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Western Cape Provincial Parliament
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NEGOTIATING MANDATE

To:	Hon O J Sefako Chairperson of the Select Committee on Land and Mineral Resources
Name of Bill:	Mineral and Petroleum Resources Amendment Bill
Number of Bill:	[B15D - 2013]
Date of deliberation:	03 May 2017
Vote of Legislature:	The Standing Committee on Economic Opportunities, Tourism and Agriculture Committee reports that it confers on the Western Cape's Permanent Delegate in the NCOP the authority not to support the Bill for the attached reasons.

Signature

04 May 2017
Date

Hon. BA Schäfer
Chairperson: SC on Economic Opportunities, Tourism and Agriculture

9.

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Economic Opportunities, Tourism and Agriculture on the *Mineral and Petroleum Resources Development Amendment Bill* [B 15D - 2013] (NCOP), dated 3 May 2017, as follows:
The Standing Committee on Economic Opportunities, Tourism and Agriculture, having considered the subject of the *Mineral and Petroleum Resources Development Amendment Bill* [B 15D - 2013] (NCOP) referred to it in terms of Standing Rule 220, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill for the following reasons:

1. Definitions, clarifications and corrections

1.1 **Clause 1(h) – Definition of "designated minerals"**: There are insufficient criteria for the minister to apply in declaring a mineral or petroleum resource a 'designated mineral'. This lack of clarity will have a negative impact on investor certainty and could result in lower investment in the industry, having a negative impact on tax revenues for the fiscus and job creation. There must be clear objective criteria that the minister must follow to declare a mineral or petroleum resource a 'designated mineral'.

1.2 **Clause 1(k) – definition of "historically disadvantaged South Africans":** The Committee supports the omission of the phrase "should be representative of the demographics of the country" in the new definition of "black persons".

1.3 **Clause 1(q) – definition of "mining area":** The proposed definition of "mining area" is too broad. The definition must be limited to include the area physically to be mined as well as infrastructure on or in that area, which are exclusively used for the purpose of mining on the land in question. This will be consistent with the interpretation of "development" in terms of other activities listed in the NEMA Environmental Impact Assessment ("EIA") Regulations, 2014.

1.4 **Clause 1(zD) – definition of "this Act":** The Committee agrees that the proposed definition of "this Act" remains unconstitutional for the reasons expressed in the President's referral of the Bill [B – 15B] back to the National Assembly. It elevates policy to the status of legislation. Refer to point 7 below.

1.5 **Clause 31(d) Section 43(5) – "Issuing of a closure certificate" in the Principal Act:** The reference to "the Department of Water and Environmental Affairs" must be changed to "the Department of Water and Sanitation and the Department of Environmental Affairs". The Department of Agriculture and relevant municipalities (the responsible authority for air pollution and municipal planning) must also be included.

1.6 **Clause 32 Section 44 – "Removal of buildings, structures and other objects" in the Principal Act:** It is unclear what is included under "building structure or object". It is open to interpretation and could apply to all structures on the site. It would be excessively burdensome on the holders of the rights if they are not allowed to remove objects and/or movable building structures or materials that are rightfully theirs. This would increase the cost of investment, and therefore deter investment. What is included and excluded in the phrase "building structure and object" must be clarified.

1.7 **Clause 37 Section 49(1) – "Minister's power to prohibit or restrict prospecting or mining" in the Principal Act:** The proposed amendment to section 49(1) is not supported. Furthermore, objective criteria must provide for the determination of "national interest" by the minister. Alternatively, a definition should be provided.

1.8 **Clause 44 Section 56A – "Establishment of Ministerial Advisory Council" in the Amendment Bill:** It is unclear who will be regarded as the "three persons representing relevant state departments" contemplated in paragraph (c). Paragraph (c) of section 56A(2) must be revised to provide for adequate representation of relevant state departments. Furthermore, provision should be made for local government and the NGO sector to be represented.

