South African Institute of Race Relations NPC
Submission to the
Department of Mineral Resources
regarding the

Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018

Johannesburg, 31st August 2018

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1 Introduction

The Department of Mineral Resources (DMR) has invited public comment on the Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (the 2018 draft charter), published in the *Government Gazette* on 15th June 2018. The deadline for public comment on the draft charter was initially set at 30 days, but was thereafter extended to 31st August 2018.

This extended period provides more scope for meaningful public involvement in the adoption of the draft charter. However, the increased time is likely to mean little in practice as the minister of mineral resources, Gwede Mantashe, seems already to have prejudged the outcomes of the current public participation process. He did so in a public statement issued on17th June 2018, two days after the document's gazetting, in which he said that the current text was 'unlikely to be altered much'.[1]

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

According to Mr Mantashe, the 2018 draft charter has been gazetted by him under the powers given to him by the Mineral and Petroleum Resources Development Act (MPRDA) of 2002, as amended by legislation adopted in 2008 and brought into effect in 2013. However, the MPRDA does not in fact give the minister the power to enact a new charter different from the one that was adopted in 2004 under Section 100 of that statute (see *Section 3*, below).

2 The regulatory background to the draft charter

Regulatory certainty and predictability are vital to the South African mining industry, which generally requires enormous upfront capital investments and has long lead times. Since 2004, however, when the MPRDA took effect, repeated revisions to the Act, the initial mining charter, and other relevant rules have steadily eroded that predictability.

The initial charter was adopted by the then mining minister, Phumzile Mlambo-Ngcuka, under Section 100 of the MPRDA and took effect in 2004. Under this document, mining companies were expected to transfer 26% of their equity or assets to historically disadvantaged South Africans (HDSAs) by the end of 2014. The charter added that ownership deals were to be done at 'fair market value on a willing seller/willing buyer basis'. It also stated that 'the continuing consequences' of all previous transactions must be taken into account in measuring HDSA ownership, even if HDSA beneficiaries had since sold out or otherwise exited from these deals.[2]

Since 2010, when a revised mining charter of doubtful validity was gazetted by the then mining minister, Susan Shabangu, these key principles have steadily been eroded. At the same time, the burden of empowerment obligations has been sharply ratcheted up. The 2018 draft charter has ameliorated some of the worst features of the 2017 charter, which was gazetted in June 2017 by mining minister Mosebenzi Zwane and then put on hold pending a court challenge to its validity by the Chamber of Mines (now the Minerals Council South Africa). However, this does not alter the fact that the current document is still profoundly investment unfriendly.

The 2018 draft charter will impose a number of additional costs on mining companies, many of which are already operating at a loss. These companies are price takers (as commodity prices are set in international markets) and will not be able to increase their selling prices to cover these additional expenses. The draft charter will thus damage the sustainability of the industry. It will also make it very much harder for South Africa to compete with other countries for essential new mining investment. By increasing ownership and other empowerment targets, the draft charter also signals that such obligations are likely to keep changing in the future. This undermines the predictability of the country's minerals regime, which in itself is a significant deterrent to fresh investment.

The draft charter thus has many damaging economic ramifications (see *Section 5*, below). In addition, it cannot lawfully be adopted under Section 100 of the MPRDA, while many of its specific provisions are also invalid and illegal.

3 The unlawfulness of the 2018 draft charter

The 2018 draft charter is unlawful and invalid in a host of ways. The most fundamental legal barrier to its validity stems from Section 100 of the MPRDA, which empowers the mining minister to 'develop *a* broad-based socio-economic empowerment charter' within six months of the statute coming into effect. This section does not give the minister any power to amend, repeal, or replace such a charter. The 2004 charter is, of course, the document that was lawfully adopted under this provision. On the clear wording of Section 100, the minister has no power to amend this initial charter, let alone repeal and replace it with a different document. This means that the 2018 draft charter is *ultra vires* the minister's powers under the MPRDA and unlawful in its entirety.[3]

Many other provisions of the draft charter are also unlawful and invalid. The relevant clauses (which are more fully described in *Section 4*) are briefly set out below, together with an explanation (in italics) of why they are invalid.

3.1 Existing rights holders must 'top-up' to 30% BEE ownership within five years.[4]
This is unlawful, as the Pretoria high court confirmed in April 2018, unless the relevant mining right was expressly made subject to this specific top-up requirement at the time of its granting.[5]

3.2 The 'continuing consequences' principle will not be applied to existing rights holders who have previously failed to attain 26% BEE ownership.[6]
This is illegal as the minister has no power under Section 100 of the MPRDA to remove this principle from the 2004 charter. This charter is also the only one which can be recognised as valid under the statute.

3.3 The ‘continuing consequences’ principle will be repealed when the draft charter takes effect, will not govern applications for new mining rights, and will be lost to existing rights holders on the renewal or transfer of their mining rights.[7]

All these provisions are illegal since the minister has no power under Section 100 of the MPRDA to remove the ‘continuing consequences’ principle from the 2004 charter.

3.4 Applicants for new mining rights must have 30% BEE ownership, which must be structured in an 8:8:14 ratio, with 8% for employees, 8% for mine communities, and 14% for ‘BEE entrepreneurs’.[8]

This is unlawful, as the Minerals Council has previously pointed out, as there is nothing in the MPRDA which authorises these specific and arbitrary requirements.[9]

3.5 Holders of new mining rights must re-do the relevant portion of their 30% ownership deals if BEE entrepreneurs sell out before the end of ten years.[10]

This demand is also inconsistent with the ‘continuing consequences’ principle, which the minister has no legal power to remove.

3.6 Holders of new mining rights must pay a ‘trickle dividend’ (calculated as 1% of earnings before interest, taxes, depreciation, and amortisation) to qualifying employees and host communities, both in the sixth year of a mining right (where ordinary dividends have not yet been declared) and in any other year in which ordinary dividends are not paid.[11]

The obligation to pay dividends to some shareholders but not others prima facie contravenes the Companies Act of 2008, which requires equal treatment for all shareholders.[12]

3.7 Trickle dividends must seemingly also be paid to BEE entrepreneurs. In this context, such dividends are defined as ‘dividends with a cash flow’ which must apparently be paid ‘throughout the term of the investment’. According to the draft charter, ‘a percentage of such cash flow is used to service [debt] while the remaining amount is paid to BEE entrepreneurs’.[13]

This provision likewise contravenes the Companies Act. It also contradicts the doctrine against ‘vagueness of laws’, which (as the Constitutional Court has ruled) requires that ‘laws must be written in a clear and accessible manner’. The draft charter fails this test, as it provides no clarity as to how such dividends are to be calculated and when they are to be paid.[14]

3.8 Mining rights holders must maintain 100% compliance with the ownership target throughout the duration of a mining right, which is normally 30 years.[15]

This requirement is inconsistent with the more flexible ownership provisions in the revised BEE generic codes of good practice which took effect in 2015. Moreover, under the Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013 (the BEE Act), the generic codes are supposed to take precedence over all conflicting empowerment rules, including those governing the mining industry.[16]

3.9 Foreign suppliers are confined to supplying 30% of mining goods and a mere 20% of relevant services, as the remaining 70% and 80% proportions must be locally purchased.[17]

These restrictions are in breach of South Africa's binding obligations under both the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO). The GATT bars preferential treatment for local suppliers, instead confirming that member states must accord foreign suppliers treatment which is 'no less favourable' than that given to domestic ones. The GATS includes a similar obligation. The charter's breach of both these binding agreements is unlawful and may also be unconstitutional. In addition, it is likely to expose South Africa to costly retaliatory counter-measures by other states belonging to the WTO.[18]

3.10 Foreign suppliers must pay a levy, which is to be set at 0.5% of the annual turnover they generate from supplying goods and services to mining companies in South Africa. The proceeds of this levy are to be paid to the Mandela Mining Precinct to help fund mining research.[19]

This levy is nothing other than a tax and hence can be introduced only via a money bill adopted by Parliament. In addition, the Constitution provides that all tax monies, other than those 'reasonably excluded by an Act of Parliament', must be paid into the National Revenue Fund. The minister thus lacks the legal authority to introduce these clauses. He is also seeking to give the charter an extra-territorial application, even though foreign firms are not bound by South African law.[20]

3.11 Junior miners are seemingly bound by the charter, but may 'make representations' to the minister regarding 'the extent to which' the document will apply to each of them.[21]

This wording contradicts the doctrine against vagueness of laws, as it provides no objective criteria to help guide the minister's unfettered discretion.

