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# Comments on the South African Mining Charter for Parliament



## About Bravura Consulting

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Bravura Consulting has been operating for 5 years as a niche BEE advisory and strategic consulting company which provides integrated strategies that aim to address BEE and transformation in a sustainable, efficient and value-adding manner.

We believe that BEE plays an important role not only in the transformation of South Africa but also as a critical element of sustainable development within our country. Furthermore, when implemented correctly, BEE can be a driver of economic growth not only for South Africa generally, but also specifically for the company implementing the strategy. As such, we encourage our clients to align any BEE strategy with their business strategies and growth objectives and assist them in doing so.

Bravura Consulting has extensive experience in advising on all elements of broad-based BEE across a range of BEE and related legislation, including particular expertise in assessing ownership principles, transactions and complex structures.

We have worked with a wide variety of large listed and unlisted entities across a wide range of sectors, as well as a number of multinational businesses operating or seeking to operate in South Africa. In addition, we have a number of clients operating in the mining industry, both mining companies and large suppliers to the mining industry.

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## 1. Executive Summary

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Given that the mining industry is such a critical part of the South African economy, and that the need for sustainable transformation as well as socio-economic development are so pressing in terms of the long term viability of our society, government needs to ensure that the legislation governing these areas is clear, well-defined, strategically planned and viable. From our experience as a strategy firm operating in the BEE space, and with extensive work in the mining sector, we have analyzed the charter in terms of the stated objectives and have listed what we feel are current shortcomings as well as given our recommendations for how the Charter could be amended in order to achieve these objectives. We have also outlined the main problematic terms and where the ambiguities are the most problematic for interpretation.

Some of the **key challenges** for effective implementation of the Charter are:

- There is still too much ambiguity in the terminology used, and there are not enough definitions. This may lead to different interpretations and conflict.
- It is not clear to whom the Charter applies and to which companies it should extend
- Not all elements have clearly identifiable targets
- The mining sector needs to move away from a compliance mindset to one of strategic transformation with a focus on the business case.

As a result of our deeper analysis, we have also come up with several **key recommendations** for changes:

- **Ownership:**
  1. BEE deals should apply *only* to employee schemes, communities, and actual producing entrepreneurs, who intend to mine or work in the industry in order to ensure that BEE benefits are not limited to the select, already wealthy, few.
  2. Financing structures that lead to real cash flow benefits should be promoted. These include internal and external leveraged models where no funding is required on the part of the BEE partner. and sustainable value is created.
- **Procurement & Enterprise Development:**
  1. In order to achieve the objectives in a sustainable way, the Charter should require a contribution to broad based BEE from mining sector suppliers, which looks at more than just ownership. HDSA ownership does not ensure that the true cornerstones of transformation are being undertaken, namely job creation, skills development, business development and social development.
  2. More clarification should be made with respect to enterprise development and how this is to occur. The Charter should stipulate that each mining company set up its own social fund for enterprise development, and manage it on behalf of their international suppliers, with their input and participation. This will help with implementation and impact as well as provide for ease of measurement. The fund should be used for local supplier development

and skills development in local communities, thus facilitating actual enterprise development as well as leading to positive impacts in terms of future local procurement requirements. This type of strategy is inherently sustainable as it also carries a strong business case that ensures all sides benefit maximally.

- **Beneficiation:** This element should be divorced from the Charter and a holistic, nationwide strategy should be agreed on by government, the mining industry and other key stakeholders to ensure that beneficiation is done properly and in a way that will create the maximum possible value addition and economic benefit.
- **Mine Community Development:** Although mines should consider national development objectives when creating SLPs, they should be created mainly through a consultative process between mining companies and the communities (and the employees) in question, with the communities themselves driving and guiding this process.
- **Employment Equity and HR Development:** The demographic requirements should be more realistically defined, especially as concerns the percentage of women in the sector being set closer to the world-wide standard.
- **Reporting:** External bodies for verification of the annual reports should be created, or bodies existing in the BEE industry should be used. These verification agents would help create a more standardized approach as well as take some of the pressure off of the DMR.
- **Sustainable Development and Growth of the Mining Industry:** This element provides a high value creation opportunity for the mining industry to incorporate all the different elements of its operations in a holistic way, including environmental and socio-economic aspects. Holistic strategies should be encouraged.
- **Compliance:** It is not entirely clear what is meant by non-compliance – specifically if a score of over 50% or over 75% is required. Given the especially heavy potential consequences for mining companies it would be good to clearly state what constitutes compliance, since it would be legally difficult to revoke these without this.
- **Definitions:** some terms are not defined while others are either vaguely or problematically defined leading to confusion. The revised Charter should clarify all possible sources of confusion in order to ensure real transformation occurs.