1.9 **Clause 73 Section 99 – "Penalties" in the Principal Act:** There should be a monetary value attributed to the fine in order that those who do not reflect profits in their annual financial statements still incur a penalty. Sections 99(1)(a), (c) and (e) must therefore be amended to include an appropriate amount as an alternative, if no profits are reflected in a holder's annual financial statements, as follows: "... percent of the persons or right holder's annual turnover in the Republic and its exports from the Republic during the persons or right holder's preceding financial year as reflected in the last available annual financial statements or one million rand, whichever is the greater, or imprisonment..."

2. Conflict with Environmental Law

General comment: The Committee proposes that where there is conflict between the Mineral and Petroleum Resources Development Amendment Bill (hereafter referred to as the MPRDA Bill) and the National Environmental Management Act, 1998 (hereafter referred to as the NEMA), that the MPRDA Bill should be fully aligned with the NEMA.

2.1 The Amendment Bill, in many instances, proposes to replace the specific time periods stated in the Mineral and Petroleum Resources Development Act with the "prescribed period". Alignment must be achieved between the MPRDA Bill and the NEMA. The "prescribed period" should be replaced with "the period as provided for in terms of the National Environmental Management Act, 1998".

2.2 **Clause 11, section 16(4)(a) and (b) – "Application for prospecting right" in the Principal Act:** The proposed deletion of "... any interested and ..." is inconsistent with the principles of NEMA and limits the scope of public participation. The environmental authorisation process in terms of NEMA allows for *all interested and affected parties* to be consulted during an environmental authorisation process, and the omission of such persons from this amendment is not supported. The deletion of the phrase "and any interested and" is, therefore, not supported. The MPRDA Bill should be aligned with the NEMA.

2.3 **Clause 19(d) Section 24(3)(a) – "Application for renewal of mining right" in the Principal Act:** The implications of the proposed amendments to section 24(3)(a) are that the minister must grant the renewal of a mining right *even if the operation is unlawful in terms of other statutes*. The proposed deletion is fundamentally wrong and promotes unlawful activities. This is inconsistent with the principles of NEMA (Section 37 of the MPRDA specifically confirms the application of the principles of NEMA) and contrary to the rule of law, a value on which the Constitution is founded, as well as the need for cooperative governance. The phrases "any relevant provision of" and "or any other law" should not be deleted from section 24(3)(a).

2.4 **Clause 28 Section 37(1) – "Environmental management principles" in the Principal Act:** The rationale for the deletions in section 37(1) is not clear. The NEMA principles apply to all mining, prospecting and related activities. The deletion is especially disconcerting when seen in conjunction with the consistent deletion of *"any other law"* throughout the amendment Bill. The proposed substitution of section 37(1) is not supported.

2.5 **Clause 29 Section 38B – "Integrated environmental management and responsibility to remedy" in the Principal Act:** Clause 29 of the Amendment Bill proposes to amend section 38B(1) by providing that an environmental management plan or programme that had been approved at the time of the coming into effect of the National Environmental Management Amendment Act, 2014 shall be deemed to have been approved as an environmental authorisation in terms of NEMA.

Clause 29 proposes to amend section 38B(4) to the effect that all pending applications lodged in terms of the MPRDA prior to the coming into effect of the National Environmental Management Amendment Act, 2014 shall be processed in terms of the MPRDA as if the National Environmental Management Amendment Act, 2014 is not in operation.

The issue of the effect and validity of environmental management plans and programmes approved in terms of the MPRDA must be addressed in NEMA. To this effect the National Environmental Laws Amendment Bill, 2015 ("NEMLA4") seeks to regulate the situation of environmental management plans and programmes that had been approved on or before 8 December 2014. The MPRDA cannot dictate the application of the underlying fundamental environmental management principles in respect of NEMA.

The proposed amendments to the NEMA (through the National Environmental Laws Amendment Bill, 2015; "NEMLA4") seek to regulate the situation of environmental management plans and programmes that had been approved on or before 8 December 2014. In light of the imminent coming into effect of NEMLA4, the provisions of section 38B of the Amendment Bill are redundant and should be omitted.