3.12 Mining companies that fail to maintain 100% compliance with the ownership element for the duration of their mining rights will be regarded as non-compliant with the charter and hence as in breach of the MPRDA. They will thus be subject to all the penalties for which that statute provides, from the suspension and cancellation of their mining rights to fines and prison terms.[22]

As the Minerals Council has pointed out, the MPRDA does not give the minister the power to cancel or suspend mining rights for a failure to comply with the charter, which is simply 'a statement of policy' on how the MPRDA's objectives may be fulfilled. If the minister is now to be given such powers, this can be done only via an amendment to the statute, which must be adopted by Parliament in the usual manner. These charter provisions are also inconsistent with the Pretoria high court judgment in April 2018, which held that a failure to comply with the mining charter does not constitute a punishable breach of the MPRDA.[23]

The minister's attempt to expand his powers under the MPRDA also conflicts with the doctrine of the separation of powers and is unconstitutional. As the Minerals Council has stated: 'The minister cannot by decree elevate the charter's status to that of legislation, and cannot by decree provide in the charter that non-compliance therewith shall render the mining *company in breach of the MPRDA... Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the [2018] charter a breach of the MPRDA.*[24]

In addition, the proposed penalties (the cancellation of mining rights or prison terms for directors) for companies that fail to maintain 100% compliance with the ownership target at all times are inconsistent with the BEE generic codes of good practice. These codes require companies to attain a 40% 'sub-minimum' of the 25% BEE ownership target, failing which they may be penalised by having their 'level of BEE contribution' reduced by one level. The far harsher penalties the draft charter seeks to impose are again inconsistent with the BEE Act, which states that the BEE generic codes must take precedence over any conflicting sector code.[25]

3.13 According to the 2018 document, the charter 'shall also apply to prospecting rights, as contemplated in Section 17(4) of the MPRDA'.[26]

Here, the charter seeks to impose a 30% ownership target on the holders of prospecting rights. This is inconsistent with Section 17(4) of the MPRDA, which merely allows the minister to 'request' an applicant for a prospecting right to 'give effect' to the MPRDA's aim of increasing black participation in the mining industry.[27]

3.14 The minister is empowered to 'review' the draft charter, simply by publishing a notice in the Government Gazette.[28]

This clause is also ultra vires *the minister's powers under the MPRDA and hence unlawful. To recap, Section 100 of the statute allows the minister to 'develop a socio-economic empowerment charter' for the mining industry within six months of the statute's taking effect, but it does not give him the power to 'review' the charter thus developed. In addition, the word 'review' – which seems to be intended to mean 'amend' – is ambiguous and contradicts the doctrine against vagueness of laws. Moreover, if the charter is to be treated as if it were a part of the MPRDA (as the penalty provisions for non-compliance clearly envisage), then the charter cannot be changed by the minister and must instead be amended by Parliament.*[29]

3.15 The draft charter seeks to change the beneficiaries of transformation from the 'historically disadvantaged South Africans' (HDSAs), to which the MPRDA refers, to 'black persons'.[30]

The minister's attempt to benefit 'black persons' rather than HDSAs is clearly ultra vires *the MPRDA and is thus unlawful. The charter tries to get around this by saying that references to 'black persons' or 'BEE entrepreneurs' must be construed as references to HDSAs, until such time as the MPRDA has been amended. However, this proviso does not alter the unlawfulness of the document's attempt to introduce a different group of beneficiaries by ministerial diktat.*[31]

The illegality of these provisions, coupled with the unlawfulness of the entire draft charter under Section 100 of the MPRDA, is a fatal impediment to any attempt to gazette or implement the 2018 document. Many of its clauses are also problematic for other reasons, as described below.

4 Overall content of the 2018 draft charter

The 2018 draft charter has six elements relevant to empowerment. These range from ownership and management to preferential procurement, enterprise development, skills enhancement, and the improvement of housing and living conditions. (Most clauses in the draft charter are reviewed below, but a few – such as Clause 2.1.2, dealing with 'pending applications' – have been omitted because of constraints of space and time. This explains why the numbering in the analysis which follows is not always consecutive.)

Clause 2.1: Ownership

Clause 2.1.1: Ownership requirements for existing mining rights holders

As earlier noted, the 'continuing consequences' principle is an integral part of the initial mining charter of 2004. In 2010, however, the revised mining charter tried to limit the principle to ownership deals concluded before 2004. When the DMR insisted that the 2010 charter must prevail, the chamber sought and, in April 2018, obtained a Pretoria high court judgment confirming that the principle could not be retrospectively changed in this way.[32]

The 2018 draft charter partially reflects this judgment – and is thus substantially different from its 2017 predecessor on the 'continuing consequences' issue. The 2017 charter was particularly controversial because it required the holders of mining rights to top up their black ownership 'from the existing level to a minimum of 30%' within a year. Moreover, since the DMR was unwilling to accept the 'continuing consequences' principle for deals concluded after 2004, this wording meant that a company such as AngloGold Ashanti – which had achieved 27% black ownership before many of its BEE investors sold out, thereby reducing its black ownership to 6% – would have had to top up by 24 percentage points within 12 months.[33]

Under the 2018 document, by contrast, a company which 'at any stage' achieved a 26% BEE shareholding, and whose BEE investors have since exited, will be 'recognised as compliant'. Hence, it must top up by only four percentage points to reach the 30% level. It also has five years, rather than 12 months, in which to do so.[34]

This is substantially better than before. However, the top-up requirement was never agreed to by the Charter Task Team, says the Minerals Council, and is 'a surprise inclusion' by the minister. The council rejects the requirement, saying it prejudices companies that 'secured their mining rights on the basis of the 2004 and 2010 charters'. Companies which thought they were already compliant will now have to devote major financial and other resources to meeting an unexpected new obligation. [35]

The top-up rule is also at odds with a key aspect of the Pretoria high court's April 2018 judgment. According to this ruling, a top-up obligation may apply only if a mining right is expressly made subject to it at the time of its granting.[36]

The 2018 draft also seeks to limit the 'continuing consequences' principle in other ways. It says, for instance, that this principle will no longer apply once mining rights are renewed.

This will have increasing ramifications over time, as more and more mining rights expire and need to be renewed. In addition, the 'continuing consequences' principle is to fall away whenever mining rights are 'transferred'.[37] This provision may oblige the transferee to do many more ownership deals to regain the 30% level, and will then greatly reduce the market value of the mining rights in issue.

The 2018 draft adds that existing mining rights holders that have failed to achieve the 26% target will not 'enjoy the recognition of continuing consequences'. Instead, they will immediately be 'subjected to the MPRDA corrective processes'. What this wording means is not explained, making for an unacceptable level of ambiguity. Companies in this situation will have to 'supplement their BEE shareholding to a minimum of 30%' within five years.[38]

To illustrate what this wording means, let us assume that a mining company reached 24% BEE ownership – rather than the 26% required – before its BEE investors sold out, reducing its BEE ownership to 10%. Under the 2018 charter, since it failed to reach the 26% target, it will be denied the benefits of the continuing consequences principle. It will thus have to top up by 14 percentage points within five years. Again, these provisions are at odds with the Pretoria high court ruling.[39]

Clause 2.1.3: New mining rights

Ownership targets

Under the 2018 draft charter, applicants for new mining rights will need 30% black ownership, of which 8% must go to mine employees, 8% to mine communities, and 14% to BEE 'entrepreneur(s)', defined as company/ies with 51% black ownership.[40] In addition, this 'prescribed minimum 30% target shall apply for the duration of a mining right', which is normally 30 years.[41] Though the document does not spell this out, the 8:8:14 ratio must presumably also be maintained throughout this 30-year period.

