the Constitutional Court stated that "*[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.*" In *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) ("***Mkontwana***") at para 32, the Constitutional Court adopted a somewhat narrower approach to deprivation than "*any interference*" as referred to in *FNB*, stating that

"*[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation … [A]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to a deprivation.*"

However, in *Reflect-All 1025 v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2010 (1) BCLR 61 (CC) ("***Reflect-All***") at paras 34-36, the Constitutional Court quoted both *dicta* with approval, apparently suggesting that they are complementary.

17.5.3.1 the deprivation must be compulsory or forced, in that it must be compelled by law;[53]

17.5.3.2 the deprivation must be required or implemented by a public authority;[54] and

17.5.3.3 there must be an equivalent appropriation or acquisition of rights by the state.[55]

17.6 **Other concerns**

17.6.1 The Bill fails to adequately address the transitional provisions, and the following concerns should be addressed:

17.6.1.1 The Bill provides that only the "*holder of an old order right or converted right to which a stockpile relates has the exclusive right to apply for a reclamation permit*". As mentioned above, in our view, the definition of an old order right does not extend to mineral rights that were abandoned, lapsed or expired prior to the MPRDA taking effect. The lawful owners of such tailings created pursuant to such rights (which were capable of being sold to third parties that did not hold mineral rights) may not be the holders of "an old order right or converted right" and are therefore prevented from applying for a reclamation permit in terms of the current wording of section 42A. We would therefore recommend that the words "or lawful owner of historic residue stockpiles or residue deposits" is inserted into the definition.

17.6.1.1 the Bill retrospectively provides for a transitional period and grants the "*holder of an old order right or converted right*" two years from the date of the MPRDA's enactment, ie 1 May 2004, to apply for a reclamation permit. The holder of an old order right or converted right thus had until

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53 Currie & De Waal, *The Bill of Rights Handbook*, 5th ed, Juta and Company Limited, 2005, at 552.

54 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) ("***Harksen***") at paras 31 – 32.

55 *Harksen, ibid,* at para 32, which cites *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) ("***Beckenstrater***"), where the court stated that:

"*expropriation… is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right and abatement or extinction of any other existing right held by another which is inconsistent with the appropriated right*".

Both *Harksen* and *Beckenstrater* are referred to as authority in *The Minister of Minerals and Energy v Agri South Africa* [2012] ZASCA 93 (31 May 2012) at para 13. See also *Reflect-All, op cit,* note 26, at paras 63, 64, in which the court held that an expropriation had not taken place as there was appropriation of rights by the government. In the Constitutional Court's judgement in *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9 (Agri SA) Mogoeng CJ, held that "*[t]o prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of", and that "there can be no expropriation in circumstances where the deprivation does not result in property being acquired by the state*".

1 May 2006 to apply for a reclamation permit. It is recommended that the Bill should be amended to record that the transitional period contemplated in section 42A commences from the date of enactment of the Bill;

17.6.1.2 the Bill entitles the "*holder of an old order right or converted right*" to apply for a reclamation permit, the Bill, however, fails to define the references to "*old order right or converted right"* in section 42A of the MPRDA. It is thus unclear if the term "*old order right"* bears the meaning assigned to it under the Transitional Arrangements in Schedule II to the MPRDA, being an "*old order mining right, old order prospecting right or unused old order right, as the case may be*", and if the term "*converted right"* refers to an "*old order right*" that has been converted under Transitional Arrangements in Schedule II to the MPRDA to a corresponding right under the MPRDA. It is unclear why a distinction is drawn between an "*old order right"* and a "*converted right"*, as all converted rights were old order rights;

17.6.1.3 the Bill fails to address the position in relation to the continuation of mining operations on the residue stockpile or residue deposit prior to a reclamation permit being granted;

17.6.1.4 the Bill fails to address issues concerning environmental liability in relation to residue stockpiles and residue deposits post the mining of such residue stockpiles and residue deposits pursuant to a reclamation permit;

17.6.1.5 the Bill fails to indicate whether a new:

17.6.1.5.1 environmental authorisation; and

17.6.1.5.2 social and labour plan,

will be required to mine a residue stockpiles and residue deposits pursuant to a reclamation permit; and

17.6.1.6 it is unclear if the terms and conditions of a reclamation permit will automatically mirror the terms and conditions of the right that entitled the application to apply for a reclamation permit.

