South African Institute of Race Relations NPC (IRR)
Submission to the
Economic Development, Environment, Agriculture, and
Rural Development Portfolio Committee
of the Gauteng Legislature
regarding the
Mineral and Petroleum Development Amendment Bill of 2013 [B 15D-2013]
Johannesburg, 28th February 2017

FORMAL PRESENTATION (SYNOPSIS)

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Introduction

The Economic Development, Environment, Agriculture and Rural Development Portfolio Committee of the Gauteng Legislature (the portfolio committee) has invited interested people and stakeholders to submit written comments, by 28th February 2017, on the Mineral and Petroleum Resources Development Amendment Bill of 2013 [B 15D-2013] (the Bill).

This submission on the Bill 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.

The Bill was adopted by the National Assembly in November 2016, and has now been referred to the National Council of Provinces (NCOP) for adoption. The Joint Tagging Mechanism of Parliament has identified it as a measure that affects the provinces and needs to be dealt with in terms of Section 76 of the Constitution. The Bill is essentially the same as an earlier version that was referred back to the National Assembly by President Jacob Zuma in January 2015 because he was concerned about its constitutionality on both substantive and procedural grounds. However, the president's concerns on these substantive issues have effectively been ignored, while various procedural shortcomings look set to be repeated by the NCOP and the various provincial legislatures.

Public participation in the legislative process

The Constitution obliges Parliament and the provincial legislatures to 'facilitate public involvement in the legislative process'. The Constitutional Court has reinforced this obligation by striking down legislation, including the Restitution of Land Rights Amendment Act of 2014, because of failures to fulfil this obligation. The Constitutional Court has also made it clear that a provincial legislature must act 'reasonably' in facilitating public participation, and 'provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them'. [*Doctors for Life*, Media summary, p2]

The Gauteng provincial legislature has nevertheless failed to act reasonably. It has given the public far too little notice of the public hearing on the Bill to be held on 2nd March 2017. It has also failed to give the public sufficient information about the Bill, for its description of the Bill in the notice it has published is truncated and often unintelligible. It has also failed to alert the public to the unconstitutionality of the Bill and the damaging economic consequences it is likely to generate. In addition, it has set aside too little time (a scant four hours) for the public hearing, suggesting that it is simply going through the motions on public consultation rather than giving people a meaningful opportunity to engage with it on the Bill.

The president's concerns about unconstitutionality

Neither of the president's substantive concerns about constitutionality has been addressed. First, the Bill still incorporates the mining charter (and other transformation policies) into the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. Yet it nevertheless still gives the mining minister the power to amend the charter (and these other policies) as he thinks fit. This is inconsistent with the doctrine of the separation of powers, which gives the law-making power to Parliament and not the executive. It also overlooks the constitutional requirement for public participation in the legislative process.

Second, the Bill obliges the mining minister to impose export quotas on 'designated' minerals (and probably on those identified as 'strategic' as well). However, the Bill's export restrictions are in breach of South Africa's binding obligations under the General Agreement on Tariffs and Trade (GATT) of the World Trade Organisation (WTO). These provisions in the Bill contradict Section 25(1) of the Constitution, which prohibits 'arbitrary' deprivations of property. They are also inconsistent with Section 33(1) of the Constitution, which requires that all administrative action must be 'lawful' and 'reasonable'. Prima facie, they also contradict the doctrine of the separation of powers, which bars Parliament from straying into areas (such as the conclusion, termination, or amendment of international agreements) which fall within the executive's domain.

