South African Institute of Race Relations NPC (IRR)
SUBMISSION
to the
Select Committee on Land and Mineral Resources
of the
National Council of Provinces
regarding the
Mineral and Petroleum Development Amendment Bill of 2013 [B 15D-2013]
Johannesburg, 22nd March 2017

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1 Introduction

The Select Committee on Land and Mineral Resources of the National Council of Provinces has invited interested people and stakeholders to submit written comments, by 22nd March 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.

An earlier version of the Bill, which is virtually identical to the current measure, was passed by the National Assembly on 12th March 2014 and by the National Council of Provinces (NCOP) on 27th March 2014. It was then referred to President Jacob Zuma for his assent. But in January 2015 the president referred the earlier Bill back to the National Assembly, citing concerns about its constitutionality on both substantive and procedural grounds. In August 2016, however, the mineral resources portfolio committee in the National Assembly rejected his substantive concerns about the constitutionality of various provisions in the Bill. [www.businesslive.co.za 25 August 2016] The National Assembly thus adopted the Bill, with only a few minor changes from its previous content, in November 2016. The Bill is now before the National Council of Provinces (NCOP) for adoption.

2 The importance of public participation in the legislative process

The Bill has been classified by the Joint Tagging Mechanism of Parliament as a measure that affects the provinces and needs to be dealt with in terms of Section 76 of the Constitution. [Para 4.3, Memorandum on the Objects of the Bill] The NCOP is enjoined to take particular care to ensure that provincial perspectives are properly taken into account in the adoption of a Section 76 Bill. This makes it all the more important that all provincial administrations should satisfy themselves as to the constitutionality of the Bill. They must also carefully examine its likely economic consequences. In addition, before they issue negotiating or final voting mandates on the Bill to their representatives in the NCOP, they must ensure that there has been proper public participation in the legislative process, as required by the Constitution.

2.1 What the Constitution requires

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)]; *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others.* [2016] ZACC 22]

The key constitutional provisions in this regard are Sections 72, 118, and 59. According to Section 72(1) of the Constitution, the National Council of Provinces 'must facilitate public involvement in the legislative…processes of the Council and its committees'. Under Section 118 of the Constitution, essentially the same obligation (the word used is again 'must') is imposed on every provincial legislature to 'facilitate public involvement in the legislative and other processes of the legislature and its committees'. The National Assembly is also placed under the same obligation, this time under Section 59 of the Constitution. [Sections 72(1)(a), 118(1)(a), 59(1)(a), Constitution of the Republic of South Africa, 1996]

Various decisions of the Constitutional Court have elaborated on what these sections require of both Parliament and the nine provincial legislatures:

- In the *Matatiele* case, the court said that a provincial legislature must 'act reasonably' in facilitating public involvement in the legislative process. Whether a provincial legislature has in fact done so will depend on all the relevant factors, including the intensity of the impact of the legislation on the public; [*Matatiele* case, Media summary, p1]

- In *Doctors for Life*, the court held that 'Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case', so long as what they do is 'reasonable'. 'This duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them.' Factors relevant to reasonableness include 'the nature of the legislation and what Parliament itself has assessed as being the appropriate method' to facilitate public involvement. [*Doctors for Life*, Media summary, p2]

- In the *New Clicks* case, Mr Justice Albie Sachs noted that there were very many ways in which public participation could be facilitated. He added: 'What matters is that…a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say'. This passage was quoted with approval in both *Doctors for Life* and the *Land Access* case, as further described in due course. [*Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630; *Doctors for Life*, at para 145; *Land Access*, at para 59]

Among the factors relevant to reasonableness, as the Constitutional Court stated in the *Land Access* case, is 'the nature of the legislation in question' and 'any need for its urgent adoption'. The court also stressed that 'a truncated timeline' for the adoption of a bill by the NCOP and provincial legislatures can itself be 'inherently unreasonable'. If the period allowed is too short (as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the NCOP), then 'it is simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate'. [*Land Access*, paras 61, 67]

In the *Doctors for Life* case, where the timeline for adoption of the Bill was also short, the Constitutional Court further emphasised that legislative timetables cannot be allowed to trump constitutional rights. Said the court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.' [*Doctors for Life*, para 194] Having cited this passage with approval, the Constitutional Court in the *Land Access* case went on to say: 'In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue'. [*Land Access*, para 70]

The Constitutional Court's judgment in the *Land Access* case also makes it clear that:

- public participation must be real, in that it must provide the public with an opportunity to be heard which is 'capable of influencing the decision to be taken'; [*Land Access*, para 71, citing *Moutse Demarcation Forum and others* v *President of the Republic of South Africa and others*, 2011 (11) BCLR 1158 (CC), para 62]

- a notice of a public hearing regarding a bill must 'not only provide details of the place, time and purpose of a public hearing' but must 'also assist in building awareness' of what the bill proposes; [*Land Access*, para 76]

- notices of public hearings must be published timeously and should give people more than seven days' warning, as a shorter period may deprive them of an opportunity to participate; [*Land Access*, para 77]

- the notice given must be sufficient to 'allow the public to study the bill and prepare for the hearings adequately', as this could otherwise have 'an adverse impact on the quality of submissions to the Provincial Legislatures'; [*Land Access*, para 77]

- provincial legislatures are not obliged simply to accept the unrealistic timelines that the NCOP may set. On the contrary, these legislatures are 'constitutionally created entities with their own separate existence and powers'. The NCOP may 'facilitate the public participation process through them', but this by no means 'subordinates them to the authority of the NCOP'. On the contrary, 'they too have a duty to play their part properly in affording the public an opportunity to participate in the legislative process'. [*Land Access*, para 80]

2.2 Public participation on the Bill in Gauteng fatally flawed

On 23rd February 2017 the Economic Development, Environment, Agriculture and Rural Development Portfolio Committee of the Gauteng Legislature (the portfolio committee) placed an advertisement in *Business Day* giving notice of a public hearing on the Bill to be held on 2nd March 2017. The advertisement required those wanting to 'make written submissions or formal presentations on the day of the public hearing' to send these to the portfolio committee by 28th February 2017. The notice was thereafter also published in some Sunday newspapers on 26th February 2017.

This gave the public in Gauteng a scant four (or two) working days on which to obtain copies of the Bill, which is 47 pages long and complex in its content. It is also impossible to understand the Bill without first obtaining and reading the principal Act it is intended to amend. This is, of course, the Mineral and Petroleum Resources Development Act (MPRDA) of 2002 (the Act), which is itself a lengthy and complicated statute.

According to the advertisement, the sending in of written submissions or other formal presentations on 28th February 2017 'would give the portfolio committee time to include such presentations on the programme for the day'. The portfolio committee thus gave itself a single working day in which to read all the submissions it received and to include all (or only some?) of them in the four-hour period (10h00 to 14h00) it set aside for the public hearing on 2nd March 2017. This suggested that the portfolio committee had little intention of taking these submissions seriously or seeking properly to engage with them.

This truncated timeline indicates that the portfolio committee has simply been going through the motions on public participation. Effectively, it has thereby denied the people of Gauteng an opportunity to be heard which is 'capable of influencing the decision to be taken', as the Constitution requires. [*Land Access*, at para 71, citing *Moutse*, at para 62]

As the Constitutional Court has also stressed, the notice given of a public hearing must go beyond providing the bare 'details of the place, time and purpose of a public hearing'. Rather, it must 'assist in building awareness' of what the relevant bill proposes. The notice published by the portfolio committee was too brief and truncated to 'build awareness' in this way.

In addition, the way in which the notice described the Bill was at times misleading. For example, the notice claimed that the Bill 'removes ambiguities that exist within the Act', when in fact it adds to these ambiguities and uncertainties. Much of what the notice said about the Bill was simply unintelligible. For example, the notice spoke of:

- 'increasing the socio-economic impact through mining';
- 'partitioning of rights'; and
- 'enhancing provisions relating to the regulation of the mining industry through beneficiation of minerals and mineral products'.

Even legal experts who are familiar with the provisions of the MPRDA and the Bill are likely to find such wording difficult to understand.

In addition, if the public was to have an opportunity for meaningful participation in the legislative process, they needed to be made aware of the likely negative ramifications of the Bill. They needed to know that the president himself (along with many legal experts) has concerns about the constitutionality of various provisions in the Bill. They also needed to know that the Bill is likely to have many adverse economic consequences for the mining industry – and that its damaging ramifications will be particularly severe in provinces where mining and related economic activities contribute significantly to provincial output.