Mine employees and mine communities will each be entitled to a 5% 'free carry' and will only have to pay for 3% of their 8% stakes.[42] Companies seeking new mining rights must thus give 10% of their equity away, as part of their 30% BEE ownership target. According to the Minerals Council South Africa (formerly the Chamber of Mines), which represents 90% of the mining industry by value, 'this will render uneconomic a significant proportion of potential new projects, and….constrain any prospects for growth in the sector'.[43]

The investors seeking a new mining right will also then own only 90% of the shares in their company. In addition, a further 20% of equity in the company will have to be transferred to BEE entrepreneurs, employees, and community members, who are unlikely to have the funds to buy them. The mining company will thus have to finance the acquisition of these shares (through vendor-financing) – and will probably have to do so at a significant discount to their market value. If anticipated returns seem unlikely to cover these additional costs, investors will have little wish to apply for new mining rights in South Africa. Comments the *Financial Mail* in an editorial: 'Given the likelihood that existing owners will also have to vendorfinance empowerment deals, pundits estimate this will lead to a 20% dilution for investors – a threat to an industry already seen as unattractive for investors'.[44]

Top-up deals

According to the 2018 document, if a BEE entrepreneur sells out before 'a third of the [30-year] duration of the mining right has elapsed' – in other words, before ten years have passed – then the mining company will get no credit for its earlier 14% deal. The same, it seems, will apply if the BEE entrepreneur sells out after ten years, but before any remaining debt on its shares has been written off, so as to give him the 'unencumbered' net value of his stake. (This requirement seems to trump another clause providing for a more gradual vesting process, in which 7.5 percentage points are to vest unencumbered every 7.5 years, in four quarterly stages over the normal 30-year duration of a mining right.) [45]

The 2017 charter sought to compel black people to sell their equity stakes solely to other blacks falling within the same categories (employees, communities, or BEE entrepreneurs), so as to help preserve the necessary 30% black ownership stake over the full period of the mining right.[46] This obligation is not repeated in the 2018 document, presumably because it would make it more difficult for BEE entrepreneurs to dispose of their shares in order to realise gains or avoid losses. Instead, the 2018 draft charter simply states that 'the BEE entrepreneur must…reinvest a minimum of 40% of the proceeds from the disposed equity in the mining industry'.[47] This obligation will help retain some of the proceeds of such sales within the mining sector, but it will do nothing to help the affected mining companies. In the circumstances earlier outlined (for example, where a BEE entrepreneur sells out before the end of the first ten years), the mining company in issue will have to do costly top-up deals to regain the 30% level.

'Trickle dividends'

If the holder of a new mining right fails to pay dividends for five years, it must in the sixth year – and in every other year in which ordinary dividends are not paid – provide a 'trickle dividend' to mine employees and communities. This must be calculated at 1% of earnings before interest, taxes, depreciation and amortisation (ebitda). Paying such dividends to some shareholders but not to others will contravene the Companies Act of 2008, which requires that shareholders be treated in the same way. The obligation will also add to costs at a time when a mine may not yet be fully operative, or may otherwise be in financial trouble.[48]

Trickle dividends – calculated on a different basis, it seems – may also have to be paid at regular intervals to BEE beneficiaries. The draft charter is particularly vague on this, but its definition section defines 'trickle dividends' as including those payable to BEE entrepreneurs. These shareholders, it seems, are entitled 'to a dividend with a cash flow…throughout the term of the investment'. According to the draft charter, 'a percentage of such cash flow should be used to service [debt], while the remaining amount is paid to BEE entrepreneurs'. This vaguely-phrased obligation is difficult to quantify, but could be extremely costly for mining companies, particularly at times when commodity prices are depressed. It also contravenes the Companies Act of 2008, by requiring differential treatment for some shareholders compared to others.[49]

The mining company is in theory entitled to have the trickle dividends it provides to qualifying employees and host communities repaid once it starts paying out ordinary dividends. However, no such claw-back applies to the trickle dividends to be paid to BEE entrepreneurs. In addition, the claw back may prove difficult to implement in practice. Moreover, the trickle dividend was not agreed to by the Charter Task Team and its inclusion is another unexpected and unwelcome 'surprise', says the Minerals Council.[50]

A new risk in mine expansion

Under the 2018 draft charter, if an existing rights holder applies for an additional mining right (say, on an adjoining property which has not been mined before), this new right will be subject to all these new obligations. Worse still, the company's existing mining rights are likely to lose their current status and will then be treated as if they were also 'new' rights. Mining experts at Webber Wentzel, a law firm, believe this interpretation of the vague charter provisions is correct and that a mining company in this situation will become fully 'subject to the empowerment regime applicable to the holders of new mining rights'.[51]

What this means, in practice, is that a mining company with existing mining rights – and which is not currently obliged to pay trickle dividends or apply a 10% free carry to mineworkers and mine communities – will become subject to these additional obligations once it applies for an additional mining right in order to expand its current operations. This regulatory consequence is likely to prove a powerful deterrent against any such expansion, irrespective of how strong the business case for it might be.

A 30-year duration for every mining right

As earlier noted, the 2018 draft charter states that 'the prescribed minimum 30% target shall apply for the duration of a mining right', which is normally 30 years.[52] This is very different from the initial charter, which indicated that the ownership obligation would apply for ten years only: from 2004 until 2014. Having to preserve a 30% BEE ownership element for three decades is itself a heavy burden. It could easily result in numerous costly 'top-up' deals having to be done if existing BEE entrepreneurs decide to sell out within ten years, or before all the debt on their deals has been repaid or written off.

Overall, the ownership obligations in the 2018 draft charter are sure to add greatly to the costs of compliance. They are thus likely to prove a significant barrier to new investment in the industry (see *Ramifications of the draft charter*, below).

Clause 2.1.4: Equity equivalence against the ownership target

Under the 2018 draft charter, all mining right holders will be able to earn 'equity equivalents', of up to 11% of their BEE shareholding, if they comply sufficiently with beneficiation obligations. [53]

The capacity to 'offset the value of the level of beneficiation achieved by a company against its HDSA ownership commitments' was recognised in the 2004 charter.[54] The 2018 draft charter seeks to spell out the requirements that must be met, but does so in terms that are profoundly ambiguous. In essence, the document fails to make it clear whether *all* or *any* of the beneficiation activities which it describes need to be in place. In addition, it sets out what is needed to *apply for* equity equivalents, but is silent on the circumstances in which these will be *granted*.

The key clause states that 'the following activities undertaken by a rights holder will entitle the right holder to *apply for* equity equivalent credits'. The clause sets out five different activities, but does not say whether all five activities must be in place, or whether it will suffice if one of the five can be demonstrated. This matters because three of the five envisage beneficiation by outside entities rather than by the mining company itself.[55]

Two of the activities on the list require the applicant company to 'supply' mineral ore or mineral products, 'at a discount to the mine gate [ie production] price', to 'beneficiation entities' which are either 'independent' or 'black-owned'. A third speaks of 'investments in' beneficiation entities that are 'locally based'. By contrast, a fourth refers to 'any other existent beneficiation related activities undertaken since 2004', which would clearly include beneficiation processes undertaken by the mining company itself. The fifth item on the list is not in fact an activity, as it refers to 'the portion of an integrated producer's production that is beneficiated'.[56]

If all five of the items on the list have to be shown, then a mining company which beneficiates its own mineral ores or products will not be able to demonstrate that it also supplies or invests in external beneficiation entities, including black-owned ones. This will bar it from applying for, let alone obtaining, equity equivalents. If this is not the intention, then the wording must be changed accordingly. It is in any event unacceptable that the relevant clause should be so vague, as the resulting ambiguity opens the way to selective interpretation by officials and undermines the rule of law.