Other provisions are also unconstitutional

Many provisions in the Bill are too vague to comply with the rule of law. This requires certainty in legislation, so that rules are not open to arbitrary interpretation and uneven application by bureaucrats and ministers. The supremacy of the rule of law is one of the founding values of the Constitution, which means that its requirements cannot simply be ignored. [Section 1(c), Constitution of the Republic of South Africa, 1996]

Some provisions in the Bill are themselves impermissibly vague. Others provide insufficient criteria to guide and constrain the exercise of administrative discretion. Examples include the Bill's amendments to:

- Section 11, which introduce ambiguous restrictions on share transfers;
- Section 26, which give the minister an unfettered discretion to impose export and other controls on 'designated' minerals;
- Section 1, which allow the minister an unfettered discretion to declare minerals as 'strategic', 'as and when the need arises', and make no attempt to explain the further consequences which may flow from such a declaration;
- Section 9, which put an end to the 'first-in, first-assessed' principle for the awarding of mining rights and increase the scope for arbitrary ministerial decision-making in this sphere;
- Section 43, which introduce permanent liability for environmental damage and render it impossible for mining companies to assess how much financial provision they must make for a liability that could extend 20, 50, or 100 years into the future; and
- Sections 98 and 99, which subject mining companies and their executives to draconian fines and prison terms for impermissibly vague offences such as failing to 'promote optimal economic growth'.

A mistaken emphasis on state-directed beneficiation

Many of the minerals extracted in South Africa are already extensively milled, refined, or smelted inside the country. Some are already used in manufacturing processes that include the production of steel and the making of other alloys. South Africa not only pioneered the production of oil from coal, but currently produces roughly a third of the petrol needed in the country in this way. In addition, the Petroleum, Oil and Gas Corporation of South Africa Ltd (PetroSA), a state-owned enterprise mainly involved in extracting natural gas from offshore fields near Mossel Bay (Western Cape), also produces synthetic fuels via a gas-to-liquids process. [Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, p275]

In recent years, however, local beneficiation has diminished. Smelters have closed down or reduced operations for lack of a reliable and affordable supply of electricity. The production of ferrochromium within the country makes little economic sense when China (despite its lack of chromium ore) can produce ferrochromium more cheaply than South Africa, even after transport costs have been factored in. South Africa's small diamond cutting and polishing industry, which cannot compete with low-cost countries such as India, has been decimated by government controls that were supposedly aimed at boosting the local industry. Steel production is under increasing threat from cheap Chinese imports. In addition, the manufacturing sector, much of which has links to the mining sector, has been struggling to maintain its profitability in the face of high input costs, load-shedding, labour instability, currency volatility, and growing international competition.

Where increased local beneficiation makes economic sense, South African business already has a demonstrable capacity to embark on this. Where it does not, government's insistence on local beneficiation is likely to cause far more economic harm than good.

The Bill, with its strong emphasis on local beneficiation 'for national development', ignores these economic realities. It also overlooks warnings from the National Planning Commission, the Industrial Development Corporation, and many others that South Africa lacks the electricity, the skills, and the international competitiveness required for successful local beneficiation.

Far from boosting the economy, the Bill's damaging export and other controls are likely to choke off the supply of key minerals, as is already happening with coal. New coalfields need to be developed, at a cost of some R100bn, to ensure adequate future supplies to Eskom and its coal-fired power stations. But few mining companies are willing to risk this enormous outlay when the mining minister can decide to whom, and at what price, coal is to be sold. A supply gap is thus developing, not because of any shortage of coal in the ground, but rather because few companies can risk mining it in these circumstances.

Instead of increasing local beneficiation, the Bill could in time help to cripple Eskom's generating capacity and plunge the country into load-shedding once again. All manufacturing and other businesses will then find it much harder to survive, let alone to compete internationally. The Bill could also help to choke off exploration for other minerals and deter fresh investment in other new mines. In 2015 mining exploration was already standing at a quarter of its level in 2007. Unless this situation is reversed – and the Bill will make it harder to achieve this – South Africa might not have a mining industry some 20 years from now.

Economic damage from the Bill

The mining industry contributes some 8% to South Africa's gross domestic product (GDP), but is in fact far more important to the economy than this figure might suggest. Mining helps to sustain some 1.5 million direct and indirect jobs. Taking into account the dependents of employees, it supports some 15 million people overall. It also helps to bring in foreign investment, generate tax revenues, and bolster export earnings.