Alternatively, an additional provision should (in conformance with the final version of NEMLA4) be included to the effect that section 38B does not apply in instances where an application for an environmental authorisation in relation to activities ancillary to exploration, prospecting, mining, or primary processing was not obtained, was refused or there was failure to obtain an environmental authorisation in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989) for activities that required such an environmental authorisation in terms of that Act, or for activities identified or specified under section 24(2) of NEMA, or a waste management licence has not been obtained, was refused or not obtained for any activity listed in terms of section 19 of the National Environmental Management: Waste Act, 2008.

2.6 **Clause 31(g) Section 43(14) – "Issuing of a closure certificate" in the Principal Act:** The insertion of this clause is not supported as some environmental consequences will only become apparent over the long term (significant time-lag effect of environmental consequences). Additionally, the term "invasive operations" is not defined. It is not clear who will determine whether a holder *"has not conducted any invasive operations"*.

2.7 **Clause 53 section 56 – "Lapsing of right, permit, permission and licence" in the Principal Act:** The final deregistration of rights must also be subject to the holder complying with any environmental responsibility related to the rehabilitation of the land.

2.8 **Clause 51(f) Section 74(4)(a) – "Application for reconnaissance permit" in the Principal Act:** The deletion of the phrase "and any interested and affected party" and the replacement with "an affected party" is not supported. It implies that it is only necessary to consult with one party. This could lead to insufficient consultation with all interested and affected parties.

2.9 **Clause 58 Section 81(3)(a) – "Application for renewal of exploration right" in the Principal Act:** The proposed deletion of "or any other law" in section 81(3)(a) is not supported. The Minister of Mineral Resources should consult with other government agencies when it knows that other laws have not been complied with, and the minister should not be compelled to issue a right in cases of non-compliance with other laws.

2.10 **Clause 58 Section 81(3)(c) – Application for renewal of exploration right" in the Principal Act:** The Committee proposes the insertion of "has complied with the terms and" before "conditions of the environmental authorisation" in section 81(3)(c).

2.11 **Clause 63 Section 85 – "Application for renewal of production right" in the Principal Act:** Compliance with environmental authorisation as well as with the environmental management programme must be assessed. The section must therefore be amended to specifically include the approved environmental authorisation as well as the environmental management programme.

The Committee proposes to amend section 85(2)(c) as follows: "(c) be accompanied by a detailed report reflecting the extent of compliance with the requirements of the approved environmental authorisation and environmental management programme, the rehabilitation to be completed and the estimated cost thereof; and".

3. Community rights and participation in decisions that affect communities

Submissions received from the Western Cape Government, Legal Resources Centre, Centre for Environmental Rights, the Mining and Environmental Justice Community Network, Action Aid and members of the public show that there is a substantive issue regarding community participation and consent in decisions that affect communities. It appears as though the rights and entitlements of communities to participate in decisions that affect them (mining and petroleum related decisions) have been diminished.

The *Interim Protection of Informal Land Rights Act, 1996* ("the IPILRA") provides for the protection of informal land rights held on a communal basis. Importantly, the IPILRA provides that a holder of an informal land right will be deemed an owner of land for the purposes of section 42 of the *Minerals Act, 1991*. The IPILRA secures the rights of communities by recognising the custom and usage of communities by providing for compensation in the case of deprivation of informal land rights, by requiring consent (of the majority) by communities for informal land rights to be disposed of, and other matters.

The IPILRA and the Minerals Act, 1991 gave significant recognition and protection to informal land rights held by communities. This meant that traditional authorities or land owners (holding title deeds) could not dispose of land or rights in land without the participation and consent of certain communities. *The Mineral and Petroleum Resources Development Act, 2002*, changed this position, and the amendment Bill leaves the principal Act largely unchanged in this regard. The principal Act, as it stands at present (and will continue to stand if the amendment Bill is passed as is), makes community participation a matter that *may in the relevant minister's discretion* be provided for.