## 2. Introduction

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In the last ten years the legislation and policies relating to the mining industry have undergone frequent and often controversial changes. To those who work in the mining sector the constant addition and change of policies, sometimes with minimal input from the key stakeholders, has led to increased anxiety and therefore losses in investment. This can be seen partly in reviewing data from McKinsey & Co, an internationally acclaimed consulting company, which shows that from 2001 to 2008 the global mining industry grew by over 5%, while in South Africa it decreased by 1% – potentially costing South Africa approximately R60 billion in value, and more than 45,000 additional mining jobs. Given that the President’s *New Growth Plan* is focused on job creation, this is particularly troubling news.

The reasons for the above appear to be complex; however, one significant factor has been the uncertainty around legislation and the high level of ambiguity present. The other related factor has been the lack of institutional capacity which is seen in overly long permit processing times and low transparency surrounding how permits are granted. Both of these factors have made investors wary of investing, and have caused losses to existing investments due to a lack of clarity, particularly on transformation.

While the Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (henceforth termed the ‘Mining Charter’) published last year was a welcome step in the right direction, there are still areas that need to be examined to ensure that maximum impact occurs with respect to transformation and meaningful change.

By ensuring clarity of policies, analyzing the real value of certain elements and creating a sector-wide cohesion and commitment to real, sustainable change, we can ensure that the next decade will see the highly valuable mining sector of South Africa grow and prosper, while creating much needed jobs and helping Historically Disadvantaged South Africans finally see full economic participation and measurable changes in their living standards.

In the next sections we first take the high level approach of analyzing the various elements in terms of the objectives they are (or should be) trying to achieve, evaluating whether how each element is measured indeed aligns to these objectives and recommending how certain changes could be made to better achieve this alignment. Thereafter, we present some general comments on the Mining Charter as it is written, before looking in more detail at the ambiguities and general interpretation issues present in some of the Charter terminology.

### 3. Alignment of the Mining Charter measures to its overarching objectives

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Although we feel that the objectives of the mining Charter are both laudable and well defined, we feel that some of the strategies and policies set out in the Charter are not conducive to achieving the intended objectives.

In this section we will examine key elements for

- What the intended objectives and impacts of each element is (or should be);
- How these could be achieved;
- Current lack of alignment in the legislation;
- Recommendations for improvement.

#### 5.1 Ownership

##### Key intended objectives:

- Participation and benefit by the individuals who are most directly impacted by mining and who enable the mining sector to generate revenue, namely:
  - Community participation and benefit
  - Employee participation and benefit
- Development of black entrepreneurs through black owned and managed businesses – more specifically, black entrepreneurs who actually operate the mines in which they own a share

**Strategy for achievement:** The best way to achieve the above aims would be to make it mandatory that BEE deals apply *only* to employee schemes, communities, and actual operating entrepreneurs, who intend to mine or work in the industry. The Mining Charter should prevent the transfer of enormous wealth to a handful of black individuals who receive the majority of the benefit, when mine communities and mine workers (from these communities) should have access to the profits of the mines for the development of their local economies.

Policies should set these three types of BEE deals as the only possible considerations for ownership, and the challenges faced by these groupings in terms of voting rights should not be a hindrance to undertaking these kinds of deals.

Financing remains a challenge, however, there are a variety of models available which do not rely on share prices and dividends and which ensure sustainability. These are the types of models which should be adopted for the mining sector.

An excellent example of ownership leading to true transformation can be found in the Royal Bafokeng model. In this model, funds generated from mining investments have been ploughed into enterprise and social investment in the communities. Their growth and development has grown to the point where the community now owns and operates some of its own mining operations. As a result the region is quickly developing and the community members are seeing real benefits in terms of quality of life.

**Current lack of alignment:** One of the public criticisms of the current policies is that it is far too easy for the select few who are already wealthy to get even wealthier, while the communities continue to see no returns. Many have said that mines often do not do enough for communities, but prohibitive and confusing government policies, which may incentivize the wrong behaviour, are partly to blame.

Furthermore, the financing schemes often used to fund BEE deals lead to benefits mainly for large financial institutions, and in addition are dividend dependant and therefore unsustainable, especially when considered against the cost of the loan used to purchase them. Often, BEE partners end up having to sell their shares to recoup the loan monies and the media showcases numerous reports on where this type of system has failed. The Mining Charter tries to address this issue by requiring value and cash flows to rest with beneficiaries, but it does not deal with the root cause of the problem – unsustainable funding structures.