It is particularly important to the output of four provinces: Limpopo, Mpumalanga, the Northern Cape, and North West. It is also vital to the prosperity of at least six mining towns. It largely sustains two key ports (Richards Bay and Saldanha Bay) and helps to support a host of other areas involved in the transporting and exporting of minerals. It is no less vital to the Eastern Cape, which has no mining activity of its own, but relies heavily on the remittances sent back to families by migrants working at mines in the North West and elsewhere.

Mining also sustains a vast array of other businesses through the goods and services it buys. In 2016 its current procurement spending totalled R156bn, which was not much less than the R188bn the central government had budgeted for current expenditure in 2015/16. In 2016 its

capital expenditure amounted to R89bn. Again, this is a tidy sum compared to the R290bn or so that the government and all its parastatals may budget to spend in a given year.

The mining industry could also be much larger than it is if poor mining policies had not already harmed it so much. As the National Development Plan (NDP) points out, South Africa's mining industry shrank by 1% a year during the global commodities boom from 2001 to 2008, whereas the mining sectors in other countries expanded by 5% a year on average over this same period.

The NDP identifies South Africa's poor performance as 'an opportunity lost'. It also puts much of the blame for it on the vague and uncertain terms of the MPRDA. It thus urges that the MPRDA be amended to 'ensure a predictable, competitive and stable regulatory framework'. However, far from complying with the NDP's recommendation, the Bill makes the regulatory framework even more unpredictable, uncompetitive, and unstable.

Much of the problem lies in the unfettered discretion given to the mining minster in various important spheres, as earlier outlined. Instead of helping the mining industry to grow, the Bill will make it even more difficult for it to attract much-needed investment. The Bill will thus make it harder still for mining companies to maintain, let alone expand, their operations. Even more jobs are likely to be lost, while mining's contributions to revenue, export earnings, and GDP could well decline.

The choice the Gauteng legislature confronts

Gauteng's legislature has an important choice to make. Should it endorse this Bill with its unconstitutional and economically damaging provisions, or should it decline to do so in the interests of its residents (and of the country as a whole)?

Before making that decision, the Gauteng legislature should reflect on how much wealthier the country would be if the mining industry – instead of shrinking by 1% a year – had grown by 5% a year during the global commodities boom, as other major mining countries were able to achieve. If this had happened, South Africa would have reaped substantial benefits in many spheres.

Instead of so many mining jobs being lost, hundreds of thousands of jobs in mining could have been created. Many more jobs would also have been generated in other sectors, for a host of businesses would have sprung up or expanded to supply the mining industry with all the additional goods and services it would have needed. There would be less poverty in both mining communities and rural sending areas. The government would have collected far more in taxes, making it easier to afford both infrastructure expenditure and current spending on education, health, housing, social grants, and other needs. Public debt would not have gone up so sharply and the interest payable on that debt would be much reduced. The country would have earned more in foreign exchange, which would have helped to strengthen the value of the rand. More foreign investment would have flowed in, helping to expand the economy still further. Pension funds and unit trusts invested in the mining industry would

have been richer. So too would all the ordinary people, both black and white, whose savings are so often invested in those funds.

Policy makers at the national level seem to have lacked an understanding of just how important the mining industry is to South Africa's economy – and just how widely its linkages into other sectors extend. The Gauteng legislature (and other provincial legislatures too) can now help to rectify this situation.

Before the Gauteng legislature endorses a measure likely to be so profoundly damaging to an essential industry, it needs to make sure that both its legislators – and the wider public they represent – are fully informed of the Bill's damaging economic ramifications. At the very least, a comprehensive and objective socio-economic assessment must be conducted and made available to the public and all those involved in the legislative process. Unless this is properly done, there is a real risk that the Bill will be enacted into law without adequate understanding of the risks it poses – and that all South Africans will pay a heavy price for this for decades to come.

Constitutional requirements must also be upheld. Neither the Gauteng legislature nor Parliament as a whole can lawfully adopt legislation inconsistent with the Constitution. All substantive shortcomings in the Bill must be addressed by removing those provisions which conflict with guaranteed rights. The constitutional obligation to facilitate public involvement in the legislative process must also be fulfilled – and cannot be downplayed or brushed aside.

South African Institute of Race Relations NPC **28th February 2017**