2.3 A Table with some 60 additional amendments to the Bill

The rules of Parliament provide that no further amendments can be made to a bill when it is returned to Parliament by the president because he has concerns about its constitutional validity. Parliament must then make such amendments as are needed to address the president's constitutional concerns regarding the content of the bill.

Parliament must also ensure that the president's reservations about compliance with the Constitution's procedural requirements are met. Any past inadequate public consultation on the content of the bill must be corrected. In addition, the public must be adequately involved in any amendments that are made to the bill to address the president's substantive constitutional concerns. Parliament may not, however, consider or adopt additional substantive amendments which fall outside the mandate of the president's referral.

The DMR has ignored these rules in proposing some 60 additional amendments to the Bill. These additional amendments are set out in a Table of Proposed Amendments to the Mineral and Petroleum Resources Development Bill, 2013 [BD-2013], drawn up by the DMR on 26th November 2016 (the Table). None of these additional changes fall within the mandate given to Parliament by President Jacob Zuma when he referred the Bill back to the National Assembly in January 2015. Neither the portfolio committee nor the Gauteng provincial legislature may thus lawfully adopt the additional changes set out in the Table.

In addition, the people of Gauteng were not given adequate notice of the further amendments set out in the Table. The Table is not available on the DMR website and has never been made known even to policy organisations, such as the IRR, which make a point of closely monitoring all proposed amendments to mining law.

The advertisements published by the portfolio committee inviting the public to attend the Gauteng hearing on 2nd March 2017 also made no reference to the Table. Instead, the advertisements referred only to the Bill (and did so in truncated and misleading terms, as earlier described). Hence, the first time the Table came to the notice of the IRR (and many other individuals and organisations) was on 2nd March 2017, when they attended the Gauteng public hearing on the Bill and were presented with the Table at the door.

The IRR was thus unable to comment at the public hearing on the contents of the Table, of which it had been given no prior notice at all. Other people attending the hearing were in the same position. Moreover, the Table can be understood only in the context of both the Bill and the MPRDA itself. Hence, getting to grips with what it proposes requires a careful study of three complex documents, each of which must be read in conjunction with the other two. This is no simple exercise. People given copies of the Table for the first time as they entered the public hearing could not possibly engage with the document in these circumstances – and especially as they were not also given copies of the MPRDA itself. This is a further major procedural weakness, which cannot now be overcome.

2.4 Fatal weaknesses in the Gauteng public participation process

The public hearing in Gauteng offered little scope for public involvement in the legislative process. Copies of the Bill and of the Table with its further proposed amendments were handed out, but not the MPRDA itself. This made it impossible for people to understand or comment on the Bill or the further changes to it that are now being proposed.

The hearing was supposed to start at 10h00, but in fact it began almost an hour late because community members who were being bussed in had not yet arrived. In the end, for reasons that were not fully explained, these community members never came at all. The relatively few people who were present at the hearing asked why central Johannesburg had been chosen as the venue, when it was far away from much of the Reef. Much of the remaining time was then taken up with presentations on the Bill by the DMR and the Gauteng Department of Economic Development. However, both used PowerPoint slides that were too small to read. The sound system was also defective, which made it difficult to hear what was being said.

A representative of various non-governmental organisations working with mining communities, who was given the chance to speak, complained that community views had been ignored in the past, and seemed likely to be ignored again. A representative of the Merafe Business Chamber said: 'We got the documents [the Bill and the Table] at the door. How can we engage with them? The documents are complex, and we can't easily engage.'

A representative of the Centre for Applied Legal Studies at the University of the Witwatersrand, who spoke for various mining communities, said: 'This process of consultation is grossly deficient. Only about ten days have been allowed. We are calling for the process to start from scratch.' A representative of the National San Council added: 'We need the consent of all affected communities, which include the indigenous peoples. It is good that the unconstitutionality of various provisions has been raised [by the Chamber of Mines and the IRR], but the DMR must look at this too. We also need a proper regulatory assessment.'

In summing up at the end of the proceedings (which terminated at around 13h30, rather than the advertised time of 14h00), the chairman of the Gauteng Legislature's Economic Development, Environment, Agriculture and Rural Development Portfolio Committee, Errol Magerman, apologised for the various ways in which public consultation had been deficient. Said Mr Magerman: 'I concur that the documents were not sent out on time. This is something we should correct. We must find better ways of doing this. There was a problem with public participation, perhaps because of the short notice in convening the hearing... The notice of the hearing was too short, but this was the minister's power.'

Mr Magerman added that the City Hall in Johannesburg had been chosen as the venue because it was central. The portfolio committee had wanted to arrange a meeting in the West

Rand, but it could not find a venue. Yet, if the hearing had been convened there, there would have been objections to its not having been held on the East Rand. 'It would have been good to have had it at all three places, but we could not do this because of the time frames,' he said.

Mr Magerman promised those present that the portfolio committee is a multiparty body, which is 'on your side'. Hence, it would 'ensure that the DMR does what it should'. Both the portfolio committee and the Gauteng provincial legislature would look carefully 'at the constitutionality of issues'. The portfolio committee had also heard the other concerns that had been raised and would take them forward to the NCOP, he stressed.

However, these undertakings by the chairman do not alter the fact that public involvement in the legislative processes on the Bill was not adequately facilitated in Gauteng. As Mr Magerman himself acknowledged, the notice period was too short, the documents were not timeously supplied, the centralised venue excluded many from attending, and the community members who were supposed to be bussed in never arrived. The chairman blamed these defects on the minister and the short timetable set by him. However, as the Constitutional Court took pains to stress in the *Doctors for Life* case, legislative timetables cannot be allowed to trump constitutional rights. In the words of the Constitutional Court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.' [*Doctors for Life*, para 194]

2.5 Public participation on the Bill in the NCOP also fatally flawed

On 3rd March 2017 the NCOP published a notice on the Parliamentary Monitoring Group (PMG) website calling on the public to make written submissions on the Bill by 22nd March 2107. The period given for public comment is thus less than three weeks. This is far too short a period to allow for meaningful public involvement in the NCOP's legislative process, as required by Section 72(1) of the Constitution.

In addition, the notice published on 3rd March 2017 is again too short to give the public any real insight into what the Bill proposes. Like the advertisements published in Gauteng, it is also misleading on various points, for the Bill does not 'remove ambiguities' or 'improve the regulatory system'. Much of what the notice says about the Bill is so badly phrased that it is difficult to understand, even for legal experts with detailed knowledge of the measure.

Moreover, if the people of South Africa are to have an opportunity for meaningful participation in the NCOP's legislative process, they need to be made aware of the likely negative ramifications of the Bill. They need to know that the president himself (along with many legal experts) has concerns about the constitutionality of various provisions in the Bill. They need to be aware that many other provisions of the Bill are also unconstitutional. In addition, they need to know that the Bill is likely to have many adverse economic consequences for the mining industry – and that its damaging ramifications will be particularly severe in provinces where mining and related economic activities contribute significantly to provincial output. They also need access to the comprehensive socio-economic impact assessment of the Bill which now needs to be conducted before the Bill can be adopted. However, the brief notice published by the NCOP meets none of these needs.

In addition, the notice makes no reference to the DMR's Table and the 60 or so additional amendments to the Bill which it proposes. Many of the people and organisations commenting on the Bill within the truncated period allowed by the NCOP may thus be unaware of the Table and unable to comment on its content. This too is a major procedural weakness. At the same time, the rules of Parliament prohibit the NCOP from adopting these additional amendments, all of which fall outside President Zuma's referral mandate. Should the NCOP nevertheless purport to adopt these additional amendments, this will be a further major breach of the relevant rules.

3 The president's concerns about unconstitutionality

In January 2015, as earlier noted, the president referred an earlier version of the Bill back to the National Assembly because of his concerns about the possible unconstitutionality of various provisions. None of these provisions has been changed. Relevant first are provisions which incorporate the mining charter and other documents into the MPRDA. Also important are provisions which empower the mining minister to impose export quotas on 'designated', and probably also on 'strategic', minerals.

3.1 Status of the mining charter and other documents

Under the Bill, the definition of 'this Act' is amended so as to include the Broad-Based Socio Economic Charter for the South African Mining and Minerals Industry (the mining charter). Also included in the amended definition are the Codes of Good Practice for the South African Minerals Industry (the codes), and the Housing and Living Conditions Standards for the Minerals Industry (the housing standards). All three are 'transformation policies', which have been adopted by the mining minister under Section 100 of the MPRDA. [Section 100, MPRDA; Clause 1, Bill]

As regards the mining charter, Section 100 (as initially drawn up) empowers the mining minister to 'develop a broad-based socio-economic empowerment charter that will set the framework, targets, and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry'. [Section 100(2), MPRDA] When the MPRDA came into operation in 2004, the mining charter did not form part of the statute. Instead, it was an ancillary document which simply set out 'a framework' and 'targets' for the process of drawing more historically disadvantaged people into the mining industry.