This is a far cry from the extensive protections provided for in the IPILRA concerning community participation, community consent and compensation. The protections provided for in the IPILRA is not a matter for ministerial discretions, but must be abided by.

Hence, since the IPILRA remains on our statute book, there is a conflict of laws between the provisions of the IPILRA and the principal Act, which can be remedies by the amendment Bill. However, the current amendment Bill does not remedy the conflict.

The Committee agrees that community participation should be aligned with the IPILRA in the MPRDA Bill. Furthermore, the Committee agrees that the definition of "community" in the amendment Bill must be further clarified and aligned with the IPILRA definition of "community".

4. Conflict with international trade agreements and obligations

The President expressed the reservation that sections 26(2B) and 26(3) of the Bill are inconsistent with South Africa's international obligations because it imposes export restrictions on "designated" minerals. In short, Parliament is passing a law that will result in South Africa being in breach of international treaties it is a signatory to.

Submissions received from the Chamber of Mines, the Centre for Environmental Rights, Anglo American, and the South African Institute for Race Relations, state that the Bill's export restrictions are in breach of South Africa's obligations under the 1994 General Agreement on Tariffs (GATT) of the World Trade Agreement (WTO), and the Trade, Development and Co-operation Agreement (TDCA) concluded between South Africa and the European Union. They argue that this will expose the country to international sanctions.

International treaty-making in South Africa falls exclusively within the competence of the national executive, and is not shared with Parliament. It is the national executive (and not Parliament's approval of the international treaty) that binds South Africa internationally. Parliamentary approval of an international treaty has domestic effect only. It follows that GATT has domestic *and* international effect.

It is inferred from this that there is a duty (domestically) on the government and Parliament to act in good faith and to act in a manner that would not defeat the objects and purpose of an approved international treaty. Government and Parliament have a legal obligation to act in a collaborative manner when exercising their authority.

Therefore, should the Bill be passed in its current form, it would compel (in terms of domestic law) the national executive to act in a manner that violates international treaties that South Africa is a signatory to. Furthermore, it appears as though Parliament would violate its obligation to act in good faith and to not defeat the objects and purpose of an approved international treaty.

Failure by the national executive and Parliament to act collaboratively in exercising their powers is irrational and unlawful.

The Committee expresses the view that international treaties must advance the interests of the South African people.

5. Mining and production rights

5.1 **Clause 5 Section 9 – "Order of processing of applications" in the Principal Act:** The Committee supports the proposed amendment; however, a change of wording is needed for "first come first served".

5.2 **Clause 8(a) Section 11 – "transferability and encumbrance of prospecting rights and mining rights" in the Principal Act:** The proposed amendment goes further than the stated intention in the Memorandum on the Objects of the Bill, and introduces the requirement of ministerial consent for the transfer of a prospecting right or part thereof in a unlisted company, or of a controlling interest in an unlisted company that *"hold a prospecting right or mining right or an interest in any such right"*. The ambit of what is intended by an *"interest in any such right"* held by a listed or unlisted company is ambiguous. Also, it appears that where unlisted companies hold only a minority shareholding in a right, ministerial consent will be required for a change in shareholding in such a company. The requirement of ministerial consent in respect of listed companies is unworkable in light of the manner in which shares in listed companies are traded. Furthermore, the proposed amendments are vague, and unduly and arbitrarily restrict the transfer of prospecting rights or parts thereof held by both listed and unlisted companies.

The amendments to section 11(1) are not supposed insofar as they are vague and potentially contravene the principle of legality and section 25 (the right to property) of the Constitution.