18. **Proposed amendment - section 43 as contained in clause 30 of the Bill**

18.1 Clause 30(a) of the Bill amends section 43(1) of the MPRDA, which was likewise amended by section 34(a) of the Amendment Act, so that subsequent to the amendments by both the Bill (underlined) and the Amendment Act (in bold), section 43(1) of the MPRDA reads as follows:

> "*The holder of a prospecting right, mining right, retention permit* ***or previous holder of an old order right or previous owner of works that has ceased to exist,*** *remains responsible for any environmental liability, pollution, ecological degradation,* ***the pumping and treatment of extraneous water, compliance*** *with* ***the conditions of the environmental authorisation*** *and the management* ***and sustainable closure*** *thereof, notwithstanding the issuing of* ***a*** *closure certificate by the Minister* ***in terms of this Act*** *to the holder* ***or owner*** *concerned*."

18.2 The Bill envisages that a right holder would remain liable for environmental and associated damage caused by prospecting and mining operations, even *after* (and notwithstanding) the issue of a closure certificate by the Minister. This means that a right holder would no longer be indemnified from liability after the issue of a closure certificate.

18.3 Not only do the amendments to this section create retrospective environmental liability for any previous holders of rights but it also envisages that a rights holder will remain liable for environmental and associated damage caused by exploration and production operations, even after (and notwithstanding) the issue of a closure certificate by the Minister. Currently, the purpose of a closure certificate is to achieve closure, and to remove the holder from any further liability once its operations have ceased or have been completed. The amendments to this section thus negate the purpose of a closure certificate.

18.4 Furthermore, the amendments will lead to impractical situations where it will be extremely difficult to apportion blame for or quantify and identify environmental liability. For instance, there may have been a number of holders of rights that have mined on a portion of land. The amendment effectively allows any one of them or all of them to be liable for environmental damage whether or not they were responsible for such damage. In our view, it would be detrimental to investment if mining companies could be held liable for environmental liability indefinitely.

18.5 In our view, the proposed amendments to section 43(6) are far more practical and sufficient to counter balance the interests of mining companies and those of the environment and it is not necessary to maintain both the amendments to sections 43(1) and 43(6).

18.6 From a MHSA perspective, the proposed amendments appear to create some level of conflict with the provisions relating to closure certificates contained in the MHSA.

18.7 In terms of section 2(2) of the MHSA, "*the employer of a mine that is not being worked, but in respect of which a closure certificate in terms of the [MPRDA] has not been issued, must take reasonable steps to continuously prevent injuries, ill-health, loss of life or damage of any kind from occurring at or because of the mine*". This is interpreted to mean that an employer's (holders) obligations in respect of health and safety extend up until the point that a closure certificate is granted.

18.8 However, it appears that the proposed amendments seek to require the holder to retain certain responsibilities after the issuing of a closure certificate. While these appear to be aimed at environmental and water related aspects, the obligation to continue pumping and treatment of extraneous water implies that work will be required to be performed by the holder after the issuing of the closure certificate.

18.9 It is unclear then whether the holder will remain responsible for the health and safety of persons performing these obligations in terms of the MHSA or whether the provisions of the Occupational Health and Safety Act, 1993 will become applicable by virtue of the closure certificate having been issued to the holder. This is a material consideration in terms of occupational health and safety compliance, particularly where the erstwhile holder may engage a third party to perform these obligations.

18.10 We note the proposed inclusion of the apparent exemption from the obligations contained in section 43 where a holder formally or legally abandons the right in circumstances where there has been no environmental damage caused. However, a scenario where no environmental damage has been caused will not necessarily imply that circumstances have arisen which will or may impact on the health and safety of persons. In this case, notwithstanding that the holder appears to be exempted from obtaining a closure certificate, the MHSA will remain applicable until the certificate is obtained and therefore the health and safety obligations placed upon the holder will remain, notwithstanding the formal abandonment.

18.11 Section 43(5A) further provides that the Minister can instruct the Chief Inspector of Mines to confirm that the provisions relating to health and safety management of potential pollution to water resources have been addressed. However, there is no time limit stipulated within which the Minister is required to instruct the Chief Inspector.

18.12 Section 43(14) is also amended to include that if no invasive operations have been conducted by the holder who abandons the right, then they are exempted from the provisions of section 43, however, no guidance is given as to what will constitute invasive operations and who will decide whether invasive operations have been conducted.

18.13 It is accordingly recommended that the phrase beginning "*notwithstanding the issuing of…*" should be deleted from clause 30(a) of the Bill.