In addition, the clause provides no guarantee that equity equivalents will be granted, even when all the stipulated activities have been fulfilled. It does not say how the application will be assessed, or set out the basis on which it will either succeed or fail. This again gives officials far too much discretion in deciding whether mining companies have done enough, in their view, to be granted equity equivalents.

All these uncertainties need to be resolved. One of the key outstanding issues, moreover, is the basis on which beneficiation activities are to be valued for the purposes of computing equity equivalents. Where a mining company engages in its own beneficiation, for instance, the full costs of doing so should at minimum be taken into account in computing the equity equivalent to which that company is entitled. Moreover, where beneficiation adds significantly to the value of its mineral products, the full extent of that value addition should also be taken into account. As yet, however, as mining expert Peter Leon, a partner at law firm Herbert Smith Freehills points out, no one knows 'how the actual offset entitlement will be calculated'.[57]

The current wording also suggests that mining companies may have to sell some of their mineral ores and products to external beneficiation entities at prices well below production costs in order to qualify for equity equivalents. If this is so, it will add significantly to the financial burden on mining companies. At the same time, the government's continued insistence on local beneficiation makes little economic sense, as the National Development Plan (NDP) pointed out six years ago. As the NDP notes, competitive beneficiation cannot be achieved when South Africa lacks the necessary capital and skills, and has such high input costs. The 356% increase in electricity prices between 2007 and 2017 has been particularly damaging and has made it all the harder for South Africa to compete with China and other manufacturing behemoths. [58]

Clause 2.2: 'Inclusive procurement, supplier, and enterprise development'

Preferential procurement

The 2018 draft charter says it seeks to 'promote economic growth through the development or nurturing of small, medium, and micro enterprises and suppliers of mining goods and services'. To this end, it imposes strict procurement targets on the holders of all mining rights.[59]

Clause 2.2.1 Mining goods

According to the draft charter, all mining rights holders must buy 70% of their capital and other mining goods from South African manufacturers. Of this 70%, 26% must come from 51% black-owned firms (of which 5% must be owned by black women or black youth). The remaining 44% must come from firms with 26% BEE ownership and level 4 BEE ratings. This requirement is essentially the same as it was under the 2017 charter.[60]

However, few South African companies – and even fewer firms that are 51% black-owned – have the capacity to manufacture sophisticated capital goods such as horizontal raise boring machines, other drilling and hoisting equipment, crushing mills, furnaces, massive drag lines, and the like. Yet if mining companies fall down on this requirement, this could also jeopardise their mining rights – especially as procurement obligations count for 60% of the points on the draft charter scoreboard.[61]

The possibility of losing their mining rights will put great pressure on mining companies to help establish and build up the necessary 51% black-owned suppliers. Yet having to incubate such entities will be an enormous burden on mining companies and will prevent them from concentrating on their core business. In addition, newly created suppliers will lack necessary experience and are unlikely to be as efficient or cost-effective as established entities. Small new enterprises may also find it difficult to sustain their operations when the local market for mining capital goods is so small and international markets are likely to prove difficult to penetrate.

This demand is so unreasonable that it could also fuel disinvestment, rather than attempts at compliance. According to Jonathan Veeren, a lawyer at Webber Wentzel, the procurement clauses could have ‘unintended consequences’. Says Mr Veeren: ‘We could see a lot of companies offshoring and setting up elsewhere.’ Far from boosting South Africa’s manufacturing capacity, the draft charter could thus ‘lead to a loss of local manufacturing jobs’.[62]

Clause 2.2.2 Services

The draft charter further stipulates that all mining rights holders must buy 80% of the services they need from South African companies. Of this 80%, 70% must come from 51% black-owned companies (of which 10% must be owned by black women or black youth). This is a slight decrease on the earlier target, for the 2017 charter required that 80% of relevant services be bought from 51% black-owned firms.[63]

According to the draft charter, the services in issue include ‘mining production services’ and ‘drilling’ as well as ‘mineral marketing’, ‘transportation’, and ‘shipping’, along with ‘consulting’, ‘financial’, ‘insurance’, and ‘legal’ services. Again, the necessary 51% black-owned firms are unlikely to exist in sufficient numbers and may thus have to be created. This would also be a major burden on mining companies.[64]

Take the ‘transportation’ requirement, for instance. If Transnet cannot be relied upon – given its general inefficiency and a recent sharp increase in train derailments – then mining companies needing to get their mineral products to port will have to find local 51% black-owned firms that are able to do the job instead. Yet how many firms of this kind have the massive fleets of heavy trucks required?

If not enough of these BEE entities are available, then mining companies may find themselves having to incubate new firms. Effectively, they will have to enter into the trucking business to get their products to port in ways that comply with the charter.

It is not only in the transport sphere that this burden will arise. Mining companies may also have to become involved in auditing, banking, insurance, and shipping (to name but a few examples) to make sure that their procurement obligations under the charter can be met. In addition, often inexperienced 51% BEE firms will have to be used irrespective of whether their services are cost-effective or reliable.

Clause 2.2.3 Verification of local content

According to the draft charter, mining companies must submit an annual report providing ‘proof of local content for mining goods’. Such proof requires a certificate from the South African Bureau of Standards (SABS) or ‘any other entity designated by the minister’.
This obligation raises yet another regulatory obstacle to mining in South Africa, especially as the SABS is in disarray and battling to do a proper job. As the minister of trade and industry, Rob Davies, has recently acknowledged, many local manufacturers are failing to secure

supply contracts in local and international markets because the SABS has performed so poorly in providing the certifications they need. Dr Davies has thus disbanded the SABS board and placed the organisation under administration in an attempt to improve its capacity.[65] Mining companies will nevertheless be obliged to use the SABS to investigate and confirm the local content of the bulk of the mining goods they procure in every year. The administrative hassle in obtaining this verification is likely to be substantial.

Clause 2.2.4 Enterprise and supplier development
According to the draft charter, mining companies may 'invest in enterprise and supplier development' in order to offset their procurement obligations. 'Up to 5% of their total procurement budget on mining goods may be offset using supplier development'. In addition, 'up to 10%' of their total procurement budget on services may be offset on the same basis.[66]

However, as earlier indicated, if there is no existing local South African company capable of manufacturing capital goods in the form of furnaces, drag lines, horizontal raise boring machines, and the like, then mining companies cannot be expected to conjure such manufacturers into existence. They also cannot be expected to create many entities that will be needed to supply them with the bulk of the services that they require. Trying to bring these new firms into operation will detract from the core business of mining companies. It will also make it far harder for them to sustain themselves during lean times, when profitability is limited and resources must be husbanded particularly carefully.

Clause 2.2.7 Contribution by foreign suppliers
According to the draft charter, foreign companies which supply either mining goods or relevant services will have to contribute 0.5% (down from 1% in the 2017 charter) of the annual turnover they generate from South African mining operations to the Mandela Mining Precinct for research.[67] (This precinct was formally opened in April 2018 as an R&D hub for the mining industry.)

However, this 0.5% levy is effectively a tax which the mining minister has no authority to impose, and which can be introduced only by Parliament. In addition, all tax revenues are supposed to be paid into the National Revenue Fund and cannot easily be directed elsewhere. Hence, the mining minister has no authority to stipulate that the levy be paid to the Mandela Mining Precinct. The minister is also trying to give the charter an extra-territorial application, even though foreign firms are not bound by South African law.[68]

Moreover, though the 2018 draft charter does not acknowledge this, foreign suppliers will effectively be restricted to providing 30% of mining goods and 20% of relevant services – as the remaining proportions will have to be locally sourced under the rules earlier described. However, these quantitative restrictions are contrary to South Africa's binding obligations under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) of the World Trade Organisation. The GATT requires all member states to accord foreign suppliers treatment which is 'no less favourable' than that given to domestic ones, while the GATS includes a similar obligation.[69] As earlier noted, these breaches could expose South Africa to damaging retaliatory actions by other member states.