The Committee agrees that the state must have a mechanism for ensuring that mining rights and interests benefit intended persons, and are not transferred without oversight. The mechanism proposed in the Bill is, however, practically unworkable. Retrospective oversight by the Department of how companies trade their shares is proposed. This ensures that the Department can achieve legitimate objectives whilst, at the same time, does not interfere with or impede trade in shares in a dynamic manner and on a day-by-day basis in the markets. The Committee proposes the following:

- Creation of a different and workable mechanism to implement the policy;
- Determination of the transfer of prospecting rights or part thereof by an independent expert body; and
- Listed companies should report on shareholding annually so that the Department of Mineral Resources can (retrospectively) track how companies are trading their shares.

5.3 **Clause 12(g), section 17(5) – "Granting and duration of prospecting right" in the Principal Act:** The Committee proposes that a time limit be set for lodging appeals against the granting of mining rights or the approval of environmental authorisations.

5.4 **Clause 31(b) Section 43(2) – "Issuing of closure certificate" in the Principal Act:** The clause will deter the holder of a mining permit from purposefully hiding certain facts in order to gain a closure certificate. However, the criteria in respect of the limits of the liability imposed by this clause should be specified in terms of how far into the future it applies and determination of the degree of culpability. Without such criteria this clause is too vague and it may not be possible to enforce it.

5.5 **Clause 34(b) Section 46(2) – "Minister's power to remedy environmental damage in certain instances" in the Principal Act:** The proposed amendment of section 26(2) to delete the phrase *"or if there is no such provision or if it is inadequate, from money appropriated by Parliament for the purpose"* is not supported.

5.6 **Clause 35 Section 47(2)(c) – "Minister's power to suspend or cancel rights, permits or permissions" in the Principal Act:** Affording the Minister a discretion to give a holder "a reasonable opportunity" to show why the right, permit or permission should not be suspended, is the preferred option rather than stipulating that the holder must be given "30 days notice", as stated in the proposed clause 47(2)(c). There may be instances where it is not appropriate or adequate or reasonable to provide the holder with only "30 days notice".

The Committee does not support the proposed amendment to section 47(2)(c). The discretion present in the principal Act should be retained.

5.7 **Clause 35 Section 47(4) – "Minister's power to suspend or cancel rights, permits or permissions" in the Principal Act:** It is not clear whether the 30 days referred to in section 47(4) is in addition to the "30 days notice" in section 47(2)(c). Consideration should be given to retaining the discretion with regards to the timeframe.

5.8 **Clause 63 Section 85 – "Application for renewal of production right" in the Principal Act:** The proposed insertion of a new paragraph (e) in section 85(3) is new and was not included in the amendment Bill. This proposal to introduce re-negotiation processes in respect of the renewal of a production right could have significant negative consequences on investment in the mining industry. Introducing additional long-term uncertainty into the mining sector has been shown to negatively affect investment and thus job sustainability. The need to re-negotiate technical, financial and commercial terms with the minister when a production right is renewed could also risk increased corruption in the mining sector. The Committee opposes this amendment.

5.9 **General comments:** The Amendment Bill does not require the mine owner or operator to make a full disclosure of the hazardous substances used during prospecting or mining. This should form part of the application for a mining license. This is especially problematic when water treatment or soil remediation is required. The amendment Bill should require the mine owner or operator to make a full disclosure of the hazardous substances used during prospecting or mining.

The MPRDA Bill should enable the Minister to consider an applicant's eligibility as a "fit and proper person", as contained in the National Environmental Management Air Quality Act and the National Environmental Management: Waste Act before issuing any rights.

6. Free-carried interest

Clause 65 ("State participation on exploration and production rights"), read with Clause 1(j) and 1(zA), Sections 1 and 86A: One of the most disconcerting clauses in the amendment Bill is partially addressed by the additional proposed amendments to clause 65 contained in the Table of Proposed Amendments to the MPRDA Bill. The state 'free carried interest' is proposed to change to 'carried interest' instead, whereby costs borne by the non-state holder shall be recoverable, thereby decreasing the investment disincentive. However, additional clarity is required in respect of the new proposed section 86A(4), *"The State is entitled to a corresponding percentage of voting rights to the interest held in such joint operating agreements"*. The proposed section 86A should be amended further to minimise the involvement of the state.