19. **Proposed amendment - section 49 as contained in clause 36 of the Bill**

19.1 It is not clear to us why the reference to "*after inviting representations from relevant stakeholders*" has been deleted. This requirement provided a form of transparency to the process.

20. **Proposed amendment - section 52 as contained in clause 39 of the Bill**

20.1 The amendment made by the Amendment Act by inserting section 52(4) places the obligation upon a holder of a right to be responsible in terms of the LRA for the management of downscaling and retrenchment until the issuance of a closure certificate.

20.2 We note that this is problematic as firstly, the holder may not be the employer of persons affected by a downscaling and retrenchment process as contemplated in the LRA and therefore unable to meet these obligations. Secondly, it may be impractical to link the management of retrenchment and LRA processes to the issuing of a closure certificate. In many cases, a closure certificate may not be sought, notwithstanding large scale downsizing and an operation may rather be placed into care and maintenance. The Bill fails to properly address the difficulties regarding section 52(4).

21. **P**roposed amendment - section 53 as contained in clause 40 of the Bil**l**

21.1 We note that the inadequacies of this section have recently been highlighted through its extensive use and interpretation in terms of the Government's renewable energy programme.

21.2 In our view, this section requires further amendments in order to clarify the following:

21.2.1 the application of this section is extremely broad (ie applies to all land in South Africa) and should be narrowed or adequately defined;

21.2.2 whether or not the Minister's consent in terms of section 53 can be transferred by the holder to a third party, for instance, if the holder of a company which previously obtained consent to establish a renewable energy project wishes to dispose of such company/project, would the third party purchaser need to apply for or obtain Ministerial consent in terms of section 53 again, or is the initial consent, as granted, capable of being transferred to the third party purchaser (the DMR is current insisting that the purchaser may re-apply for section 53 consent which, in our view, is unnecessary and a waste of the DMR's resources);

21.2.3 section 53(2)(b) states that consent is not required in respect of "*the use of any land which lies within an approved town-planning scheme which has applied for and obtained consent in terms of subsection (1)".* This section does not address town planning schemes which were approved prior to the MPRDA taking effect and which could not have obtained consent in terms of section 53. We would therefore recommend that the wording *"or similar consent required under previous mining and mineral legislation applicable at the time that the town planning scheme was approved" is incorporated immediately after "consent in terms of sub-section (1)";*

21.2.3 whether it is necessary to register the section 53 consent at the Mineral and Petroleum Titles Registration Office ("**MPTRO**"). The section 53 application template published by the DMR on its website states that the consent must be registered at the MPTRO, yet there is no such requirement in terms of the MPRDA or the Mining Titles Registration Act, 1967; and

21.2.4 the procedure to be followed where an application for consent in terms of section 53 is lodged over an area where existing mining or prospecting rights are held and *vice versa*.

22. **Proposed amendment - section 69 as contained in clause 45 of the Bill**

22.1 Section 69(2)(a) of the MPRDA provides a list of sections in the MPRDA which, although they refer to mining and prospecting rights, by virtue of section 69 of the MPRDA, apply to exploration and production rights, as well as technical co-operation and reconnaissance permits. Section 69(2)(b) of the MPRDA also

stipulates the substitutionary words which are necessary to facilitate such application.

22.2 In our view, clause 45 of the Bill is poorly drafted and at once appears to apply the list of substitute words to "*any provision of this Act*", despite having added a number of sections of the MPRDA to the section 69(2)(a) list, and to delete the list of substitutionary words. We presume that these are mistakes by the drafters of the Bill and for the purpose of this submission, proceed on that presumption.

23. **Proposed amendment - section 70 as contained in clause 46 of the Bill**

23.1 We note that the Bill does away with the Minister's power to designate a State-owned agency, and transfers the power to process and administer petroleum exploration and production rights from the designated agency to the DMR's Regionals Managers. The Minister appointed Petroleum Agency South Africa (Proprietary) Limited's ("**PASA**") as the "*designated agency*" in 2004.[56] This amendment effectively nullifies PASA's role in the MPRDA. The functions of PASA, as set out in section 71 of the MPRDA, are transferred as they currently stand to the Regional Manager of the region in which the exploration or production right application is being processed or operation is being undertaken.