Clause 2.3 Human Resource Development

Under the 2018 draft charter, all mining rights holders must contribute 5% of their annual payroll to skills development. (This is in addition to the 1% levy payable under skills development legislation.) This 5% must be paid in every year irrespective of whether companies are making profits or losses. Of the 5% total, 3.5% must go to training for both employees and non-employees (community members, the document suggests). The remaining 1.5% must go to public universities, science councils, and other research institutions, and must be used for the 'development of solutions in exploration, mining, processing, technology efficiency, beneficiation, and environmental conservation and rehabilitation'.[70]

However, the training provided to employees and others must be 'apportioned in proportion with national or provincial demographics'. The bulk of training must thus go to black, so-called 'coloured', and Indian employees, many of whom are likely to have been poorly prepared for the world of work by largely dysfunctional public schools.

Spending on research must also be apportioned among public universities and other institutions 'in proportion with national or provincial demographics'.[71] What this presumably means is that most of the universities selected must be historically black. However, such universities have limited research capacity, especially in the complex areas of hard-rock deep-level mine mechanisation or the remediation of acid mine drainage and other pollution. Yet mining companies spending their own money on research should be free to select whatever institutions are best able to provide effective solutions to the challenges they confront.

(These provisions in the 2018 draft charter are very much the same as those in the 2017 document. The main differences are that 3.5% of the 5%, up from 2% before, can now be spent on training, rather than research. In addition, the Mining and Transformation Agency, which would earlier have been entitled to a 2% slice, no longer features.)[72]

Clause 2.4 Employment equity

Under the 2018 draft charter, all mining rights holders must 'achieve a minimum threshold of black persons which is reflective of the provincial or national demographics' and meets the following targets.

Clauses 2.4.1 to 2.4.5 Targets from board to junior management levels

Mining companies must have 'a minimum of 50%' black representation at board level. In addition, black representation must reach 50% at top and senior management levels, 60% at middle management level, and 70% among junior managers.[73]

Each of these targets for black representation must be sub-divided among black men and women, so that black women make up 20% of the 50% target at board level, 15% of the 50% target at top management level, 15% of the 50% target among senior managers, 20% of the 60% target for middle management, and 25% of the 70% target for junior managers.[74]

These targets have been reduced to some extent from those in the 2017 charter. The earlier targets closely mirrored the BEE generic codes in requiring 60% black representation for senior management, 75% for middle management, and 88% for junior management. However, even these reduced targets are likely to prove difficult to meet when half of the black population is under the age of 25 and only 3% of black people have the university degrees often needed or advisable for management positions.[75]

Clause 2.4.7 Core and critical skills

The 2018 draft charter also demands that black people should make up 60% of a mining company's 'core and critical skills'. These skills are defined as including 'science, technology, engineering and mathematical skills'. However, the country's schooling system is so poor that South Africa, despite the large tax revenues spent each year on education, ranks in 128th place out of 137 countries (on the World Economic Forum's Global Competitiveness Index 2017-18) for 'the quality of its maths and science education'. Given the poor foundation provided by the schooling system, this charter requirement will also not be easy for mining companies to fulfil.[76]

Mining companies must also develop and implement 'a career progression plan' which is consistent with racial demographics and includes 'targets and timeframes', along with mechanisms to ensure implementation. These overall plans must seek to 'identify a talent pool to be fast tracked in line with needs'. They must also have 'career development matrices for each discipline', along with 'individual development plans' for employees.[77] These provisions turn the skills development in which every mining company has an obvious interest into yet another bureaucratic exercise with complex compliance requirements unlikely to add any value to the training that companies are providing in any event.

The draft charter adds that its 'prescribed board and executive/top management targets must include BEE shareholders', so as to increase the 'active participation [of black people] in the management and control of the mining industry'.[78] This suggests that BEE entrepreneurs, with their 14% equity stake, must be given substantial representation at board and top management levels, as must mine employees and mine communities. Yet many of these individuals may lack the experience and business expertise that board members and top managers, in particular, must have if they are to help mining companies navigate successfully through all the complex challenges they face.

In addition, the draft charter signals that these targets, which are already unrealistically high, given the age and skills profile of the black population, are likely to 'change in order to address employment equity measures'.[79] This wording is too vague to provide any clarity as to the shifts likely to occur. All it shows is that further unrealistic amendments, with even higher compliance costs, still lie ahead.

Clause 2.5 Mine community development

All mining rights holders must 'meaningfully' contribute to mine community development by 'identifying the developmental priorities of mine communities' and incorporating these priorities in their approved Social and Labour Plans (SLPs). SLPs must provide 'clear targets and timelines for implementation', while any amendments to targets and budgets must be 'consulted with mine communities' (sic) and approved by the DMR. SLPs must also be made available to mine communities, both in English and in 'one or two other languages commonly used within the mine community'. (Mine communities are defined as 'communities where mining takes place, major labour sending areas, and 'adjacent communities' within (it seems) the relevant municipal boundary. [80]

The 2017 charter was different, for it required mining companies to make contributions to mine community upliftment which were 'proportionate to their investments'. This wording no longer features. In addition, mining rights can no longer be cancelled if companies fail to maintain 100% scores on this requirement.[81] However, the costs of fulfilling SLPs may still be difficult for mining companies to sustain, particularly at times when mineral prices are depressed and input costs are rising.

Clause 2.6 Housing and living conditions

All mining rights holders must 'improve the standard of housing and [the] living conditions of mine employees, as stipulated in the Housing and Living Conditions Standard for the Mining and Minerals Industry, developed under Section 100 of the MPRDA'.

Clause 2.6.1 Principles of housing conditions

The Standard stresses, among other things, the need for 'decent and affordable housing', 'integrated human settlements', and either 'home ownership' or 'secure tenure' in the housing institutions provided for mine employees.

Clause 2.6.2 Principles of working conditions (sic)

Mineworkers are also entitled to appropriate working conditions, which must include 'proper health care services' and 'balanced nutrition'.

In addition, every mining company must have a 'housing and living conditions plan', which must be approved by the DMR after consultation with organised labour and the Department of Human Settlements. According to the draft charter, the Housing and Living Conditions Standard adopted under Section 100 of the MPRDA must also be 'reviewed' so as to provide 'clear targets and timelines' against which the performance of mining companies can be assessed.[82]

(These provisions have been simplified in various ways but otherwise remain much the same as in 2017.)[83]

Clause 3 Application of the mining charter to licences granted under the Precious Metals Act, 2005, and the Diamonds Act, 1986

These provisions of the 2018 draft charter lie outside the scope of the IRR's current capacity for review.

Clause 4 Repeal of Section/Paragraph 3 of the Codes of Good Practice for the Minerals Industry

The draft charter repeals section/paragraph 3 of the Codes of Good Practice, as published in the Government Gazette on 29 April 2009.[84] This deals with permits and licences granted under the Precious Metals Act of 2005 and the Diamonds Act of 1986. It is thus to fall away because the same issues are to be covered under Clause 3 of the 2018 draft charter.

Clause 5 Reporting (monitoring and compliance)

All rights holders must report annually on their level of compliance with the charter. The DMR is to monitor and evaluate implementation, 'taking into account the impact of material constraints which may result in non-achievement of the set targets'.[85] The DMR is thus enjoined to take into account the various material constraints which will inevitably make it difficult for mining companies to achieve many of the stipulated targets. In the past, however, the DMR has seemed indifferent to these constraints – and the mining industry has little reason to anticipate its taking a different approach.

Clause 6 Applicability of the mining charter

Mining rights

According to the document, the mining charter is to apply to all existing mining rights, to pending mining right applications, and to new mining rights.[86] This attempt to subject existing mining rights and pending applications to the new requirements set out in the charter contradicts the rule of law, which requires that new obligations should operative prospectively, rather than with retroactive effect. Whether new mining rights can lawfully be made subject to these new rules is also doubtful, as the 2018 draft charter is clearly *ultra vires* Section 100 of the MPRDA, as set out below.