The new proposed section 86A must be scrutinised in respect of constitutionality in so far as it appears to be retrospective in application.

7. Inclusion of Mining Charter, Codes of Good Practice, and Housing and Living Condition Standards in "this Act"

Various submissions spoke to the proposed definition of **"this Act"** as being unconstitutional. The amendment Bill proposes the amendment of the definition of "this Act" to include the Draft Reviewed Mining Charter (the Charter), the Codes of Good Practice for the South African Minerals Industry (the Codes), and the Housing and Living Condition Standards (the Standards) for the Minerals Industry.

By incorporating certain codes, standards and guidelines under the definition of "this Act" in clause 1 of the Bill and, at the same time, empowering a minister to amend those codes, standards and guidelines, the Bill imparts to the national executive a power to amend a statute. This is indeed cause for concern. Should the Bill be passed in its current form, a minister may amend a statute or parts of a statute without involving Parliament at all. This is constitutionally impermissible and violates the separation of powers.

For this reason, the Committee asserts that the proposed definition of "this Act" in clause 1 of the amendment Bill is unconstitutional.

8. Application for, issuing and duration of mining permit

Clause 22(c) Section 27 – "Application for, issuing and duration of mining permit" in the Principal Act: The amendment proposed on page 9 of the Table of Proposed Amendments to the MPRDA Bill to section 27 is not contained in the amendment Bill [B 15D - 2013]. This proposed amendment, on the face of it, appears to have the effect of limiting the issue of mining permits to 50%+1 Black Owned South African Companies.

The Chamber of Mines' submission points to unintended consequences should the amendment proposed by the Department to the MRPDA Bill be accepted. It may be problematic where there is no black-owned or controlled company that is interested in applying for a permit, or that qualifies for the relevant mining permit. The mining opportunity may then go to waste, which would not accord with the object in section 2(e) of the MPRDA of promoting mineral resource development in South Africa.

This proposed amendment appears like an unduly blunt measure, which will have the effect of excluding foreign companies and reducing investment. This provision should be reconsidered after a full and careful impact assessment.

9. Issue of "Regional Manager"

9.1 **Clauses 39 and 40 Sections 51 ("Optimal mining of mineral resources" in the Principal Act) and 52 ("Notice of profitability and curtailment of mining operations affecting employment" in the Principal Act):** The reason for the removal and replacement of all references to "the Board" with "Regional Manager" is not clear. The Board's composition allowed for broader input from various relevant stakeholders. This will be lost. In addition, both options of the Board or Regional Manager are inferior to the option of an independent body being constituted to regulate matters independently and transparently in mining-related matters. This would decrease the potential for corruption.

The Committee does not support the replacement of "the Board" with the "Regional Manager". The reference to the "Board" should be replaced with a reference to the "Ministerial Advisory Council", or alternatively, to an independent body, and provision should be made for such a body to be properly constituted to ensure it has appropriate independence and expertise.

9.2 **Clause 51-53, 56 and following:** From clauses 51 onwards, the amendment Bill deletes references to the "designated agency" and replaces this with "Regional Manager," which refers to a Regional Manager of the Department of Mineral Resources. In the current Act this is the Department of Minerals and Energy, but this is revised to refer to the Department of Mineral Resources in the amendment Bill. This is where the conflation between mineral and petroleum resources becomes problematic – the management of petroleum resources requires specific techniques and approaches, which is not catered for in the amendment Bill.

Provision should be made in the amendment Bill for the role of the Petroleum Agency of South Africa, with responsibilities that are specific to petroleum resources.

MS BA SCHÄFER, MPP

CHAIRPERSON: STANDING COMMITTEE ON ECONOMIC OPPORTUNITIES, TOURISM AND AGRICULTURE

DATE: 3 MAY 2017