23.2 There does not appear to be any justifiable basis for transferring the powers currently vested in PASA to the Regional Managers. The change is likely to increase the obligations imposed on Regional Managers and may entail a revision of the current division of South Africa's regions, which is regulated by section 7 of the MPRDA. The change will also result in the loss of PASA's institutional value, and the collective experience and knowledge of PASA's employees as regards the administration of exploration and production rights, which are significantly different from prospecting and mining rights which the Regional Managers currently deal with, not least because the rights are primarily located offshore.

24. **Proposed amendment - section 71A as contained in clause 48 of the Bill[57]**

24.1 The Bill obliges the Minister to appoint a "*public entity*" to:

24.1.1 promote onshore and offshore exploration for and production of petroleum;

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[56] On 18 June 2004 in GN 733, *Government Gazette* 26468, the Minister, acting under section 70 of the MPRDA, designated PASA to perform the functions referred to in Chapter 6 of the MPRDA.

[57] Note that the Bill contains two clauses 47 and 48. Section 71A is amended by the first occurrence of clause 48.

24.1.2 receive, store, maintain, interpret, add value to, evaluate, disseminate or deal in all geological or geophysical information relating to petroleum submitted in terms of section 88 of the MPRDA to the Regional Manager and the Council for Geoscience;

24.1.3 bring to the notice of the Minister any information in relation to the exploration and production of petroleum which is likely to be of use or benefit to the State; and

24.1.4 advise and recommend to the Minister on a need to by itself, through contractors or through any other State enterprise carry out on behalf of the State reconnaissance operations in connection with petroleum.

24.2 The proposed section 71A grants the Minister the unfettered discretion to appoint a national[58] or provincial public entity[59] to fulfil the functions recorded in such section, without recourse to the institutional knowledge and experience of such entity. Moreover, the definition of public entity in the PFMA has been cast so wide that a

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[58] Section 1 of the PFMA defines a "*national public entity*" as:

"*(a) a national government business enterprise; or*

(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is-

(i) established in terms of national legislation;

(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

(iii) *accountable to Parliament*".

Section 1 of the PFMA defines a "*national government enterprise*" as:

"*(a) is a juristic person under the ownership control of the national executive;*

(b) has been assigned financial and operational authority to carry on a business activity;

(c) as its principal business, provides goods or services in accordance with ordinary business principles; and

(d) is financed fully or substantially from sources other than-

(i) the National Revenue Fund; or

(ii) by way of a tax, levy or other statutory money".

[59] Section 1 of the PFMA defines a "*provincial public entity*" as:

(a) a provincial government business enterprise; or

(b) a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is-

(i) established in terms of legislation or a provincial constitution;

(ii) fully or substantially funded either from a Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation; and

(iii) accountable to a provincial legislature".

Section 1 of the PFMA defines a "*provincial government enterprise*" as:

"*(a) is a juristic person under the ownership control of a provincial executive;*

(b) has been assigned financial and operational authority to carry on a business activity;

(c) as its principal business, provides goods or services in accordance with ordinary business principles; and

(d) is financed fully or substantially from sources other than-

(i) a Provincial Revenue Fund; or

(ii) by way of a tax, levy or other statutory money".

state owned petroleum company could be appointed to fulfil the functions under section 71A of the MPRDA. It is particularly disconcerting that such state owned petroleum company could be granted a wholly unfair advantage by having access to the geological or geophysical information relating to petroleum submitted by the holders of any reconnaissance permit, technical co-operation permit, exploration right and production right, to the Regional Manager or Council for Geoscience.

25. **Proposed amendment - section 74(2A) as contained in clause 48(c) of the Bill**[60]

25.1 We note that the Bill amends section 74 of the MPRDA to allow the relevant Regional Manager to accept an application for a reconnaissance permit for an area over which another permit or right has already been granted, provided the holder of the existing permit or right consents in writing to the Regional Manager's acceptance of the application for an additional reconnaissance permit.

25.2 The Bill, however, does not put in place any precautionary measures to avoid the potential difficulties and conflicts which may arise from overlapping permits or rights (for example, a plan determined by the relevant parties to ensure co-operation and efficient dispute settlement).

26. **Proposed amendment - section 80(2) as contained in clause 54(b) of the Bill**

26.1 The Bill grants the Minister discretion to require that an application for an exploration right comply with the Revised Mining Charter. The discretion is to be exercised with "*regard to the type of petroleum resource concerned and the extent of the proposed exploration*".