**Recommendations:**

1. BEE deals should apply *only* to employee schemes, communities, and actual producing entrepreneurs, who intend to mine or work in the industry in order to ensure that BEE benefits are not limited to the select, already wealthy, few.
2. Financing structures that lead to real cash flow benefits should be promoted. These include internal and external leveraged models where no funding is required on the part of the BEE partner. and sustainable value is created.

## **5.2 Procurement & Enterprise Development**

**Key intended objectives:** The ultimate objective of procurement and enterprise development are to ensure that suppliers to the mining companies – and their own suppliers in turn – make meaningful contributions to BEE and transformation and support the establishment, growth and development of black businesses and job creation.

**Strategy for achievement:** Procurement should focus on a supplier’s contribution to broad-based BEE and not simply look at ownership, which is an archaic, narrow-based approach to transformation. This ensures suppliers who have low HDSA ownership but who are creating vital jobs, skills development and contributing to socio-economic development for HDSAs are supported as well, leading to higher HDSA ownership levels in the future and thus ensuring sustainable change.

Furthermore, as procurement alone is not enough for supplier development to occur, training, capacity support and supply chain integration strategies should be laid out. This creates sustainable development of BEE suppliers – particularly local suppliers from communities – as well as leads to reliable sources of goods and services, thus providing an intrinsic business case for the mine in addition to socio-economic development.

**Current lack of alignment:** The new Charter includes the setting of specific and measurable targets for procurement, a clarification of what is meant by BEE entity, a recognition of the need to exclude certain types of non-discretionary spending from the calculation and the provision for the creation of a social fund to ensure that international procurement leads to some local benefit, through levies

on multinational suppliers. However, the biggest shortcoming is the narrow based measure of BEE which inhibits the progress of real, sustainable transformation across a variety of measures.

In addition, although enterprise development is a key part of the heading of this element, there are no specifications on how enterprise development is supposed to occur. The entire section refers only to BEE procurement and the establishment of a social fund to be funded by multinational suppliers, although the details of this social fund are also not laid out. Procuring from BEE entities alone is not a factor sufficient for enterprise development. Enterprises do not simply need an influx of capital to grow, but typically need management support and training to be successful.

#### **Recommendations:**

1. In order to achieve the objectives in a sustainable way, the Charter should require a contribution to broad based BEE from mining sector suppliers, which looks at more than just ownership. HDSA ownership does not ensure that the true cornerstones of transformation are being undertaken, namely job creation, skills development, business development and social development.

2. More clarification should be made with respect to enterprise development and how this is to occur. The Charter should stipulate that each mining company set up its own social fund for enterprise development, and manage it on behalf of their international suppliers, with their input and participation. This will help with implementation and impact as well as provide for ease of measurement. The fund should be used for local supplier development and skills development in local communities, thus facilitating actual enterprise development as well as leading to positive impacts in terms of future local procurement requirements. This type of strategy is inherently sustainable as it also carries a strong business case that ensures all sides benefit maximally.

### **5.3 Beneficiation**

**Key intended objectives:** Beneficiation is meant to facilitate keeping the value of mined resources within South Africa to the greatest extent possible. The aim is to refine and process raw materials to the higher value levels, as this creates additional jobs and helps the economy develop.

**Strategy for achievement:** Some minerals are more easily beneficiated than others, and at much less expense. In addition, the beneficiation of some minerals leads to higher socio-economic impacts and more jobs being produced. The highest benefit for South Africa would be to research and select the minerals whose beneficiation would be the highest impact trade-off between being most labour intensive, value creating, and the least expensive – in terms of needed inputs – to achieve. In effect, the industry would need to research where the least amount of input would generate the greatest impact. The level of skills required for beneficiation also needs to be considered as the vast majority of South African unemployed youth do not have a tertiary education and thus would not be benefitted by the creation of a vast majority of high-skilled jobs.

This strategy would best be carried out outside of the clauses of the Charter and should be a collaborative undertaking between government and industry, where all parties understand the value created for all.

**Current lack of alignment:** The current strategy with which the government and the mining sector approach beneficiation leads to little downstream value creation for mines or for communities.

Placing beneficiation in the Charter and using it as an offset to ownership requirements places all the onus on the mining sector for a strategy which should be co-ordinated nationwide. As it is currently presented, it is likely to incentivize ad hoc interventions without considerations for real transformational impact or sustainability in the long term.

**Recommendations:** This element should be divorced from the Charter and a holistic, nationwide strategy should be agreed on by government, the mining industry and other key stakeholders to ensure that beneficiation is done properly and in a way that will create the maximum possible value addition and economic benefit. This should be informed by sound research and a focus on national economic development as well as global trade competitiveness.