Under the Bill, however, not only the mining charter but also the codes and the housing standards are now to form part of the MPRDA. [Clause 74, Bill, amending Section 100, MPRDA] Yet, to take the mining charter as an example, there was never any 'public involvement' in any 'legislative process' leading to its adoption, as required by sections 59, 72, and 118 of the Constitution. The charter cannot now simply be elevated to the status of legislation without infringing these constitutional requirements.

In addition, the Bill not only elevates the mining charter and these other documents to the status of legislation, but also gives the power to amend them to the minister, rather than to Parliament. It thus states that 'the minister shall, as and when the need arises, amend or repeal' the mining charter, as well as the housing standards and the codes. [Clause 74 Bill, amending Section 100, MPRDA]

Empowering the minister to amend or repeal a part of the MPRDA is inconsistent with the Constitution, which gives this legislative power to Parliament. It also bypasses constitutional procedures for the adoption and amendment of legislation, which include the need for public participation in the legislative process (as earlier outlined). In addition, it means that Parliament has no control over the circumstances in which the punitive provisions in the MPRDA – those providing for the suspension and/or cancellation of mining rights in response to a breach of the statute – will apply.

The provisions of the Bill also contradict the doctrine of the separation of powers, on which South Africa's constitutional order is founded. Under this doctrine, Parliament is the branch of government entrusted with the adoption, amendment and repeal of legislation. By contrast, the executive's role is to administer the laws which the legislature has adopted. The executive may not assume or encroach on powers which are reserved for the legislature. The Bill ignores these core principles and is thus prima facie unconstitutional.

The president's concern about the constitutionality of these provisions is well-founded, but was nevertheless rejected by the National Assembly on spurious grounds. In dismissing the president's views, the chairman of the portfolio committee on mineral resources, Sahlulele Luzipo, simply stated that the relevant issue is 'not a constitutional matter'. However, this assertion is not convincing and cannot be accepted as definitive.

Mr Luzipo also said that the mining charter is 'a tool of transformation which has to be complied with and thus cannot be excluded from the Bill'. [www.businesslive.co.za, 25 August 2016] However, this view brushes aside Parliament's constitutional obligation to facilitate public involvement in the legislative process and to ensure that all legislation it adopts is fully consistent with the Constitution. It also overlooks the fundamental principle that the executive cannot usurp law-making functions that are reserved for the legislature, as the Constitutional Court had repeatedly stressed. Relevant judgments here include *Executive Council, Western Cape Legislature, and others* v *President of the Republic of South Africa and others*, [1995(4) SA 877 (CC), para 51] and *Justice Alliance of South Africa* v *President of the Republic of South Africa and others*, *Freedom under Law* v *President of the Republic of South Africa and others*, *Centre for Applied Legal Studies and another* v *President of the Republic of South Africa and others*. [2011(5) SA 388 (CC), paras 53-65]

The provisions in the Bill that seek to make the mining charter, the codes and the housing standards part of the MPRDA must be deleted so as to bring the Bill into line with the Constitution.

3.2 Export quotas for many minerals

Section 26 of the MPRDA currently provides that the mining minister 'may' promote the beneficiation of minerals, whereas the Bill states that the minister 'must' do so. The Bill further obliges the minister (in consultation with relevant national departments) to 'designate any mineral or mineral product for local beneficiation'. Under the Bill, 'every producer of designated minerals must offer to local beneficiators a prescribed percentage of its production of minerals or mineral products in prescribed quantities, qualities and timelines at the mine gate or agreed price'. In addition, no producer 'may export designated minerals or mineral products' unless they have provided the prescribed percentages to local beneficiators or have obtained 'the minister's prior written approval'. [Clause 21, Bill, amending Section 26, MPRDA]

The economic reasons for these provisions are flawed and unconvincing, as further explained in due course. However, the key objection here is a constitutional one, stemming from the fact that these provisions clearly impose quantitative restrictions on mineral exports. However, such export restrictions are prohibited under international trade agreements to which South Africa is party and which are binding on it.

Particularly relevant are South Africa's obligations under the General Agreement on Tariffs and Trade (GATT) of the World Trade Organisation (WTO). Article X1:1 of the GATT states: 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [WTO member]…on the exportation or sale for export of any product destined for the territory of any other [WTO member]'.

In international trade law terms, the obligation to offer local beneficiators a ministerially prescribed percentage of a designated mineral amounts to an unlawful export quota system. In addition, the obligation to obtain prior ministerial approval amounts to an export licensing regime. Both measures constitute quantitative restrictions on exports which are prohibited by Article XI:1 of the GATT.

In flagging his concerns about the constitutionality of these provisions, the president warned that they could expose South Africa to 'challenges in international fora'. The correctness of his view is illustrated by two recent rulings of the WTO Dispute Settlement Body (DSB) against the People's Republic of China (China) over very similar measures.

The first complaint, which was brought by the United States (US), the European Union (EU), and Mexico concerned export quota and licensing regimes imposed by China over various raw materials, including bauxite, magnesium, manganese, silicon metal, yellow phosphorus and zinc (the 'raw materials' case). The second complaint, which was brought by the US, the EU, and Japan, concerned export quota regimes over various rare earths, tungsten, and molybdenum (the 'rare earths' case). [Herbert Smith Freehills, Key Outstanding Legal Issues in the Mineral and Petroleum Resources Development Amendment Bill, 2013, unpublished memorandum, 2017]

In the raw materials case, the DSB, including its Appellate Body, rejected China's claim that other articles in GATT allowed these export restrictions. China argued, among other things, that Article XX(g) allows the imposition of measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. The DSB rejected this argument, saying 'the right to adopt conservation programmes is not a right to control the international markets in which extracted products are bought and sold'. In addition, the conditions set out in the article were not met, as China was not seeking to reduce but rather to '*stimulate* domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries'. [Herbert Smith Freehills memorandum, emphasis as in the original] South Africa's Bill also aims to stimulate local production of designated minerals, which means that the 'conservation' argument cannot be used to justify its breach of Article XI:1.

China's other arguments in both cases were likewise rejected by the DSB. This has prompted China to withdraw both the impugned measures. Had it failed to do so, it would have had to negotiate a compensation agreement with the various complainants within 20 days. If no such agreement had been reached, the complainants would have been entitled to impose countermeasures against China, both in the same economic sector and in others. [Herbert Smith Freehills memorandum]

As these cases confirm, the Bill's export restrictions are contrary to South Africa's binding obligations under the GATT. They are also prima facie inconsistent with the separation of powers, under which the executive has the task of entering into international agreements, withdrawing from them, or attempting to negotiate any modification of their terms with all the other countries that are party to them. Parliament's prior approval is necessary before the executive can withdraw from or renegotiate an international agreement which has been incorporated into South African law, as the North Gauteng High Court has recently ruled. [*Democratic Alliance* v *Minister of International Relations and Cooperation and others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017)] At the same time, Parliament cannot usurp the executive's power to deal with other governments in the international arena. The Bill ignores this in introducing export restrictions that contradict South Africa's treaty obligations and expose the country to major penalties under the GATT. For Parliament to stray into the domain of the executive in this way is inconsistent with the separation of powers doctrine.

The Bill's export restrictions are also unconstitutional for other reasons. Once minerals have been extracted from the ground, they represent 'property' within the meaning of Section 25 of the Constitution (the property clause). Any restriction on their use, enjoyment or disposal thus constitutes a 'deprivation' within the meaning of Section 25(1) of the Constitution, and as confirmed by the Constitutional Court in the *FNB* case, in particular. [*First National Bank of SA Ltd t/a Wesbank* v *South African Revenue Service*, 2002 (7) BCLR 702 (CC)]

Section 25(1) states that ‘no law may permit arbitrary deprivations of property’ – and yet this is precisely what the Bill seeks to do. In allowing the minister to impose export controls on mineral products, it gives an unguided and unfettered discretion to the executive, which in itself is ‘arbitrary’ and impermissible. In addition, what is ‘arbitrary’ must be interpreted in accordance with international law and this (in terms of the GATT) prohibits the imposition of quantitative restrictions on exports. [*First National Bank* v *SARS*, op cit; *Glenister* v *President of the Republic of South Africa and others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011)]

In addition, in designating minerals, fixing quotas for domestic sale, and deciding whether to consent to the exporting of mineral products, the mining minister will be engaging in ‘administrative action’. Such action must comply with Section 33 of the Constitution, under which ‘everyone has the right to administrative action which is lawful, reasonable and procedurally fair’. [Section 33(1), 1996 Constitution] Since the GATT constitutes law, is binding on South Africa, and has been approved by the National Assembly and the NCOP, the minister cannot act either ‘lawfully’ or ‘reasonably’ in imposing export restrictions which are in breach of the GATT.