Prospecting rights

The draft charter goes on to say that its requirements 'shall also apply to prospecting rights, as contemplated in Section 17(4) of the MPRDA'.[87] Under this section, as amended in 2008, the minister may 'request' an applicant for a prospecting right to 'give effect' to the MPRDA's aim of increasing black participation in the mining industry.[88]

The Minerals Council is nevertheless concerned that a 30% black ownership target will also be applied to 'new greenfields prospecting rights'.[89] Legal experts at Webber Wentzel also believe that new prospecting rights are to be 'subject to the same empowerment regime' as new mining rights.[90] This may indeed be what the mining minister intends, but he lacks the power to do so under Section 17(4).

Mining prospecting is a high risk activity, which requires high levels of expenditure but can provide no certainty that viable mineral deposits will be found. Any company wanting to embark on exploration would be loath to start by giving away 30% of its equity to BEE partners unlikely to be able to contribute to the substantial costs involved in drilling, sampling, geological modelling, and the like. Imposing a 30% ownership obligation would thus, in practice, greatly limit prospecting, as the Minerals Council had cautioned. Yet exploration is vital to expansion and is, in the council's words, 'the lifeblood of new projects for the industry'.[91]

(Though the DMR has no authority to impose a 30% BEE ownership obligation on applicants for new prospecting rights under the MPRDA, the 2018 draft charter is nevertheless a significant improvement on the 2017 one. The 2017 charter required all applicants for new prospecting rights to have 'a minimum of 50% + 1 black person shareholding' or 51% black ownership for short. This requirement would have made it inordinately difficult for South Africa to attract investors willing to embark on the fresh prospecting vital to the sustainability of the industry.)[92]

100% compliance on the ownership element

According to the draft charter, the ownership element is 'ring fenced' and 'requires 100% compliance at all times'. This obligation applies 'for the duration of a mining right', which is normally 30 years.[93]

The 2018 document adds that a mining right holder who fails to score 100% at all times on the ownership element and who also fails to score at least 50% on the draft charter scorecard will be regarded as non-compliant with the charter and hence as in breach of the MPRDA. For this breach, relevant penalties will include the suspension or cancellation of mining rights, as well as possible fines and prison terms for directors.[94]

These provisions in the 2018 draft are at odds with the Pretoria high court's April 2018 ruling. This judgment made it clear that the mining minister cannot impose additional obligations on top of those which applied at the time the mining right was granted. The court also ruled that a failure to comply with the obligations in the mining charter does *not* constitute a breach of the MPRDA for which the penalties in the Act may be imposed.[95]

Moreover, if mining rights are indeed to be cancelled because companies have failed to maintain 100% scores on the ownership element over 30 years, the economic consequences will be severe. Any such rule will profoundly undermine the security of mining titles.

Requiring 100% compliance on the ownership element for 30 years is also inconsistent with the BEE generic codes of practice and the Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013. This statute gives the generic codes precedence over all conflicting empowerment rules. In practice, this means that all sector specific codes, including the mining charter, are supposed to be brought into line with the generic codes. But the 2018 draft goes far beyond the generic codes in demanding 100% compliance on the ownership element on pain of draconian penalties (the termination of a company's mining right, plus potential major fines and prison terms). By contrast, the generic codes give firms credit for partial performance on the ownership target and punish them comparatively lightly – by reducing their level of BEE contribution by one level – if they fail to reach a 40% minimum score on the ownership element.[96] If alignment with the generic codes is to be achieved, as the 2003 statute requires, then the 2018 draft charter should follow a similar approach.

(The 2018 draft is, again, better than the 2017 charter, which required 100% compliance for 30 years not only on the ownership element but also on two other elements as well, these being skills development and mine community upliftment. These additional demands have fallen away under the current draft, which is an important advance. However, these clauses in the 2017 charter should rather have been scrapped altogether.) [97]

Junior miners

Junior miners are apparently to be bound by the draft charter, but may make representations to the mining minister regarding 'the extent to which' the charter elements will apply to them. Though the wording is vague, essentially junior miners will be able to apply for exemption from some of the charter's provisions.[98] However, no objective criteria have been included to guide the minister's unfettered discretion and help determine the circumstances in which exemptions should be granted.

This contradicts the principle of certainty in law, for it means that decisions on exemption are likely to be made by in different ways by different officials at different times. This will make for inconsistent, arbitrary, and often irrational decision-making. In addition, unless broad exemptions are routinely granted, the draft charter's obligations will prove demanding and costly enough to bankrupt many struggling juniors.

Clause 7 Transitional arrangements

The draft charter gives mining companies between two and five years in which to span the gap between the procurement and employment equity targets it sets out and those contained in the 2010 revised charter.

Procurement targets for mining goods

Under the 2010 charter, mining companies are expected to procure 40% of mining capital goods from suppliers with 25% BEE ownership. Under the 2018 draft charter, by contrast, as earlier outlined, mining companies are expected to procure 70% of capital goods from BEE suppliers, a significant proportion of which must have 51% black ownership. Mining companies are thus given a five-year transitional period in which to bridge this gap. Hence, the 'first-year target' for mining goods is set at '10% of the procurement budget', rising to 50% by the fourth year and reaching 70% by the fifth year.[99]

Procurement targets for relevant services
Under the 2010 charter, mining companies are expected to procure 70% of relevant services from suppliers with 25% BEE ownership. The 2018 charter raises this percentage to 80%, while requiring that many of these services be procured from firms that are 51% black owned. A brief transitional period thus applies. The first year target is set at 70% of the procurement budget, while the 80% target is expected to be reached in the second year. The draft charter thus gives very little consideration to how difficult it will be for mining companies to find or establish all the 51% black-owned suppliers that will be required by the end of this two-year period.[100]

Employment equity targets
The 2010 revised charter requires mining companies to achieve 40% black representation at both board and management levels. The 2018 document, as earlier described, sets far more onerous targets, which start at 50% at board, top, and senior management levels, and rise to 70% for junior management. Mining companies are thus allowed five years to comply with these increased targets, though they must within six months of the publication of the 2018 charter 'submit a five-year plan indicating how the progressive implementation' of these targets is to be achieved.[101]

After the transition period
According to the draft charter, once the transition period has ended, then all rights holders 'must maintain compliance with the Mining Charter targets for the duration of a mining right'.[102] What level of compliance is required is indicated in the charter scorecard, as described below.

Clause 8 Non-compliance
As earlier indicated, a right holder who 'has not complied with the ownership element and falls between levels 6 and 8 of the Mining Charter scorecard will be regarded as non-compliant with the provisions of the Charter and in breach of the MPRDA and will be dealt with in terms of Section 93, read with Sections 47, 98, and 99 of the Act'.[103] These provisions are in conflict with the MPRDA, as confirmed by the Pretoria high court judgment in April 2018, and inconsistent with the BEE generic codes of good practice, which are supposed to take precedence over all conflicting empowerment obligations.

Clause 9 Review of the charter
According to this clause, 'the minister may, by notice in the Gazette, review the mining charter'. The word 'review' is not defined. The intention, however, is clearly to empower the minister to make unilateral changes to the charter, simply by publishing a notice in the Gazette. (That 'review' effectively means 'amend' is evident from Clause 7(d) of the draft charter, which speaks of the 'finalisation' in due course of the 'reviewed' housing and living conditions standard.)[104]

However, the minister has no power to 'review' the mining charter under Section 100 of the MPRDA. Moreover, if the charter is to be treated as part of the MPRDA, so that a breach of the charter also amounts to a breach of the statute, then only Parliament has the power to amend it. Purporting to give the minister this power is a breach of the doctrine of the separation of powers.

Clause 10 Repeal of previous mining charters

Under Clause 10, the initial charter which came into effect in 2004 and was then amended in 2010, along with the 2017 charter gazetted by Mr Zwane in June that year, are to be 'amended by the repeal and substitution' of the 2018 draft charter, once this has been gazetted in its final form. Though badly phrased, what this means is that the 2018 charter, once finalised, will repeal and replace the 2004 charter, the 2010 amendments to it, and the 2017 charter. The repeal of the initial charter will put an end to two key provisions: the 'continuing consequences' principle, and the clause stating that the equity or assets transferred for empowerment purposes must be valued 'at fair market value on a willing seller/willing buyer basis'.