26.2 The transformation of the exploration and production of the petroleum and oil industry, however, is already regulated by the Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry ("**Petroleum and Liquid Fuels Charter**"). In view of this, the amendment occasioned to section 80(2) could create confusion and uncertainty in that there are considerable differences in the obligations contained in the two charters, and it is unclear in the event of an overlap which Charter would prevail. In addition, the discretion afforded to the Minister under this amendment is very broad. This will make it difficult for applicants for exploration rights to know in advance whether they will be expected to comply with the Revised Mining Charter.

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[60] See footnote 57. Section 74 is amended by the second occurrence of clause 48.

26.3 Further, a number of the Revised Mining Charter's provisions (such as clause 2.6 "*mine community development*", and clause 2.7, "*housing and living conditions*") are irrelevant to certain operations of the petroleum industry, particularly those situated offshore. In contrast to the Petroleum and Liquid Fuels Charter, the Revised Mining Charter imposes precise targets and timelines which must be met by right holders, meaning that an exploration right holder would also potentially be subject to more onerous transformation requirements. The Petroleum and Liquid Fuels Charter, with regard to the upstream activity of oil and gas exploration and production, merely requires that such exploration and production rights reserve a minimum of nine per cent of the right holder's shares for HDSAs. The Revised Mining Charter, on the other hand, obligates right holders to achieve twenty six per cent ownership by HDSAs by 2014. There is no mention of a transition period to allow gas exploration right holders to comply with the Revised Mining Charter, if so required by the Minister.

27. **Proposed amendment - section 82(2)(g) as contained in clause 56(b) of the Bill**

27.1 The insertion of section 82(2)(g) would require that the holder of an exploration right relinquish a portion of the area to which the right relates when applying for the *renewal* of an exploration right or a production right unless the holder proves that he or she is in a position to explore the entire exploration area or he or she has made a discovery in respect of the entire exploration area. This obligatory relinquishment is newly introduced by the Bill. First, it appears that this obligation to relinquish cannot be justified over those portions of the technical co-operation area where there are insufficient quantities of petroleum to justify an application for an exploration right.

27.2 Furthermore, in our view, it should not apply to converted exploration rights which are converted from OP26 subleases or from old order prospecting rights for petroleum in terms of items 4 and 6 in Schedule II to the MPRDA; or to items 3 and 8 in Schedule II relating to pending prospecting and exploration applications, and to holders of unused old order rights who, in acquiring such exploration rights, complied with item 2(b). This potentially onerous obligation to relinquish is vague, as the Bill does not set out how large a portion will need to be relinquished. It is also not clear in what manner or by whom this will be determined, whether this relinquished land will be given to a third party; or whether the holder of the right will have any input in determining which area to relinquish. This is likely to be yet another disincentive for investors.

28. **Proposed amendment - section 99 as contained in clause 70 of the Bill**

28.1 Clause 70 of the Bill amends section 99 of the MPRDA extensively. The long title of the Bill provides that one of its objects is "*to provide for enhanced sanctions*". The proposed sanctions are excessive and disproportionate to the acts and omissions which they intend to punish.

28.2 Penalties under the Bill may be imposed for non-compliance with the MPRDA, other relevant law, the terms and conditions of a right, or the provisions of the relevant exploration work programme, production work programme, social and labour plan, or environmental management programme. The maximum penalty for non-compliance with the MPRDA is R500 000. The Bill, on the other hand, sets penalties with reference to a percentage of annual turnover in South Africa and exports from South Africa in the preceding financial year. The Bill also envisages that an appeal against a penalty will not suspend the immediate obligation to pay the penalty unless it is suspended by the Minister.

28.3 It is recommended that the drafters of the Bill reconsider the penalties they have proposed under clause 70. It is noted that the penalty provisions, through the use of the phrase "*not exceeding*", set maximum thresholds and thus afford the relevant regulators significant discretion in determining the extent of the fine or period of imprisonment. It is accordingly recommended that the Bill should include a list of factors which the regulator in question must take into consideration when determining the relevant fine or period of imprisonment.

28.4 The proposed penalties will, without doubt, deter investment in the South African mining industry.

29. **Proposed amendment - section 102 as contained in clause 72 of the Bill as well as the definition of "*associated minerals*" as set out in section 1**

29.1 Clause 72(c) of the Bill inserts subsections 102(3) and (4) into the MPRDA. These subsections read as follows:

"*(3) [a]ny right holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the right holder, but which must of necessity be mined with the first-mentioned mineral, provided that the right holder declares such associated mineral or any other mineral discovered in the mining process.*

(4) The right holder contemplated in subsection (3) must within 60 days from the date of making the declaration apply for an amendment of its right to include the mineral so declared failing which a third party may apply in terms of section 16, 22 or 27 as the case may be for such associated mineral."