The National Assembly has erroneously rejected the president’s concerns regarding the constitutionality of these export restrictions. [www.businesslive.co.za, 25 August 2016] This cannot alter the fact that the Bill, in requiring the minister to impose these export restrictions, is in breach of:

- Section 25(1) and its prohibition of any law permitting an arbitrary deprivation of property;
- Section 33(1), with its requirement that all administrative action be lawful and reasonable; and
- the doctrine of the separation of powers, under which the legislature may not stray on to terrain (the conclusion, termination, or amendment of international agreements) which is the preserve of the executive.

All provisions in the Bill which allow the imposition of quantitative controls on mineral exports are thus also unconstitutional and must be deleted.

4 Other provisions of the Bill are also unconstitutional

Other provisions in the Bill are also unconstitutional. This means that these clauses, too, cannot be enacted into law by Parliament. As the Constitutional Court stressed in the *Certification* case in 1996: “Under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament… Parliament ‘must act in accordance with, and within the limits of, the Constitution’”. [*Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC), at para 109]

Many of the provisions in the Bill are too vague to comply with the rule of law. This requires certainty of law, among other things, so that rules are not vulnerable to arbitrary interpretation and uneven application by bureaucrats or ministers. The supremacy of the rule of law is also one of the founding values of the Constitution, [Section 1(c), 1996 Constitution] and its requirements cannot be ignored.

Violations of the rule of law are particularly evident where legislation is vague, or where insufficient criteria are provided to guide and constrain the exercise of an administrative discretion. In the words of Judge Richard Goldstone in *Janse van Rensburg* v *Minister of Trade and Industry*: 'It is inappropriate that [any] minister should be able to exercise an unfettered and unguided discretion in situations [which are] fraught with potentially irreversible and prejudicial consequences to business people and others who may be affected.' [*Janse van Rensburg* v *Minister of Trade and Industry*, 2001 (1) SA 29 (CC), para 29]

However, there are many provisions in the Bill which give the mining minister precisely such an 'unfettered and unguided discretion', with 'potentially irreversible and prejudicial consequences' to many people, as outlined below.

4.1 Share transfer restrictions

The Bill's amendments to Section 11(1) of the MPRDA are too vague and ambiguous to pass constitutional muster. The amended section requires that 'a prospecting…or mining right…*or an interest in any such right, or any interest in an unlisted company or any controlling interest in a listed company (which companies hold a prospecting right or mining right or an interest in any such right)* may not be …transferred…or alienated with the prior written consent of the minister, as prescribed'. [Clause 8 Bill, amending Section 11, MPRDA, emphasis supplied by the IRR]

The italicised portion of this amended provision is full of ambiguities. For example, it is unclear whether a share in a mining company constitutes an 'interest' in its business or its assets, or in the business or assets of its subsidiaries. It is also uncertain whether Section 11 extends to the indirect change of a controlling interest. It is equally unclear whether it applies to the trading of shares in the parent companies of subsidiaries with a relevant 'interest' in a mining right.

In addition, the amendments provide little guidance as to the criteria which are to guide the minister in deciding whether to grant the necessary approval. They are also vague on the procedures to be followed, and make no attempt to set any time period within which whatever consent is required must be given or refused. Overall, the amendments are too vague to comply with the rule of law. They could also have serious implications for stock exchanges engaged in the trading of South African mining shares. These include not only the Johannesburg Stock Exchange, but also those in New York, London, Toronto, and Sydney. [Herbert Smith Freehills, memorandum]

4.2 Designated minerals

The Bill also fails to provide adequate substantive guidelines or procedural guardrails for the exercise of the minister's discretion in deciding what minerals or mineral products to 'designate for local beneficiation'. All it says is that the minister must make this decision 'in consultation with a minister of the relevant national departments'. This is impermissibly vague, and is likely to make for arbitrary decision-making with uneven impact. This in turn will contradict a further vital aspect of the rule of law – the need for equality before the law.

Equally impermissible is the Bill's failure to provide appropriate guidelines to limit and govern the minister's discretion in deciding what 'percentage' of a designated mineral must be offered to local beneficiaries and what 'quantities, qualities, and timelines' may be prescribed. [Clause 21, Bill, amending Section 26, MPRDA] Again, arbitrary decision-making is sure to result, while the Constitution's guarantee of equality before the law will also be eroded. [Section 9(1), 1996 Constitution]

In addition, as the Constitutional Court stressed in the *Janse van Rensburg* case, it is 'inappropriate' for the minister to be able to exercise 'an unfettered and unguided discretion' where this could have 'potentially irreversible and prejudicial consequences to business people and others who may be affected'. [*Janse van Rensburg*, at para 29] Yet the minister's decisions here could have precisely such consequences. Mining companies which depend on export markets to sustain the profitability of their operations could suffer great economic harm if they are compelled to sell the bulk of their minerals (70, 80%, 90%, or any other percentage the minister may decide) to domestic purchasers instead. This in turn could have major prejudicial consequences for many other people, including mine employees and their families, and the suppliers from which mining goods and services would otherwise be bought.

4.3 Strategic minerals

The Bill is even more impermissibly vague on the circumstances in which the minister may declare minerals to be 'strategic'. It is also silent on the consequences that are to flow from such a declaration. All that the Bill says in this regard is that '"strategic minerals" mean such minerals as the minister may declare to be strategic minerals as and when the need arises in the *Gazette*'. [Clause 1, Bill, amending Section 1, MPRDA]

The Bill lays down no criteria whatsoever to guide or to constrain the exercise of this unfettered discretion. This contradicts a core element of the rule of law, for it robs mining companies, their employees, their suppliers, and all potential mining investors of any capacity to understand or foresee what minerals may in time be declared 'strategic' – and what the consequences of such a declaration might be.

The main pointers to the Bill's likely impact are instead to be found in various policy documents adopted by the ruling African National Congress (ANC). These include: [Jeffery, *BEE: Helping or Hurting?* pp253-254]

- an ANC policy discussion document adopted in March 2012 and entitled 'State Intervention in the Minerals Sector (SIMS)';
- the recommendations adopted by the ANC at its policy conference in Midrand (Gauteng) in June 2012; and
- the resolutions adopted by the ruling party at its national conference in Mangaung (Bloemfontein) in December 2012.

The SIMS document recommends, among other things, that certain minerals should be identified as 'strategic' and then exploited 'in an orderly and optimal manner'. The document defines strategic minerals as those that should not be exported until domestic requirements have been adequately met, and which need to be supplied within South Africa either at export parity prices or on a cost-plus basis, as determined by the government. [Jeffery, *BEE: Helping or Hurting?* p258]

The Midrand policy conference endorses many of the recommendations in the SIMS document. It also urges increased state control over 'strategic' minerals, such as coal and iron ore, so as to ensure their supply at reasonable prices to state-owned enterprises and downstream industries. The Mangaung resolutions likewise endorse many of the SIMS recommendations. They further stress that 'state intervention with a focus on beneficiation for industrialisation' is urgently required. To support beneficiation and the competitive pricing of strategic minerals, they call for the 'targeted management' of mineral exports. [Jeffery, *BEE: Helping or Hurting?*, p254]

The final resolutions adopted at the Mangaung conference include a long list of the minerals the ANC regards as 'strategic and important assets'. These include iron ore, coal and oil, along with platinum group metals, copper, chromium, manganese, nickel, and vanadium. Also on the ruling party's list are uranium, natural gas and shale gas, together with phosphates and potassium (important in agriculture) and limestone and gypsum (needed for infrastructure development). The list suggests that all these minerals might in time be declared 'strategic' by the minister and then made subject to comprehensive export and price controls. [Jeffery, *BEE: Helping or Hurting?* p258]