Clause 11 Interpretation of the Mining Charter

Under this clause, the draft charter is to be 'read and interpreted in conjunction with the MPRDA'. The document adds that its references to 'black' persons must be seen as referring to 'historically disadvantaged persons' until such time as the MPRDA has been amended. This clause has been included because the MPRDA speaks of benefitting 'historically disadvantaged South Africans' (HDSAs), rather than 'black' people. The draft charter's references to black people are thus *ultra vires* the MPRDA until such time as the statute is changed.

The change from 'HDSA' to 'black' beneficiaries is one of the amendments the 2013 MPRDA Amendment Bill, currently before Parliament, is seeking to achieve. However, that Bill has yet to be enacted. It is also so flawed – both on substantive issues and in terms of the procedures used in its adoption – that it is unlikely to survive any challenge to its validity that may be brought before the Constitutional Court. Perhaps for this reason, Mr Mantashe has recently indicated that the 2013 Bill is to be withdrawn, rather than enacted. All the draft charter's references to black people, rather than HDSAs, will thus remain invalid for inconsistency with the MPRDA until such time as this statute has been amended.[105]

Scorecard

According to the scorecard, whether a mining company has, in any year, maintained the necessary 100% compliance with the ownership element is to be assessed on a simple Yes/No basis. For the rest, the employment equity element counts 20% towards the total of 100%, while procurement and supplier/enterprise development counts 60%. Human resource development counts the remaining 20%. The draft charter also gives a detailed breakdown of compliance targets and the weightings assigned to each of them within these five elements.[106]

Annexure A
This provides an overview of how the charter scorecard is supposedly 'aligned' with the BEE generic codes of good practice developed by the Department of Trade and Industry (DTI). It reflects the 'levels' of BEE contribution which have been developed by the DTI, which range from Level 1 to Level 8. Mining companies falling within Levels 1 to 5 will be regarded as 'compliant' with the charter. By contrast, those falling within Levels 6 to 8 – or scoring even lower than these levels – will be seen as 'non-compliant'.[107]

Mining companies will attain Level 1 if they score 100% on the ownership element and 100% on the other four elements, as earlier described. They will fall within Level 5 if they score 100% on the ownership element and 50% to 60% on the other four elements. However, they will come within Level 4, and be seen as non-compliant, if they score 100% on the ownership element but 40% to 50% on the other four elements. They will also be regarded as non-compliant if they fail to score 100% on the ownership element, and their scores on the other elements are unsatisfactory. (The Annexure fails, however, to explain what scores would be viewed in this way.)

The 2018 document assumes that the necessary 'alignment' between the generic codes and the mining charter is thus demonstrated. This is not so. As earlier described, the generic codes do not expect 100% compliance on the ownership element, as the draft charter does. Under the generic codes, moreover, firms that fail to meet prescribed targets on three key elements are penalised by having their level of BEE contribution reduced by one level. Under the draft charter, by contrast, mining companies which fail adequately to meet ownership and other targets will be heavily penalised by fines, potential prison terms, and the loss of their mining rights. This deviation from the generic codes, which are supposed to take precedence over all conflicting empowerment rules, is contrary to the BEE Act of 2003.

5 Ramifications of the draft charter
The 2018 draft is better than its 2017 predecessor in various ways. It scraps the 51% ownership requirement for new prospecting rights, gives more recognition to the 'continuing consequences' principle, and slightly reduces earlier procurement and employment equity quotas. In addition, it scraps the 100% compliance requirement for skills development and mine community upliftment, instead confining this onerous demand to the ownership element alone.

However, the draft charter still greatly increases the regulatory burden on mining companies in South Africa. Its adoption of a 30% ownership target contradicts all the assurances earlier provided by the DMR that the 26% target was immutable and would not be changed. Now that the DMR has gone back on this pledge, the risk of the ownership target being raised once again – perhaps to 51% next time, as the 2017 charter foreshadowed – looms all the larger. (The Black Business Council wants BEE ownership targets to rise even higher, saying 'the objective is to have ownership of the economy reflecting the demographics of South Africa'.[108] This suggests that the BEE ownership target will in time rise to some 80%, as black people make up that proportion of the overall population. But an 80% target would overlook the age profile of the black population, roughly half of which is under the age of 25. Black youths who are not yet 25 years old cannot realistically expect to own half the country's mines.)

In addition, some 75% of the country's gold and platinum mines are loss-making in current conditions and are battling to survive. This is because commodity prices are relatively depressed, while input costs are sharply up. The key factors here are electricity prices, which have tripled in the past decade, and labour costs, which have increased at rates well above inflation in recent years.[109]

The draft charter overlooks the dire economic plight of many mining companies. Instead, it demands that all rights holders do additional and costly BEE deals while simultaneously fulfilling a host of unrealistic procurement and other obligations. These requirements will greatly push up operating costs – and increase the likelihood of shafts being shuttered and mineworkers retrenched.

Data from Statistics South Africa show that the mining sector lost 52 000 jobs in the first half of 2018. The gold and platinum sectors are in particular trouble, and thus have little choice (as *Business Day* journalist Allan Seccombe reports) but to 'shed thousands more jobs as shafts become deeper, productivity drops, grades shrink, and costs outpace prices'.[110]

Retrenchments now planned or under way at gold and platinum mines include:

- some 1 600 at Gold Field's South Deep mine, which has been losing about R1bn a year since 2006, when it was bought for R22bn;[111]
- roughly 13 000 at the Rustenburg operations of Impala Platinum (Implats), which plans to shut five of its 11 shafts over the next two years to address six years of losses currently amounting to R100m a month;[112]
- some 12 600 over three years at Lonmin's platinum mines, where old mines are being closed as part of a shift to lower-cost and more sustainable operations;[113]
- around 1 700 at Pan African's Evander gold mine, which is also loss-making at current gold prices;[114] while
- about 2 000 at AngloGold Ashanti, which is seeking to reduce its R3.3bn annual overhead costs by two-thirds.[115]

Mr Mantashe seems indifferent to the economic plight of these struggling mining companies. Instead, he has described Implats' recent decision to retrench 13 000 people as a 'display of arrogance' and an indication of how little the company values its workforce. But demand for platinum has dropped so sharply that its price is now well below $1 000 an oz. Hence, jobs will inevitably have to be trimmed to keep struggling mines in business.[116]

The price of gold has held up better, but gold mining companies face other major challenges. In particular, most are running out of accessible gold-bearing rock, while the bulk of the country's still vast gold resources are located at depths of five kilometres or more. This makes traditional mining methods both too dangerous and too costly to deploy. Further mining will be feasible only if full-scale mechanisation and round-the-clock operation can be achieved. If mechanisation cannot be implemented in time, many gold mining companies will exhaust the ores they can reach by the early to mid 2020s and will have to scale down dramatically, or even close their operations.[117]

Mechanisation of mining operations in hard gold-bearing rock and at the depths in issue will not be easy to achieve. Hence, gold mining companies are unlikely to succeed in this unless they can commission the best research, employ the people with the best skills and experience, and purchase the best machinery and other equipment from the international suppliers best able to meet their complex needs. But the draft charter will make it more difficult for them to do any of these things. Much of the country's gold wealth is thus likely to remain below the ground because its exploitation is neither feasible nor cost-effective under the charter's additional burdens.

South Africa still has enormous mineral wealth, of course, which is a major draw card. But decisions on mining investment are guided 60% by geological attractiveness and 40% by the content of mining policies. Prospective investors take careful note of policy differences between countries and tend, in the words of the Fraser Institute's *Mining Survey*, to 'shift exploration investment away from jurisdictions with unattractive policies'. South Africa does particularly badly on the 'policy perception index' in the Fraser survey, where it came 81st out of the 91 jurisdictions monitored in 2017. In 2013, by contrast, South Africa had ranked 78 out of 112.[118]

Already, moreover, South Africa's adverse policy environment is choking off new investment because:

- the relevant rules are so vague, allowing mining officials to interpret them in different ways at different times, so as to help some companies and hinder others;
- the requirements change far too often, which erodes the predictability that mining companies need before they can risk huge capital investments with long lead times; and
- the demands placed on miners in South Africa are very much more onerous and costly than the requirements in other mining countries.