29.2 Associated minerals have, in the past, been a source of some difficulty and confusion where third parties were granted rights to associated minerals, while the right to the primary mineral is held by someone else. We commend the Minister, DMR and the drafters of the Bill on the attempt to regulate the removal of "*associated minerals*". In our view this is a constructive development intended to address the difficulties that arise in the prospecting and mining of secondary minerals occurring in association with the primary mineral(s) over which a right has been granted in terms of the MPRDA.

29.3 However, in our view, the manner in which the Bill proposes to address and regulate such "*associated minerals*" is inadequate, for the following reasons:

29.3.1 the term "*associated mineral*" as defined in the Bill and as applied in the proposed section 102(3) appears to relate only to a mining right and no reference is made to mining permits and/or prospecting rights in this regard. This may create practical difficulties for the holder of a prospecting right or mining permit who, whilst conducting operations in terms of such right or permit, discovers an associated mineral;

29.3.2 the proposed section 102(3) contained in the Bill, requires the holder of a right to declare such associated minerals. However, no indication is given in the subsection as to:

29.3.2.1 who such declaration must be made;

29.3.2.2 the time period within which the discovery of the associated mineral must be declared; or

29.3.2.3 the purpose of such declaration and the consequences of the declaration or the failure to declare.

29.3.3 the term "*associated mineral*" as defined in the Bill is not applied in the proposed section 102(3) and is, in fact, defined further in the said section. The term "*associated mineral*" as defined in the proposed section 1 should be applied throughout the Bill and the definition should not be defined further in a different section of the Bill. The proposed section 102(3) as drafted in its

current form, creates uncertainty and is contradictory as to the distinction between a 'primary mineral' and an "*associated mineral*" as defined in the Bill;

29.3.4 the Bill does not prohibit the grant of multiple permits, permissions or rights regarding different minerals or categories of petroleum evident in a particular area. As a result, the Bill fails to properly address the difficulties regarding associated minerals that have been experienced historically, and which may potentially manifest in relation to associated categories of petroleum; and

29.3.5 the proposed section 102(4) provides that a holder of a right must within sixty days from the date of making a declaration under section 102(3) apply for an amendment of its right to include the occurring in, on and under the area over which he/she holds such right. Failing which a third party may apply in terms of section 16, 22, or 27 as the case may be for such associated mineral. The rights, obligations and limitations of the holders of the primary mineral and the associated mineral are left unregulated. In addition, the amendment fails to set out what the position is, in respect of pending applications for (i) a mining right, and (ii) an amendment of a right to include the associated mineral.

29.4 We recommend that:

29.4.1 in order to remove uncertainty in this regard, prospecting rights, mining rights and mining permits should be granted in respect of all minerals occurring in various geological horizons such as, among other things, coal seams, platinum reefs and gold-bearing reefs;

29.4.2 the definition of "*minerals*" be expanded upon to include a broader scope of minerals which are mined as associated minerals; and

29.4.3 different mineral groups should be established and defined in order for rights to be granted in respect of a particular group of minerals and such group should include the associated minerals of the primary mineral being processed.

Part 3: Conclusion

30. The objects of the Bill to "*improve the regulatory system*", "*remove ambiguities*" and "*streamline administrative processes"* are commendable. These objects are, however, contradicted and undermined by the substance of the Bill itself. In fact, instead of addressing the problems which exist currently within the MPRDA, the Bill in its current form exacerbates them.

31. The proposed amendments in the Bill leaves much unclear and adds to the uncertainty of many provisions of the MPRDA. The vague wording of a number of key provisions, coupled with the broad administrative discretion given to the Minister and Regional Managers, is likely to create further regulatory uncertainty in the mining industry. This, together with potential instances of expropriation under the Bill, impacts negatively on security of tenure of prospecting and mining rights, notwithstanding the fact that this is an objective of the MPRDA. Given these issues, it needs hardly be said that the Bill, if passed, will have a significantly negative impact on investor confidence in South African mining sector.

32. We hope that the commentary and recommendations contained in this submission will be considered, and will be of assistance in rectifying much of the uncertainty created by the amendments contained in the Bill.