The SIMS document, together with the Midrand and Mangaung resolutions, provide some indication of what the ANC has in mind, but the Bill itself is impermissibly vague. All it says is that the minister may declare minerals to be strategic 'as and when the need arises'. This gives the minister precisely the 'unfettered and unguided discretion' that the Constitutional Court rejected in the *Janse van Rensburg* case. The Bill also fails to provide any guidance as to the extent of the export and price controls the minister may impose on minerals identified as 'strategic'. However, the implication from the *expressio unius est exclusio alterius* (the expression of the one thing means the exclusion of the other) principle of statutory interpretation is that such controls will go beyond the parameters set out in (the amended) Section 26. These provisions deal expressly with 'designated' minerals and not with 'strategic' ones. Moreover, it is clear from the definitions section in the Bill that 'strategic' minerals are different from ‘designated’ ones, as both have their own distinct definitions. [Clause 1, Bill]

The implication is that the minister could go further than Section 26 allows in imposing price controls and export quotas on ‘strategic’ minerals. The economic consequences of the minister’s ‘unfettered and unguided discretion’ in this sphere could thus be even more ‘irreversible’ and ‘prejudicial’ for mining companies, their employees, and their suppliers. Given the mining sector’s importance to the economy, this excessive ministerial discretion could also have ‘irreversible and prejudicial consequences’ for the country as a whole. [*Janse van Rensburg,* at para 29]

4.4 Price controls amounting to expropriation

Wherever minerals or mineral products are ‘designated’ for local beneficiation by the mining minister, the percentages specified by him must be sold to local beneficiators either at ‘mine-gate’ or ‘agreed’ prices. [Clause 21 Bill, introducing Section 26B, MPRDA] If no agreement on some other price can be reached, the mine-gate price will automatically apply.

In these circumstances, the producers of these minerals or mineral products will suffer losses based on the differences between higher export prices and lower mine-gate ones. This amounts to the expropriation of part of a producer’s income, for which just and equitable compensation must be paid under Section 25(2) of the Bill of Rights. However, the Bill makes no provision for such compensation. This is contrary to what the Constitution requires.

4.5 First-in, first-assessed principle replaced

The Bill puts an end to the ‘first-in, first assessed’ principle in the MPRDA, under which applications for mining rights which are received on different dates must currently be dealt with ‘in the order of their receipt’. Instead, the minister will be empowered to ‘invite’ applications for prospecting or mining rights by notice in the *Gazette*. In doing so, says the Bill, the minister will be able to ‘prescribe the period within which any application may be lodged…and the procedures which shall apply’. [Clause 5, Bill, amending Section 9, MPRDA]

Here, the Bill jettisons a rule which has applied in South Africa for more than 100 years, and which is easy to understand and objectively verifiable. Instead, it replaces this with a process in which unguided ministerial discretion is to play a large part. Again, this is impermissibly vague.

These uncertain rules are particularly prejudicial to those who have invested resources in finding minerals in a given area, but are confined (under the current terms of the Bill) to requesting the minister to invite applications for the relevant mining rights. Though the minister must then ‘give preference’ to their applications, this wording is too vague to secure the award of the relevant rights to them. [Clause 5, Bill, amending Section 9, MPRDA; see, in particular, Sections 9(2) and 9(5) as currently amended]

In an attempt to cater for this problem, the DMR now proposes additional amendments, under which a dual application system would be introduced – and the ‘first-in, first-assessed’ principle would still apply ‘in respect of minerals discovered by the applicant’. [Table of Proposed Amendments to the Mineral and Petroleum Resources Development Bill, 2013 [BD-2013], For consideration by the NCOP and provincial legislatures, last updated 24 November 2016, Clause 5, from lines 5 to 8, pp6-7]

However, as earlier described, the NCOP has no power to introduce such an amendment at this point in the legislative process. The NCOP is obliged to delete all provisions in the Bill which contradict the Constitution, but it has no authority to introduce new provisions of the kind now proposed by the DMR. Hence, the only way in which the NCOP can cure the unconstitutionality of the vague ‘invitation’ process envisaged by the Bill is to delete the whole of Clause 5 in the Bill. This would restore Section 9 of the MPRDA to what it was before the Bill’s adoption in 2014.

4.6 Permanent environmental liability

Under the current MPRDA, the holder of a mining right remains responsible for any environmental liability (including the pumping and treatment of extraneous water) until such time as the minister has issued it with a closure certificate. Under the Bill, by contrast, the holder is to remain responsible, ‘despite the issuing of a closure certificate’, for any environmental liability ‘which may become known in the future’. [Clause 31, Bill, amending Section 43, MPRDA]

This responsibility has no time limit. It makes it impossible for a mining company to assess how much financial provision it needs to make for a liability that could arise 20, 40, 60, 80, or 100 years after mining has ceased and a closure certificate has been issued. It also creates the risk that mining companies will be held accountable for environmental damage that in fact has no causal link to the mining operations that ended decades earlier. This provision in the Bill is thus impermissibly vague in certain respects, while it spreads the net of liability far too widely.

4.7 Free carried interest and other relevant provisions

The Bill gives the State a ‘free carried interest’ in all new oil and gas exploration and production rights. It defines a ‘free carried interest’ as ‘an interest allocated to the State in exploration or production operations without any financial obligation on the State’. [Clause 1, Bill, amending Section 1, MPRDA]

According to the Bill, the State will have the ‘right to a 20 percent free carried interest in all new exploration and production rights’, from the date such rights take effect. In addition to this free carried interest, ‘the State is...entitled to a further participation interest’ of an unspecified proportion. It may obtain this additional participation interest either through ‘acquisition at an agreed price’ or via ‘production sharing agreements’, for which no price (on the current wording of the Bill) need seemingly be agreed. The State is then also ‘entitled to a corresponding percentage of voting rights' to the interest which it holds. [Clause 65, Bill, introducing new Section 86(2), MPRDA]

The Bill gives the State an unfettered discretion to decide the magnitude of the further participation interest it may require. It wording suggests that no price need be paid if the State decides to take this further interest in the form of a 'production sharing agreement'. By contrast, if the State decides to 'acquire' this further interest, then the price for it must be 'agreed'. However, since the State is 'entitled' to this additional interest, it may also be able to insist on a price which is well below market value. In either situation, the State's insistence on this additional participation interest – which could easily exceed 51% – would amount to an expropriation. Yet, under Section 25(2) of the Constitution, any expropriation must be accompanied by 'just and equitable' compensation, which must either be agreed or approved or decided by a court. The Bill ignores these constitutional requirements.

These provisions are also so vague as to contradict a core element of the rule of law. The unfettered discretion given to the government robs oil companies, their employees, their suppliers, and all potential investors in the offshore oil industry of the capacity to understand or foresee either the size or the financial consequences of the participation interest that might ultimately be taken by the State. These provisions are thus inconsistent with the Constitution for this additional reason as well.

Also impermissibly vague are provisions in the Bill stating that the mining minister 'may' request that an applicant for an exploration right 'comply with' the mining charter. The discretion thus given the mining minister is again broad and unfettered. In addition, irrespective of whether the minister has requested such compliance, the oil company will not be able to have its exploration right renewed unless it can show that it is 'not in contravention of any provision' of the MPRDA. [Clauses 57 and 58, Bill, amending Sections 80(2), 81(3)(a), MPRDA] Since the Bill defines the MPRDA as including the mining charter, oil companies will be barred from such renewals unless they have complied with mining charter rules that often have little relevance to the oil industry and were never previously intended to govern it.

In addition, the Bill provides no mechanism for resolving the conflicts that could arise between the mining charter's 26% BEE requirement and the additional participation interest the State will be able to demand in granting a new exploration right. There is nothing in the Bill to prevent the State demanding a 60% additional participation interest, over and above its 20% free carried interest. However, such a demand would make it impossible for an oil company simultaneously to comply with the 26% BEE ownership requirement in the mining charter. Again, these conflicting provisions lack certainty and are unconstitutional.

The DMR has belatedly tried to cater for these difficulties by proposing a number of further amendments to the Bill, as set out in the Table. If these changes could lawfully be adopted at this late stage, they might help to unlock investment in a new off-shore oil industry for South Africa. However, they cannot be adopted at this time, as they lie outside the president's referral mandate. The DMR thus cannot correct the Bill in the way envisaged in the Table. Instead, it must simply delete all those provisions in the Bill which are relevant to the oil industry and are inconsistent with the Constitution.

4.8 Draconian penalties for vaguely defined offences
Under the MPRDA, it is an offence punishable by a fine of R100 000 or imprisonment for up to two years to mine without a mining right, without an approved environmental management programme, or without having first consulted the owner of the land. [Sections 98, 99 MPRDA] It is also an offence punishable by a fine of R500 000 or a jail term of up to ten years not to meet the environmental responsibilities laid down under an approved environmental management programme. [Sections 98, 99, MPRDA]

Under the Bill, by contrast, offenders face maximum fines amounting to 10% of annual turnover (plus 10% of the value of exports in the previous year) or prison terms of up to four years, or both such fines and imprisonment, for failing, among other things: [Clauses 72, 73, Bill, amending Sections 98, 99, MPRDA, read together with Section 2, Bill, amending Section 2, MPRDA]

- to 'substantially and meaningfully' expand opportunities for historically disadvantaged South Africans to enter the mining industry; or
- to 'promote optimal economic growth…[and the] development of downstream beneficiation industries'.