#### ***5.4 Mine Community Development***

**Key intended objectives:** The aims of this element are that mining operations should also benefit communities in sustainable ways, through community consultation and collaboration, and assessment of community needs so as to provide relevant development interventions.

**Strategy for achievement:** Community consultation and involvement is key to the development and success of sustainable socio-economic development strategies. Top-down approaches have repeatedly been shown to be ineffective in a global development context.

Communities should be enabled and empowered to be the drivers of their own development while mining companies should act as facilitators and offer assistance where most needed, as well as in terms of where most of their capacity lies. The mining company may not be able to address all the possible needs in a community due to lack of expertise in certain types of interventions. In this case, partners should be brought in as needed. In the case of limited resources, mining companies should rather focus on helping communities in a way which makes sense for their core business – through skills development and training, supplier development to drive procurement needs, as well as providing for the health and safety of communities from which they source the majority of their workers.

**Current lack of alignment:** Although the Charter rightly states that community consultation and collaboration is critical, many of the other policies and practices surrounding this element are potentially detrimental to this aim. In particular, Social and Labour Plans (SLPs) as they have been used thus far focus on collaboration and approval through municipal channels. Often times municipalities can be under resourced and under qualified to engage in community development and may necessarily act in the best interests of the community. SLPs should mainly be decided between communities and mining companies, with municipalities involved in discussions only.

**Recommendation:** Although mines should consider national development objectives when creating SLPs, they should be created mainly through a consultative process between mining companies and the communities (and the employees) in question, with the communities themselves driving and guiding this process. Municipalities should be involved and be allowed to participate in discussions, but should have minimal power in driving SLPs that are agreed on by both a community and the mine.

## **5.5 Employment Equity and Human Resources Development**

**Key intended objectives:** The objectives of these two elements, which we have grouped for simplicity, are to grow and develop the skills capacity of HDSAs in the mining sector, which is one of the largest employers of human resources in South Africa.

**Strategy for achievement:** In order to achieve the above we would create higher targets for junior levels and lower for higher management levels initially, with the intent of raising the latter over time as employees develop their skills and become qualified to fill higher positions. The HRD spend should be slightly higher than other sector as mining is a labour intensive field and in order to meet skills development targets.

**Current lack of alignment:** The Charter follows the same reasoning as above and staggers targets in a progressive manner over time. In addition the 5% HRD spend target is in line with achieving objectives. However, the concern here is the stipulation of demographic representation, which would suggest that women should make up half of the entire mining sector workforce. Given that global averages of women in mining are in the 5-15% range, we feel this is not a realistic target to aim for by the given date.

**Recommendations:** The demographic requirements should be more realistically defined and specifically stated for women, especially as concerns the percentage of women in the sector being set closer to the world-wide standard.

## **5.6 Other**

In this section we cover some elements which require less detail than the previous sections but on which we felt it was still important to comment:

- **Reporting:** Given the general resource limitations of the DMR, it may be advisable to create external bodies for verification of the annual reports, such as are found in other sector BEE regulations. These verification agents would help create a more standardized approach as well as take some of the pressure off of the DMR, so that it could focus on other much needed areas.
- **Sustainable Development and Growth of the Mining Industry:** this element is well framed and stresses the importance of a consideration of environmental and health and safety management which speaks directly to long term sustainability of mining. Helping local research centres is also an attainable and highly beneficial goal. This section provides a high value creation opportunity for the mining industry to incorporate all the different elements of its operations in a holistic way. For example, utilizing research into environmental technologies and then selling these to HDSA entrepreneurs to utilize as a business model would have environmental, socio-economic, and empowerment impacts. We need to emphasize these types of holistic approaches as they can create larger impacts with smaller inputs, thus also reducing the strain on business.
- **Housing and Living Conditions:** We fully support the intentions of this section and feel that this element has been clarified, and that specific and achievable targets have been set.

## 4. General Comments on the Reviewed Mining Charter

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Overall there have been many improvements in the new Charter compared to the original one. However, there are still many issues which prevent the sector from attaining the objectives that are set out. Below we list some general areas which we feel could be improved:

- There is still **too much ambiguity** in the terminology used, and there are not enough definitions. Many key concepts are not explained. This creates problems because mining companies may interpret ‘grey areas’ one way, while the DMR interprets them in another, leading to confusion and impeding achievement of the objectives.
- It is not sufficiently clear to **whom the Charter applies** and to which companies it should extend – for example does it apply to:
  - Only actual holders of mining rights that are engaged in direct mining activities or
  - Subcontractors engaged in direct mining activities or
  - Suppliers to mining operation who are temporarily / permanently based on site
- Not all elements have clearly **identifiable targets**, which limits how effective they will be
- The mining sector needs to move away from a **compliance mindset to one of transformation** if we are to see real change. In order for this to happen the DMR and legislation such as the Mining Charter need to be geared towards helping companies develop effective transformation strategies which benefit everyone. Both government and mining companies need to realize the business value in transformation and need to link transformation strategies to their core business in order to ensure that everyone benefits and that change is lasting and not ad-hoc. Government and industry need to collaborate in order to understand the multi-faceted nature of the problem and create real, viable solutions.