The upshot, as Bernard Swanepoel, a former chief executive of Harmony Gold, warned at the Junior Mining Indaba in June 2018, is that 'exactly zero' has been spent on greenfields exploration in the past year. Yet without fresh exploration, no expansion is possible and the mining industry will continue to decline.[119]

The overall decrease in exploration budgets in South Africa over the past ten years has also been substantial. According to data from S&P Global Market Intelligence, South Africa's exploration budget amounted to $363m in 2008, but by 2017 it was down to $87m, a decrease of roughly 75%. Moreover, as the Minerals Council points out, the exploration investment that South Africa managed to attract in 2017 was only 1% of global expenditure on mineral exploration in that year.[120]

In addition, according to research by the Minerals Council, net investment in the South African mining industry has declined by 57% since 2008. This is partly because of economic factors – the adverse combination of lower global commodity prices and higher input costs – but the decrease has also been fuelled by the country's damaging mining policies. These are not simply too shifting and uncertain, as many commentators point out, but are also increasingly hostile to property rights and the success of the mining sector.[121]

By contrast, if the regulatory environment were to be reformed, so as to give the country the benefits of certain, stable, and predictable mining policies, then new investment would double, 150 000 more direct and indirect jobs would be generated, and the mining industry would once again start playing a much larger part in boosting the country's anaemic rate of economic growth.

These gains will not be attained, however, if the draft charter is adopted in its current form. Rather, this further regulatory blow could help push the South African mining industry to 'the point of no return', cautions Neal Froneman, CEO of Sibanye-Stillwater. Says Mr Froneman: 'If we continue with policies that are not investor friendly and are totally populist, that will be the end and there will be no recovery from it.' Investor confidence will then be so badly damaged that it cannot be regained. In issuing this warning, Mr Froneman was thinking not only of the draft charter and other mining laws, but also of the government's plans to embark on expropriation without compensation (EWC). Such plans, he stressed, 'do not sit well with investors in South Africa or abroad'.[122]

6 A more effective approach to empowerment

For all the reasons earlier described, the 2018 draft charter is a particularly damaging BEE instrument. However, it is also very much in line with other BEE policies, which have helped only a small minority while greatly harming the rest of the population. If South Africa is to succeed in positive transformation, it needs to shift away from BEE to a far more effective empowerment policy. This alternative policy is being developed by the IRR and is called 'economic empowerment for the disadvantaged' or 'EED.'

EED would actively promote investment, growth, and employment, always the key foundations for prosperity. It would also make growth more inclusive by helping to break down barriers to upward mobility.

Millions of South Africans are currently held back by bad schooling, poor housing, and failing health care. Yet state expenditure in these three spheres totals some R580bn in this financial year alone, and far exceeds what most other developing countries can spend.

Despite this high spending, outcomes are generally dismal. Some 80% of public schools are dysfunctional, while at least 84% of public hospitals and clinics cannot maintain proper standards of hygiene or ensure the availability of medicines. In addition, the 'RDP' houses provided by the state – despite a massive increase in the housing subsidy from R12 500 in 1994 to R160 500 today – remain small, badly located, and often poorly built.

The state's repeated promises to do better have brought little change. Hence, the most effective way to kick-start improvements is to empower ordinary South Africans to start meeting their own needs in these three key spheres.

This can be done by redirecting much of the R580bn now budgeted for a top-down system of state provision into tax-funded vouchers for schooling, housing, and health care. These vouchers would go directly to millions of disadvantaged South Africans.

Tax-funded vouchers for meaningful empowerment
Re-directing the education budget would generate vouchers worth some R16 000 per pupil per year. Once parents had been provided with these vouchers – which could be redeemed solely for education – schools would have to start competing for their custom. Failing state schools would be forced to improve. Many more independent schools would be established, by both companies and non-profits, to help meet burgeoning demand. The resulting competition would hold down costs and push up quality – as experience with school vouchers in other countries has shown.

Take housing next. The current housing and community development budget could be re-directed to provide housing vouchers to roughly 10 million South Africans between the ages of 25 and 35. These would be worth some R110 000 over ten years, so a couple could pool their money and receive R220 000 over a decade. A couple earning R6 000 a month could devote R1 500 (25%) of that to housing, which would boost their housing budget to some R400 000 over ten years.

Such sums would help people gain mortgage finance or enable them to start building their own homes. Families would no longer have to wait endlessly on the state to provide them with a small (and probably defective) RDP home. Building activities would accelerate, while dependency would diminish and self-reliance increase.

Re-directing the health care budget would provide health care vouchers, worth some R10 000 a year, to roughly 10 million households. People could then join the low-cost medical schemes that have been proposed (at premiums of some R200 per person per month), or take out 'combination' health insurance policies offering both hospital and primary care. Again, this would expand competition, increase efficiency, and help contain costs.

Since all households will want maximum value from their vouchers, tax revenues will be far better spent. The voucher system would also widen individual choice, build self-reliance, inject a new dynamism into the economy, and bring real benefits to millions of people now marginalised and destitute.

Tax-funded vouchers for education, housing, and health care are thus integral to EED and are a key factor distinguishing this strategy from BEE. Other differences between the two approaches are also important. BEE focuses on redistribution and promotes rent-seeking and entitlement, whereas EED would stimulate investment, quicken growth, expand employment, and encourage entrepreneurship instead of crony capitalism.

An EED strategy would rest on three prongs: the voucher system; an emphasis on economic growth as the overarching priority; and an EED scorecard that rewards the private sector for contributing to growth and effectively empowering the truly disadvantaged.

The benefits of shifting from BEE to EED would swiftly be felt across the country. However, the gains to be made are now particularly evident in the mining sector – where the contrast is stark between the harm the draft charter will do and the benefits that EED would bring.

An EED charter for mining

Under an EED mining charter, companies would earn EED points for their contributions in four categories: economic, labour, environmental, and community. Given the overarching importance of growth, their economic contributions would count the most.

In the ***economic*** sphere, mining companies would gain EED points for capital invested, minerals produced, profits earned, dividends declared, and contributions made to tax revenues, export earnings, and R&D spending.

In the ***labour*** sphere, companies would earn EED points for jobs provided and salaries paid, as well as for initiatives to improve skills, health, and mine safety, among other things.

As regards the ***environment***, companies would obtain EED points for reducing electricity and water consumption, minimising rock and other waste, treating polluted water, rehabilitating land, and so on.

As for their ***community*** contributions, companies would earn EED points for topping up the education, housing, and health care vouchers of poor households in mining communities, or for helping to improve provision in these three spheres. (Companies could earn EED points, for instance, for helping to develop innovative ways to treat polluted water for the benefit of mine communities.)

The policy choices are becoming stark. The country can keep on with BEE policies in mining and elsewhere, and reap the bitter harvest that will surely follow as the economy falters even further, state delivery continues to decline, and an increasingly corrupt political elite expands its power.

At the same time, the 2018 draft charter is *ultra vires* the MPRDA and unlawful in very many of its provisions, as earlier outlined. The draft charter thus cannot legally be adopted or implemented. A fundamental rethink is thus required as to how positive transformation can best be achieved in mining (and elsewhere). The answer lies in shifting from BEE to EED.

A shift to EED in mining, in particular, would allow South Africa to draw the full benefits of its enormous mineral wealth. It would also empower the poor and disadvantaged in a way that the draft mining charter will never be able to achieve. With the mining industry in the doldrums and the draft charter's fundamental flaws readily apparent, it is time to revive investor confidence, kick-start growth in a vital sector, and re-ignite prospects of upward mobility for millions of South Africans by shifting to an EED scorecard for mining instead.

South African Institute of Race Relations NPC **31st August 2018**

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