Again, these provisions are impermissibly vague. What does the Bill's reference to 'optimal' economic growth mean? What is the meaning of 'substantially and meaningfully' in this context? These terms have no clear or objectively determinable meaning, yet the penalties for breaching their ambiguous requirements are massive.

These provisions also contradict other aspects of the rule of law, including the need for due process in the criminal justice system. If due process is to be upheld, mining companies and their executives must be able to understand what conduct the law prohibits, and cannot be punished for outcomes over which they have little or no control. It is contrary to due process for mining executives to face prison sentences for failing to bring about the 'optimal' economic growth which the Bill itself, together with a host of other laws, makes it virtually impossible for any business to generate. It is equally contrary to due process for mining executives to confront jail terms for failing to 'develop downstream beneficiation industries' when various government failures (on electricity and skills, for instance) have made this extremely hard to achieve. Provisions that so contradict due process have no place under a Constitution which identifies the 'supremacy' of the rule of law as a founding value of the current order. [Section(1)(a), 1996 Constitution]

4.9 All unconstitutional provisions must be deleted
All the provisions identified above (in addition to those flagged by the president in his referral mandate, as set out in *Section 3* of this submission) are unconstitutional. Moreover, as the Constitutional Court has repeatedly stressed, the provisions of the Constitution are

binding on all branches of the government, including the legislature. All these unconstitutional provisions must therefore be deleted from the Bill before it can lawfully be adopted by the NCOP.

5 Impermissible provisions that cannot lawfully be adopted at this time

As earlier noted, the rules of Parliament prevent the adoption of additional amendments going beyond the president's referral mandate. The NCOP thus has no legal authority to adopt the 60 or so additional amendments to the Bill set out in the Table. Since these proposed amendments cannot lawfully proceed, the IRR's submission will merely highlight the likely adverse consequences of three particularly damaging proposals.

5.1 Cancellation of mining rights for failure to comply with the mining charter and housing standards

The DMR is proposing that the mining minister should be empowered to cancel or suspend mining (and other) rights if the holder of such a right 'has contravened the provisions' of either the mining charter or the housing standards. [The Table, page 10, proposed amendment to Clause 35 of the Bill (page 24, after line 20)]

This proposed provision will be highly damaging to investor confidence in the South African mining industry. Since the Bill also empowers the mining minister to amend the mining charter at any time, mining companies will have no certainty as to the obligations they may be expected to shoulder or the circumstances in which their mining rights will be at risk. However, the reviewed draft mining charter published in April 2016 suggests that the mining minister wants to compel mining companies to maintain, over the full life of a mining right (which could last 30 years or more):

- 100% compliance with the 26% BEE ownership requirement, irrespective of how many times existing BEE investors sell out and irrespective of how much this costs existing institutional investors, including pension funds;
- 100% compliance with the skills development requirement, irrespective of whether mining companies, in times of depressed commodity prices and rising input costs, can afford to spend 5% of payroll on training for black employees and other learners, on top of the normal 1% skills development levy; and
- 100% compliance with all housing obligations, irrespective of whether municipalities have made sufficient serviced land available, regardless of mineworker preferences (which might be for formal housing in their home communities), and irrespective of affordability constraints in times of economic hardship.

The reviewed draft charter is supposed to bring BEE obligations in the mining sector into line with those set out in the generic codes. Yet the draft charter – in demanding 100% compliance from mining companies on these 'ring-fenced' elements – goes well beyond what the BEE generic codes require. On ownership, for example, the BEE generic codes would give mining companies credit for partial performance, sanction them comparatively lightly (by reducing their level of BEE contribution by one level) if they fail to reach a 40% minimum score, and take account of indirect black ownership via pension funds and unit trusts. By contrast, the draft charter recognises only direct ownership, gives no credit to BEE ownership at any level below 26%, and threatens companies with a devastating penalty – the loss of their mining rights – if they fail to fulfil this target for 30 years or more.

The Table's proposed amendment increases the risk that mining companies will have their mining rights cancelled for unavoidable failures to comply with charter obligations that are impractical and unreasonable. This will pose a major deterrent to any fresh mining investment in the country. Already, South Africa – despite its enormous mineral wealth – ranks as the third least attractive mining jurisdiction on the African continent. Only Zimbabwe and South Sudan fall below it. If this amendment is adopted, investment that is urgently needed in South Africa to help expand mining and provide jobs will increasingly go to other mining countries. Far from empowering the disadvantaged and helping to overcome past injustice, this will make it even harder for the poor and marginalised to get ahead.

For the reasons earlier outlined, it is also unconstitutional to allow the cancellation of mining rights on the basis of provisions in the mining charter which:

- have not been adopted in the form of statute, with the necessary public involvement in the legislative process;
- are open to amendment by the executive at any time; and
- give Parliament no control over the circumstances in which this draconian penalty may be imposed.

Again, the introduction of such amendments would contradict both the separation of powers and the requirements of the rule of law.

5.2 Mining permits reserved for 51% black-owned companies

The Table also proposes that mining permits should be reserved for companies that are South African and also '50 + 1% black-owned'. [The Table, page 9, amending Clause 22 of the Bill, page 17, after line 58).

Mining permits have less value than mining rights in that they may be issued only in respect of relatively small mineral deposits: those which can be 'mined optimally within three years' and in an area not exceeding five hectares. [Section 27, MPRDA] However, once a 51% BEE ownership requirement has been introduced for mining permits, it could in time be extended to cover mining rights, as the draft charter that was leaked to the press back in 2002 in fact envisaged.

This leaked draft caused such a panic that the value of mining shares fell by some R90bn within two days. In response, the then mining minister emphasised that the document was nothing more than a draft, while the charter was then revised to limit the BEE ownership requirement to 26%. In addition, to reassure investors and prevent a recurrence of the panic that had followed the leaking of the draft, the government repeatedly stressed that the 26%

ownership target was fixed and would not later be increased. [Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, pp224, 225]

The reservation of mining permits for 51% black-owned companies is likely to resurrect fears that a wider 51% BEE ownership requirement will in time be imposed for prospecting, mining, and other rights. Already, the proposed change – which is similar to Zimbabwe's indigenisation requirement for the mining sector there – is eroding investor sentiment towards South Africa, especially in the mining industry. Yet the more investors are persuaded by damaging regulation of this kind to bypass or exit South Africa, the more the poor and marginalised will suffer.

5.3 A special appeals procedure for applications concerning the state mining company

The Bill currently provides that a mining company whose rights or legitimate expectations have been adversely affected by any administrative decision may appeal to the mining minister or, in the case of an environmental matter, to the minister of environmental affairs. The DMR now seeks to add an extra provision under which certain appeals relating to the state mining company will go to an 'appeals panel' appointed by the minister. [The Table, p24, proposing changes to Clause 71, page 39, line 6 of the Bill]

A bill conferring various powers on a state mining company was gazetted in 2016, but has yet to be adopted by Parliament. Section 7 of that bill gives the state mining company the power, among other things, to 'acquire and develop...mining rights' under the MPRDA. [Clause 7, Draft African Exploration Mining and Finance Corporation Bill of 2015, gazetted for comment in January 2016] According to the DMR's proposals, where a private mining company is adversely affected by an administrative decision on such an issue, it will have to appeal, not to the mining minister, but to an appeals panel appointed by the minister. (This situation might arise, for example, where the private company has found minerals it wants to mine, but the mining right is nevertheless awarded to the state mining company under the new applications process which is to replace the current 'first-in, first-assessed' principle.)

According to the Table, the three-person appeals panel will be appointed by the minister from a list of nominees put forward by the public. However, their terms and conditions of appointment will be decided by the minister. The minister (in consultation with the finance minister) will also determine their remuneration and allowances. [The Table, pp24-26, proposed amendments to Clause 71, Bill] These provisions seem calculated to undermine the independence of the appeals panel. Greater institutional autonomy is clearly needed for a body charged with deciding whether DMR officials have acted reasonably and without partisanship towards a fellow public entity, the state mining company.