## 5. Interpretive Issues

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Compounding some of the strategic issues in complying with the revised Charter outlined in the previous section, there are also several issues of ambiguity and interpretation present. Although the revised Charter has included many new definitions which help clarify the content, there are still terms that are too vague, leading to confusion, as well as some terms which are defined in ways that may countermand the objectives of the Charter. Some are also simply not defined at all. In this section we will highlight some of the key terms that we feel are problematically defined, as well as list terms that should be defined but are not.

### 5.1 Problematic Definitions:

- **HDSA:** Since this definition impacts on virtually every element of the Charter it should be of particular importance that it is explicitly clarified. In its current form there are two particularly problematic ambiguities:
  - The statement that HDSAs should be representative of the demographics of the country is confusing as it suggests that not all HDSAs are equal. This may be

counterproductive and difficult to measure. In addition it may create problems with targets pertaining to women, as mentioned previously.

- it is not clear if foreign nationals with current citizenship in South Africa count as HDSA, or only those who received citizenship prior to democracy.
- **Compliance:** The non-compliance clause is an important addition to the Charter as it attempts to clarify what the consequences of non-compliance are, namely a breach of the MPRDA resulting in possible loss of mining rights. The problem is that it is not entirely clear what is meant by non-compliance as the scorecard seems to imply that above 50% performance is the minimum acceptable, as below that number the entity is non-compliant, but it can also be interpreted that a 75% score is needed to be compliant. Given the especially heavy potential consequences for mining companies it would be good to clearly state what constitutes compliance, since it would be legally difficult to revoke these without this.
- **BEE entities:** This is defined quite narrowly and only in terms of HDSA ownership which suggests that mining companies would not necessarily be able to accept BEE certificates under the dti Codes of Good Practice from suppliers as proof of HDSA status, thus creating unnecessary administrative costs and constraints, and resulting in inconsistent measurement across mining companies as there is no industry body regulating the calculation of ownership statuses.
- **Effective ownership:** This is also problematic as it seems to mandate that all BEE partners are to have a say in management and control of the mining company. In reality this is difficult to achieve, especially if entire communities are involved. It is important that this be clarified and that suggestions for possible structures, such as community trusts, be developed to incentivize more community ownership.
- **Social fund:** Although there is a brief definition of a social fund under 'Definitions', it might be a good idea to further clarify how the social fund is meant to be used, and perhaps stipulate that it be used to fund entrepreneurs in conjunction with existing training and development programs in communities, or else be used to create such training and funding program, thus leading to enterprise development specifically.
- **Consumer goods:** In fact, the scorecard uses the term 'consumable goods' in place of 'consumer goods' and the two are not necessarily interchangeable. Neither are defined.
- **Mining companies/Mining Industry:** These two terms are used in different parts of the Charter and seemingly interchangeably. Neither is defined and the use of both further creates problems of interpretations as to whom the Charter is meant to apply to. As mentioned in earlier sections, this creates problems for identifying which companies need to comply.

## **5.2 List of Key Undefined Terms:**

- **Flow through principle:** is mentioned under 'BEE entity' but not clearly defined.
- **Material constraints:** This is used as a consideration for evaluation of reports, but the term is nowhere defined. This creates problems in legally enforcing certain clauses.
- **Multinational suppliers**
- **Capital goods/services/consumables**

## 6. Conclusion

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Given the overall importance of the Mining Charter to creating real transformation and socio-economic development of South Africa while ensuring the sustainable growth of the industry, we feel that the Charter should be revised in a way that shows how clauses directly and strategically lead to the intended objectives. One must carefully consider the incentive structures that are set up to ensure that policies are not actually incentivizing unsustainable, ad hoc or cosmetic changes which will act against achieving the intended objectives. Strategic interventions with a business case should be encouraged, and ambiguities in definitions and targets clarified. This is critical to ensuring that much needed transformation occurs in the mining sector, bringing HDSAs into full economic participation, and leading to benefits for all.

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