6 The Bill's mistaken emphasis on state-controlled beneficiation

There seems an obvious merit in the idea that South Africa should beneficiate more of its mineral products before it exports them, as this would help to build up the domestic economy, promote the manufacturing sector, generate jobs, and allow the country to realise more value from its great mineral wealth. However, decisions on beneficiation should be based on market considerations. They should also be left to business to make, as the private sector in South Africa has generally been quick to take advantage of the genuine economic opportunities that beneficiation may offer.

Many of the minerals extracted in South Africa are thus 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. [Jeffery, *BEE: Helping or Hurting?* p275]

In recent years, however, local beneficiation has diminished. Smelters have closed down or reduced their operations for lack of a reliable and affordable supply of electricity. The production of ferrochromium within the country has been eroded by China's capacity to produce ferrochromium more cheaply than can be done here. 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 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.

In demanding very much more local beneficiation of minerals, the Bill overlooks these practical realities. Instead, its emphasis on beneficiation can be traced back to the SIMS policy discussion document, as earlier described. This document warned against the mine nationalisation that some in the ANC were demanding, and urged that the government should increase its interventions in mining in various ways. Among other things, it recommended a renewed focus on the local beneficiation of mineral products, to be enforced by increased tariffs on mineral exports. This approach has a superficial economic appeal, but ignores many relevant factors. [Jeffery, *BEE: Helping or Hurting?* p 253]

Responded Gavin Keeton wrote in *Business Day*: 'The [document] proposes a major role for the state in directing mining, as an alternative to outright nationalisation. Underlying these interventions is a vision of the state using South Africa's natural resources to drive rapid minerals-intensive industrialisation. To achieve this, the state will limit mining exports and dictate the volume and price of local sales.' However, there are 'numerous flaws in this vision', including the 'false belief that lowering raw material prices will be enough to achieve international competitiveness [when] mineral and metals inputs are…only a small part of overall production costs and are less important than other factors such as transport and energy costs, and the costs of capital and labour'. Hence, however welcome the document's rejection of mine nationalisation might be, the alternative policies it prescribed could 'prove equally unworkable and potentially economically destructive,' he cautioned. [*Business Day* 27 Feb 2012]

These warnings were ignored when the Bill was being piloted through Parliament in 2013 and 2014. Instead, the then mining minister, Susan Shabangu, frequently stressed that the government had earmarked beneficiation as a growth engine for the economy and a source of new jobs. But this decision ignores the National Development Plan (NDP) and its blunt warning that the conditions for successful beneficiation do not currently exist within South Africa. [Jeffery, *BEE: Helping or Hurting?* p256]

The NDP pointed out that South Africa lacks the electricity needed for the primary and secondary stages of beneficiation, which are the phases likely to provide the most jobs. This is likely to remain the case even after Eskom's current build programme has been completed, for many of South Africa's existing power stations were built some 50 years ago and will soon need to be replaced. Solar and wind power are not reliable sources of base-load generation and cannot, unless the storage problem is effectively resolved, be counted upon to sustain smelting or other operations with intensive energy requirements. The nuclear option is risky, far more costly than the struggling economy can afford, and unlikely to add substantially to generation for many years. Moreover, even if generation challenges can be overcome, problems in transmission and efficient distribution will remain.

As the NDP further warned, South Africa also lacks the technical skills and direct investment needed to make a success of the third and fourth stages of beneficiation, which generally involve the making of end products for consumers. These fundamental obstacles have not been resolved and are unlikely to be overcome in the foreseeable future. Instead, South Africa continues to lag behind most other countries in the quality of its education (particularly in mathematics and science), while foreign direct investment (FDI) inflows into the country have dropped sharply in recent years. [*Business Day* 25 January 2017]

The Industrial Development Corporation (IDC), a parastatal that helps fund and mentor qualifying businesses, already has a mandate to promote beneficiation. It warns, however, that this is difficult to achieve in practice. A key factor impeding progress, the IDC says, is 'the uncompetitive pricing of inputs' which range from wages and energy to transport and logistics costs. Other constraints include 'the excessive volatility of the currency…and a shortage of managerial and technical skills to drive downstream beneficiation'. [*Business Day*, 31 July 2012]

Moreover, though the Bill assumes that state controls on 'designated' and 'strategic' minerals will help ensure their increased supply to the domestic economy, the practical effect could well be the opposite. Already, the possibility of price and export controls on coal is stalling investment in the new coal mines needed for future electricity generation. By 2022, if not before, Eskom will need an additional 76 million metric tonnes of coal to supply its power stations. Increasing supply in this way requires vast investment in new coal mines, but mining companies have little wish to risk this outlay when the mining minister can decide to whom, and at what price, coal is to be sold.

Said Mike Rossouw, chairman of the Intensive Energy Users Group, in 2013: 'The supply gap will develop not because of the unavailability of coal in the ground but because of the failure to bring it to market. This is because older mines are ageing, while new investments have effectively been frozen…with the threat that government will soon intervene to set a price for coal… Nobody will put investment into the ground without the assurance of a reasonable return. So [the Bill] will choke off new investment and decrease supply, which is the opposite of what the government wants and is needed.' [*Business Day* 5 August 2013]

Little improvement in this situation is yet evident. Since Eskom runs 14 coal-fired power stations and has two big new plants, Medupi and Kusile, due to come into full operation in the next few years, South Africa is locked into coal for the foreseeable future. It also has enormous reserves of coal still available to it. However, supply from the large collieries is drying up, while the new investment in evidence is not enough. [John Kane-Berman, 'Diamonds and all that', *@Liberty*, Issue 30, February 2017, p39]

A few years ago Eskom said that it needed ten new coal mines at a cost of R100 billion. Several large local companies, among them Exxaro, have been making big investments in coal for both Eskom and the export market, but this investment is not happening on the scale required. Instead, a number of major mining companies, including BHP Billiton, have been reducing their exposure to South Africa. Major new investors are unlikely to come in from abroad, while smaller local companies could battle to raise the capital required or to attain the necessary efficiencies of scale. [Kane-Berman, 'Diamonds and all that', p39] Moreover, if the state mining company attempts to fill the gap – which many in the ANC might favour – experience with Eskom, Transnet, the Passenger Rail Agency of South Africa (Prasa) South African Airways, the South African Post Office and other parastatals casts doubt on whether such an entity would be able to raise the necessary funding or to conduct mining operations in an efficient or cost-effective way.

If the Bill is adopted in its current form, this will increase the risk of Eskom running short of coal within the next decade. Damaging load-shedding could then resume. This would further cripple the economy, harm all South Africans, and make it all the more difficult to achieve the increased local beneficiation the Bill is intended to promote.

Moreover, it is not only in the coal sector that exploration and new mine development has slowed. Fixed investment in existing mines has held up reasonably well because (in the words of economics adviser Jac Laubscher) 'existing projects naturally have to continue and ongoing investment is needed to keep up production'. However, he notes, there has been a sharp decline in mineral exploration, which in 2015 was 'standing at a quarter of its level in 2007'. [Kane-Berman, 'Diamonds and all that', p43]

Unless exploration increases once again, there is a real risk – as Bernard Swanepoel, a former chief executive of Harmony Gold, warned in 2015 – that South Africa might not have a mining industry some 20 years from now. [Kane-Berman, 'Diamonds and all that', p42] Most of the country's remaining mineral wealth would then remain unexploited in the ground. It would no longer be a magnet for investment or a source of employment and other economic activity. All South Africans would suffer as a result, but the poor and disadvantaged would suffer most of all.

7 The need for a proper socio-economic assessment

Now that the Bill has been referred back to Parliament for re-adoption, it falls within the ambit of the socio-economic impact assessment system (SEIAS) introduced by the government in 2015. Hence, the NCOP cannot lawfully adopt the Bill without first ensuring that a proper socio-economic impact assessment has been conducted. The outcomes of this assessment must also be made available to all stakeholders and the wider public to 'facilitate the public involvement...in the legislative process' that the Constitution requires. [Section 72, Constitution]

Any such assessment must examine all the risks in state-controlled beneficiation, as described in *Section 6* of this submission. It must also include an evaluation of the economic importance of the mining industry. This industry is, of course, the bedrock on which modern South Africa has been built. Mining also remains vital to the country's economy, for it still provides employment (directly and indirectly) to some 1.5 million people. It also helps to bring in foreign investment, generate tax revenues, and bolster the country's export earnings.

Also relevant is the fact that South Africa has virtually unparalleled mineral riches, a Citibank survey in 2010 estimating the value of its mineral resources at $2.5 trillion. This puts the country far ahead of both Australia and Russia, whose resources are estimated at $1.6 trillion each. Though these enormous mineral resources ought to be a vital foundation for increased prosperity for all South Africans, the mining industry has in fact performed far below its potential for the past 15 years. Even during the global commodities boom from 2001 to 2008, as the National Development Plan (NDP) has pointed out, the country's mining industry shrank by 1% a year, whereas the mining sectors in other states expanded by 5% a year on average over this period.

The NDP identifies this poor performance as 'an opportunity lost'. It also puts 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'.

Far from complying with the NDP's recommendation, the Bill makes the regulatory framework even more unpredictable, arbitrary, and unstable. It does so by giving the mining minister a broad and unfettered discretion in various important spheres, as earlier outlined. Instead of helping South Africa to compete more effectively with other mining countries, the Bill will make it even more difficult for the local mining industry to attract much-needed international and domestic investment. It will also make it far more challenging for companies to maintain, let alone expand, their mining operations. Even more jobs are thus likely to be lost, while mining's contributions to revenue, export earnings, and GDP could all decline.

Any such deterioration in the performance of the mining industry will have major consequences for the country as a whole. It will also have enormous ramifications for at least two state-owned enterprises (Eskom and Transnet), which depend heavily on the mining industry in diverse ways.

Eskom relies on coal for almost all of its current electricity generation, yet the Bill (along with other damaging interventions) is already choking off fresh investment in the new coalfields required to feed its power stations. The more coal mining falters, the more Eskom could find itself unable to meet the country's electricity needs. Transnet Freight Rail derives much of its operating income from the transporting of coal and other mineral products. If supplies of coal and other minerals diminish significantly, then so will much of Transnet's business. This will have major ramifications for all its employees and suppliers.

The Bill holds particularly negative ramifications for the four provinces and six cities that are closely tied to mining. The Northern Cape derives more than a fifth of its output from mining, mostly of iron ore. In Mpumalanga, more than a fifth of provincial output comes from mining, mostly of coal. Limpopo, which has extensive deposits of diamonds, iron ore, and various other minerals, relies on mining for 25% of its output. North West province, with its extensive platinum reserves, relies on mining for almost 30% of its output.

Excluding Johannesburg, which long ago diversified far beyond mining, six of South Africa's largest towns are still substantially dependent on mining. These towns are Rustenburg, Middelburg, Witbank, Secunda, Sasolburg, and Thabazimbi. At present, residents of these towns have some of the highest figures for GDP per head in the country. This highlights how much mining contributes to these towns – and how much the people living there would suffer if the industry were to decline under the impact of this damaging Bill.

Several harbour towns are also heavily dependent on mineral exports. Richards Bay exports massive quantities of coal (railed to it from Mpumalanga) as well as phosphate products of various kinds. The port is by far the largest in the country in terms of tonnage handled, and it ships around 30 different commodities to countries right around the world. It is also home to Richards Bay Minerals, a Rio Tinto Zinc subsidiary which produces the titanium dioxide that is used in white pigments and accounts for half the mining output of KwaZulu-Natal.

Saldanha Bay in the Western Cape depends heavily on the exporting of iron ore, which is produced in the Northern Cape and railed to it from Sishen. In the Eastern Cape, the new port of Ngqura near Port Elizabeth is being extended to handle the export of manganese from the Kalahari field north of Hotazel in the Northern Cape, which is home to 80% of the world's known manganese ore reserves. Exports from the Kalahari field mean that the railway line is being extended from there to Ngqura, a distance of more than 1 000 kilometres. [Kane-Berman, 'Diamonds and all that', p31]

Even provinces that have little mining activity could be hit hard by the Bill. This is particularly true of the Eastern Cape. Though it has no mines, it is nevertheless heavily dependent on the mining industry because so many migrant mineworkers come from there. The remittances they send to their families back home help sustain a range of businesses and are vital in alleviating poverty within the province. [Kane-Berman, p35]

Mining contributes to South Africa's economy in other ways as well. In 2016, for example, mining directly contributed R291 billion to GDP, which is a significant amount. In addition, the sector spent R245 billion on buying goods and services from other sectors of the economy. These purchases ranged from footwear to construction operations to a range of business and legal services. Major sums were spent on transport and storage, in particular, as well as on chemicals, machinery, equipment, electricity, and water. Capital expenditure made up R89 billion of the total, while R156 billion went on current spending. [Kane-Berman, p32]

To get an idea of how large the sum of R245 billion is, it is worth comparing this figure with the government's own expenditure. The budget for current spending by the central government on goods and services in 2015/2016 was R188 billion, against the mining industry's figure of R156 billion. Total comparable expenditure by all the municipalities in the country in 2015/2016 was R169 billion. Total public infrastructure spending by all three levels of government and state-owned companies was budgeted that same year at R290 billion, whereas capital expenditure by the mining industry alone amounted to R89 billion. [Kane-Berman, p32]

Apart from generating demand for a vast array of goods and services, mining also gives rise to various important by-products. Uranium, for instance, is a by-product of gold production. A whole range of plastics are by-products of Sasol's processes for making oil from coal. One such product is polypropylene, which is one of the most commonly used plastics in the world. Sasol currently exports polypropylene to China, South America, Europe, the US, and the rest of Africa. It also commissioned a R1 billion polypropylene expansion project at Secunda in November last year, so helping to generate additional jobs and economic activity both in Mpumalanga and more broadly. [Kane-Berman, p34]

All these factors need to be taken into account as part of the necessary socio-economic assessment. In addition, before it decides to adopt the Bill, the NCOP 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. [Kane-Berman, p38]

The National Assembly, in adopting the Bill in November 2016, seems 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 NCOP can now help to rectify this situation.

8 The obligations resting on the NCOP

The NCOP has a duty to uphold the Constitution and the rules of Parliament. The NCOP is thus obliged to delete all the unconstitutional provisions contained in the Bill, as described above. These include not only the provisions flagged by the president in his referral mandate (see *Section 3* of this submission), but also all the further unconstitutional provisions highlighted in *Section 4* of this submission. In addition, since the rules of Parliament bar it from adopting any amendments on issues outside the president's referral mandate, the NCOP must reject all the 60 or amendments set out in the Table.

The constitutional obligation resting on the NCOP to facilitate public involvement in its legislative processes must also be fulfilled, not downplayed or brushed aside. Yet no socio-economic impact assessment of the Bill has seemingly been conducted, while the outcomes of such an assessment have certainly not been made available to the public to help facilitate their involvement in the adoption of the measure.

Moreover, the NCOP has allowed less than three weeks for the sending in of written submissions, which is not nearly long enough for such a lengthy and complex Bill. In addition, the NCOP has failed to give the public adequate notice of what the Bill provides, which in turn has denied people a necessary opportunity for 'meaningful' participation in the law-making process. The NCOP has also failed to give the public any information about the DMR's additional 60 or amendments, which it cannot adopt for this reason either.

The public participation process in Gauteng has also been flawed, as the chairman of the relevant portfolio committee has publicly acknowledged. According to the chairman, Errol Magerman, the timetable set by the minister made it difficult for the relevant portfolio committee of the Gauteng provincial legislature to give people more notice of the public hearing held on 2nd March 2017, to arrange hearings in different parts of the province, or to ensure that people were given copies of the Bill and the Table in advance. In addition, no attempt was made to give them copies of the MPRDA, even though the Bill and the Table are simply unintelligible unless the Act is also to hand.

If Gauteng found that the timetable for the NCOP process impeded adequate public facilitation, then other provincial legislatures are likely to have experienced the same problem. Hence, the public participation process is likely to have been similarly flawed in all (or almost all) of them. Yet, as the Constitutional Court has stressed, guaranteed rights to public participation cannot be trumped by a timetable; rather it is the timetable that must yield to the constitutional imperative to ensure adequate public involvement in the legislative process.

In summary, the NCOP cannot lawfully adopt new provisions which fall outside the president's referral mandate and on which no adequate public participation has taken place. It also cannot adopt the Bill until a comprehensive socio-economic assessment has been drawn up and made public, and stakeholders have been given an adequate opportunity to engage on the contents of this assessment.

Most importantly of all, the NCOP has an obligation to delete all provisions of the Bill which are inconsistent with the Constitution. These include not only the provisions flagged by the president, but also all the other unconstitutional provisions described above. The NCOP's first and most compelling duty is to bring the Bill into line with the Constitution by deleting all these clauses. Only what remains in the Bill itself (and not in the Table) can then be adopted. However, this can be done only after a full socio-economic impact assessment has been carried out and made public – and the people of every province have indeed been given a 'meaningful' opportunity to participate in the legislative processes of both their provincial legislatures and the NCOP itself.

South African Institute of Race Relations NPC **22nd March 2017**